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THE ANNOTATED CONSTITUTION

OF THE

AUSTRALIAN COMMONWEALTH.

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THE

ANNOTATED CONSTITUTION

OF THE

AUSTRALIAN COMMONWEALTH

BY

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OF VICTORIA IN THE NATIONAL AUSTRALASIAN CONVENTION 1897-8

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TO

THE PEOPLE OF AUSTRALIA

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PREFACE.

The preliminary part of this work is a historical introduction and guide to the study of the Constitution of the Australian Commonwealth. This is followed by analytical, legal, and political commentaries on the Constitution, for the use of those who seek a special and comprehensive acquaintance with its provisions.

Our chief aim has been a practical one. Clear as is the language of the Constitution, it cannot be fully understood without the study of a large correlated literature.

The Federation of the Australian colonies has occupied the best energies of the statesmen and the people of Australia for many years; and this Constitution is the outcome of exhaustive debates, heated controversies, and careful compromises. It is an adaptation of the principles of British and colonial government to the federal system. Its language and ideas are drawn, partly from the model of all modern governments, the British Constitution itself; partly from the colonial Constitutions based on the British model; partly from the Federal Constitution of the United States of America; and partly from the semi-federal Constitution of the Dominion of Canada; with such modifications as were suggested by the circumstances and needs of the Australian people.

The Constitution of the Commonwealth, therefore, is not an isolated document. It has been built on traditional foundations. Its roots penetrate deep into the past. It embodies the best achievements of political progress, and realizes the latest attainable ideals of liberty. It represents the aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire.

Such an instrument of government must needs be rich in historical associations, and many of its derivative enactments

are necessarily intertwined with the course of constitutional development and interpretation in kindred systems and communities. There is hardly a phrase in it without a history, or without analogy with a phrase which in some other Constitution has been the subject of exhaustive arguments and judicial decisions. The Commentaries of the great American jurists, and the numerous judgments on constitutional questions given by the Supreme Court of the United States during the last century, are full of profound reasoning which is applicable to the words of this Constitution. Many decisions of the Supreme Courts of Canada and the Australian colonies upon constitutional questions, and reviews of them by the Privy Council, are of great value in the elucidation of the Constitution of the Commonwealth. There is thus an immense store of material for comparative study.

The actual history of the Constitution is traced generally in Part IV. of the Historical Introduction, and in detail in the Historical Notes appended to each clause, section, or sub-section. But its study involves many other aspects. Its character as a colonial Constitution demands a review of the history and principles of colonization, which are shortly dealt with in Parts I. and II. of the Historical Introduction. As an Australian Constitution, it is intimately associated with the story of the constitutional development of the Australian colonies, which is traced in Part III. of the Historical Introduction. As a Constitution on the British model, it requires some knowledge of British constitutional law and history, the outlines of which are sketched in the notes to the Preamble and elsewhere. And as a Federal Constitution, light is thrown upon it by the American, Canadian, Swiss, and German Constitutions. Wherever comparison was thought useful, the corresponding provisions of those Constitutions have been set out in small type immediately after each section.

We are fully sensible of the difficulty of attempting to expound a Constitution before it has been the subject of practical working or judicial exposition. It is impossible to foretell where the real difficulties will be found, or how they

will be met. The experience of other countries is a guide, but not an infallible guide; and the development of the Constitution of the Commonwealth must assuredly follow lines of its own. We have, however, endeavoured, from the vast and scattered materials bearing on the subject, to produce a work which we hope will facilitate the interpretation of, and foster an affection for, the Constitution. We trust that by the orderly arrangement of historical matter, by the minute and impartial analysis of every fundamental word, phrase, and enactment of the Constitution, and by the provision made for the comparative study of other Constitutions, with their wealth of associated precedents, the work may prove of assistance, not only to students of constitutional history and political science, but also to those who, in the active fields of law, politics, or commerce, have a practical interest in the working of the new federal institutions of Australia.

For valuable assistance to the study and exposition of the Constitution of the Commonwealth, we desire to express our acknowledgments and obligations to the following works :—

Sir Thos. Erskine May : *Parliamentary Practice.*
Walter Bagehot : *The English Constitution.*
Dr. E. Hearn : *The Government of England.*
Professor E. Jenks : *The Government of Victoria.*
Professor A. V. Dicey : *The Law of the Constitution.*
Sir Richard Chaffey Baker, M.L.C. : *Manual for the Use of the Convention of 1891 ; and Pamphlets.*
Kent's *Commentaries on the Constitution of the United States.*
Storey's *Commentaries on the Constitution of the United States.*
George Bancroft : *Formation of the Constitution of the United States.*
Dr. John W. Burgess : *Political Science and Constitutional Law.*
A. J. Baker (Iowa) : *Annotated Constitution of the United States.*
Dr. J. A. Pomeroy : *Constitutional Law of the United States.*
Dr. H. Von Holst : *Constitutional Law of the United States.*
John Fiske : *The Critical Period of American History.*
Roger Foster : *Commentaries on the Constitution of the United States.*
Dr. Thomas M. Cooley : *Constitutional Limitations and Constitutional Law of the United States.*
E. P. Prentice and J. G. Egan : *Commerce Clause of the United States Constitution.*
James Bryce : *The American Commonwealth.*
Carl E. Boyd : *Cases on American Constitutional Law.*
Alpheus Todd : *Parliamentary Government in the British Colonies.*
Goldwin Smith : *Canada and the Canadian Question.*
Gerald John Wheeler : *Confederation Law of Canada.*
A. H. F. Lefroy : *Legislative Power in Canada.*

For information as to the progress of Federation and constitutional government in South Australia we are indebted to Sir Richard C. Baker, and for similar materials in the case of Tasmania to the Hon. Nicholas J. Brown, M.H.A. Professor Morris, of the University of Melbourne, kindly revised the sketch of ancient colonies and modern colonization down to Magellan's great voyage. We have to thank Mr. Francis Walsh, Parliamentary Librarian of New South Wales, Mr. R. Church, Parliamentary Librarian of Victoria, Mr. G. W. Waddell, Librarian of the Supreme Court of New South Wales, and Mr. John Schutt, Librarian of the Supreme Court of Victoria, for courteous facilities afforded and assistance given in referring to original reports and authorities.

J. Q.
R. R. G.

7th Dec., 1900.

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Selected cases from the American State Courts down to 1869 are collected in the "American Decisions" (100 vols.); from 1870 to 1887, in the "American Reports" (60 vols.); and from 1888 to the present time in the "American State Reports." Under the national reporter system, the decisions of the highest courts of the different States are now contained in the following group of reports:—Atlantic Reporter, North-eastern Reporter, North-western Reporter, Pacific Reporter, Southern Reporter, South-eastern Reporter, South-western Reporter.

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By the QUEEN.

A PROCLAMATION.

Victoria R.

WHEREAS by an Act of Parliament passed in the Sixty-third and Sixty-fourth Years of Our Reign intituled, "An Act to constitute the Commonwealth of *Australia,*" **it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation, that, on and after a day therein appointed, not being later than One Year after the passing of this Act, the people of** *New South Wales, Victoria, South Australia, Queensland,* **and** *Tasmania,* **and also, if Her Majesty is satisfied that the people of** *Western Australia* **have agreed thereto, of** *Western Australia,* **shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.**

And whereas We are satisfied that the people of *Western Australia* **have agreed thereto accordingly.**

We therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the First day of *January* **One thousand nine hundred and one, the people of** *New South Wales, Victoria, South Australia, Queensland, Tasmania,* **and** *Western Australia* **shall be united in a Federal Commonwealth under the name of the Commonwealth of** *Australia.*

Given at Our Court at *Balmoral* **this Seventeenth day of** *September,* **in the Year of our Lord One thousand nine hundred, and in the Sixty-fourth Year of Our Reign.**

God Save the Queen.

ERRATA.

PAGE.

50, line 17. For "30 Vic. c. 11, s. 38," read "32 and 33 Vic. c. 11, s. 8"
213, line 9. For "10,000" read "80,000."
298, line 15 from bottom. For "48 Vic. No. 3" read "48 and 49 Vic. c. 23."
318, line 11. For "(1640) 16 Char. I. c. 10" read "(1679) 31 Char. II. c. 2."
322, line 8. For "3 and 4 Will. 4" "read 5 and 6 Will. IV."
548, line 3 from bottom. For "import" read "export."
949, line 23 from bottom. For "Bank Tax Cases," read "Van Allen *v.* Assessors"

ADDENDUM.

New Ministry in Victoria.—On the 15th November, 1900, in consequence of a no-confidence vote by the newly-elected Legislative Assembly in Victoria. Mr. Allan McLean tendered the resignation of his Ministry (see p. 374, *infra*), which was accepted. Sir George Turner formed a new administration, consisting of the following members, who were sworn in on 19th November:—Premier, Treasurer, and Commissioner of Customs, the Right Hon. Sir George Turner, P.C., G.C.M.G.; Attorney-General, the Hon. I. A. Isaacs; Chief Secretary and Minister of Labour, the Hon. A. J. Peacock; Minister of Public Works and Railways, the Hon. W. A. Trenwith; Minister of Agriculture, the Hon. J. Morrissey; Minister of Lands, the Hon. D. J. Duggan; Minister of Mines and Water Supply, the Hon. J. B. Burton; Postmaster-General and Minister of Public Instruction, the Hon. W. Gurr; Solicitor-General, the Hon. A. Wynne, M.L.C.; Minister of Defence and Health, the Hon. W. McCulloch, M.L.C.; Ministers without portfolio, the Hon. E. J. Crooke, M.L.C., the Hon. P. Phillips, M.L.C., the Hon. S. Gillott, M.L.A., the Hon. R. McGregor, M.L.A.

HISTORICAL INTRODUCTION.

PART I.

ANCIENT COLONIES.

(1) HELLENIC CITY-STATES.

Colonies and Plantations.—The terms "Colony" and "Plantation" were originally applied to English settlements abroad, or small communities of English subjects established in foreign parts, principally for the purpose of raising produce. They were never extended to English dominions in Europe, such as Dunkirk, Toulon, and Calais, whilst those places belonged to the kingdom, nor were they, nor are they at the present time used in reference to Jersey or Guernsey, or other islands in the English Channel. For some years the terms colony and plantation were used indiscriminately. In the reign of Charles II. "Colony" came into general use, to denote the relation of dependence in which American Plantations stood to the Crown. A colony then came to mean a plantation which had a Governor and civil establishment subordinate to the mother country. In the statute 7 and 8 William III. c. 22, declaring void Colonial Laws repugnant to English Law applicable to the colonies, and in the Navigation Acts afterwards passed, the two names are used without distinction.—Petersdorff's Abridgment, vol. V., p. 540.

In connection with a new instrument of Government which marks the transition from the colonial system planted in Australia over one hundred years ago to a new order of things, a higher and more complex political organization, a larger measure of self-government, and a more matured social development, it will be fitting to draw attention to the origin and growth of British colonies, and to some of their leading characteristics and achievements, and to compare them with the colonies of antiquity with which they in some respects agree, but from which they in more respects differ. They agree in having, like the older types, sprung from a parent stock, but they differ materially in the circumstances and motives which led to their establishment, in their primary structure, and in their relations with the mother country, as well as in their career and progress.

Greek Colonies.—Various tribes and divisions, of which the ancient Hellenic race was composed, participated in the settlements known as Greek colonies. The causes which led to these migrations were the pressure of population on the means of subsistence within the narrow limits of crowded cities; internal dissensions conse-

quent on class domination and party faction; and a love for maritime exploration and discovery.

Among the first recorded of these settlements were the Ionian colonies. After the death of Codrus (B.C., 1100, according to the early legends of Greek history), Ionian adventurers sailing eastward and northward from Attica, established themselves in that part of Asia Minor along the shores of the Ægean sea from Phocæa to Miletus. Twelve cities were built, the principal of which were Ephesus and Miletus. They were severally independent of the States from which their founders had emigrated, but they formed a mutual association for common purposes known as the Ionic Confederacy. From this new centre expeditions went forth and planted commercial emporiums on the shores of the Black Sea, including one from Miletus which established Sinope, the greatest and most important of the colonial stations fronting the Euxine. Trebezus (Trebizond) was afterwards settled from Sinope.

Whilst the Ionians were thus engaged, another body of Greeks, Æolians, proceeding from Thessaly and Bœotia, founded Æolian colonies on the northern islands of the Ægean sea, and on the northern part of the western coast of Asia Minor. They also were united in a confederacy of twelve cities, called the Æolian Confederacy, the chief of which were Lesbos and Tenedos.

In like manner the Dorians, another Hellenic tribe, settled in the southern islands and in the southern part of the western coast of Asia Minor. Six of these cities formed themselves into the Dorian Confederacy. In 658 B.C., Greek emigrants from Megara established a colony at Byzantium, commanding an entrance to the Euxine, which grew into an important centre, and in after ages became Constantinople. The Dorians and other Greeks sailing along the Mediterranean westward and southward from their central home reached Sicily, Italy, Gaul (South France), and even Africa; planting in Sicily, Syracuse and Agrigentum, two of the most splendid cities of the ancient world; in the forked peninsula of Italy, cities such as Tarentum, Sybaris, Croton, Metapontum, Rhegium, Cumæ, and Neapolis (Naples), in which Greek civilization became so advanced and the colonists so numerous that Lower Italy was known as Græcia Magna or Great Greece; in the south of Gaul, Massilia (Marseilles), which for centuries was one of the most important commercial centres of the Mediterranean; and on the northern shore of Africa, between the Nile and Carthage, Cyrene, occupying a fine maritime situation which developed into a city rivalling the Phœnician capital in wealth and splendour.

The very name "Apoikia," by which these primitive communities were known, indicated their true character and origin. A Greek colony was not a mere plantation retaining its connection with the parent state from which its pioneers had emigrated; it was literally a going-away-from-home, a parting, a complete separation. These colonial groups went away from their old city-states, like swarms from old hives, to cluster in new hives, to cultivate new lands, to found new cities, to establish new centres of trade and commerce. Following, in their tiny ships, the ebbs and flows of the great tidal

sea, they, for the most part, clung to its coastal regions. They explored what was to them a new world of strange waters, and here and there on the narrow fringes of the seaboard they made camps which grew into towns and bustling cities, pulsating with new life and new energy. The situations selected afforded convenient sites within communication, by sea, with their ancient seats, and at the same time they were accessible to an avenue of retreat from the invasions of barbarous hordes, should they emerge from the interior.

Greek colonization was not promoted by state-aid or state-patronage. It was in some instances prosecuted in spite of the opposition of Greek cities, from which the migrating swarms went forth. From small beginnings these insignificant groups, whilst preserving the laws, customs, and institutions of their mother-cities, which they regarded with respect and reverence, grew in power, influence, and importance, and became autonomous political communities. With one or two exceptions each of them enjoyed the unfettered right of self-government. Until they became subject to local despots, or were crushed by foreign conquest, the people of each colony exercised perfect freedom in the management of their own affairs; they appointed their own leaders and magistrates, and, even in their foreign relations, they were independent of their mother-city; they could declare war and make peace with her public enemies. In every respect, therefore, these small Greek societies were free and sovereign commonwealths, having the obligation to maintain that freedom and sovereignty against external attacks, by their own prowess and with their own resources. They owed no allegiance to any distant hereditary king, nor were they under subjection to any political state except their own. The mother-cities from which they had migrated regarded them as emancipated children over whom they exercised no direct authority or jurisdiction; guaranteed them favours and assistance in times of difficulty and danger, and expected nothing in return except filial respect and gratitude.

In the course of time some of these Greek colonies equalled if they did not surpass the mother-cities in wealth, population, art, philosophy and poetry, and in all the achievements of culture and civilized life. The only ties tending to draw them together in sympathy were those of common language, common religion and common blood; vital forces which seldom fail to yield tremendous results in the history of mankind. This community of sentiment led in some instances to something like a federal union between the original states and their colonial offshoots; such as the defensive league between Imperial Athens and the powerful Ionian cities of the Ægean sea and Asian shore, known as the Confederation of Delos.—Adam Smith's Wealth of Nations, pp. 249, 252, 454. Conversations Lexicon, vol. VI., p. 768.

"The Greek colonist, citizen of a city, planted a city. Severed from his native city, severed perhaps by such a world of waters as that which parts Euboia from Sicily or by such a wider world of waters as parts Phokaia from Gaul, he could no longer remain a citizen of his own city; he could no longer discharge the duties of citizenship on a distant spot; he could no longer join in the debates

of the old agoré; he could no longer join in the worship of the old temple; but he must still have some agoré and some temple; he must still have a city to dwell in, a city in which still to dwell the life of a free Greek, when he could no longer live that life in the city of his birth. So he planted a city, a free city, a city that knew no lord, that knew no ruling city, a city furnished from the first with all that was needed for the life of a Greek commonwealth, a city free and independent from its birth. And he dwelled in the new city as he once dwelled in the old; he gave himself to make the new worthy of the old, the daughter worthy of the mother. But did he thereby deem that he had ceased to be a Greek? Did he deem that he had severed himself from Greece? Did he even deem that he had broken off from all duty and fellowship towards the city from whence he had set forth? No; dwell where he might, the Greek remained a Greek; wherever he went he carried Hellas with him; in Asia, in Libya, in Sicily, in Italy, in Gaul, far away by the pillars that guarded the mouth of Ocean, far away in the inmost recesses of the Inhospitable Sea, wherever he trod, a new Hellas, if we will, a Greater Hellas, sprang into being; on those new shores of Hellas he kept his old Hellenic heart, his old Hellenic fellowship; he still kept the tongue and customs of his folk; he clave to the gods of his folk; he could go to the old land and consult their oracles, he could claim his place in their sacred games, as freely as if he still dwelled by the banks of the Spartan Eurotas or under the shadow of the holy rock of Athens. And how fared he towards the city of his birth, the *metropolis*, the mother-city of his new home, the birthplace and cradle of himself and his fellow-citizens of his new city? Political tie none remained; no such tie could remain among a system of cities. Parent and child were on the political side necessarily parted; the colonist could exercise no political rights in the mother-city, nor did the mother-city put forward any claim to be lady and mistress of her distant daughter. Still the love, the reverence, due to a parent was never lacking. The tie of memory, the tie of kindred, the tie of religion, were themselves so strong that no tie of political allegiance was needed to make them stronger. The sacred fire on the hearth of the new city was kindled from the hearth of its mother; the parent was honoured with fitting honours, her gods were honoured with fitting offerings; her citizens were welcomed as elder brethren when they visited the younger city. And when the child itself became a parent, when the new city itself sent forth its colonies, the mother-city of all was prayed to share in the work and to send forth elder brethren of her own stock to be leaders in the enterprise of her children."—Freeman's Greater Greece and Greater Britain, pp. 26-29.

(2) ROMAN COLONIÆ.

Roman Colonies.—The Roman system of colonization differed materially from the autonomous settlements of the Greeks. A "Colony," as its derivation from the Latin "Colonia" denotes, was originally a plantation of *coloni*, or farmers, under the protection of the central government; it was not an *apoikia* or a separate state.

Roman colonies were established by the Roman government as a matter of national policy, and for political and military considerations. In the early history of the Republic, as the Romans gradually subjugated the various Italian races with whom they came into contact, lands of the conquered people were divided among Roman citizens, who were distributed in groups under military protection.

When the Etruscans were finally vanquished, numerous military garrisons, which developed into colonies, were founded in various parts of Etruria. The national character of the surviving Etruscans was in that way gradually destroyed, and they were ultimately Romanised. Florentia, one of the towns of Etruria, thus became a leading Roman colony; its greatness under the name of Florence dates from the Middle Ages. So when the Samnites were finally conquered Samnium was laid waste and most of the inhabitants were sold into slavery; their places were supplied by Roman citizens clamouring for land. After the conquest of Cis-Alpine Gaul, Venetia became a Roman dominion; military stations were formed, and the land was divided among the victors, as in the case of Etruria and Samnium. When Trans-Alpine Gaul was brought under the Roman yoke it was divided into four provinces, in each of which was established a military colony. The name and identity of one of them, Lugdunum, situated at the confluence of the Rhone and Saone, still survives in the name of Lyons. Similarly the name and identity of another, Colonia Agrippina, on the Rhine, settled by the Emperor Claudian, is preserved in the modern city of Cologne.

For over three hundred years Britain, like Gaul, was subjected to the dominion of the Roman Empire. At the maturity of Roman occupation (304 A.D.) there were five divisions or provinces. Each of these provinces had a separate local ruler, subject to the Governor-General of Britain, who was appointed by the Emperor under the title of Prefect. This Prefect exercised all but sovereign authority, having supreme military and judicial power. Under the Prefect was a Procurator or Quæstor, who levied taxes and administered the revenue. The chief military and civil power of the Roman Government was centralised in about one hundred cities; the principal being London, Colchester, Bath, Gloucester, Chester, Lincoln, and Chesterfield. Most of these were built on lands which the Emperor had granted to the veterans of the conquering legions. The descendants of these warriors formed the greater part of the population of the cities. The ten largest cities enjoyed a special privilege, called the *Jus Latii*, an incomplete citizenship, which conferred on them the right to elect their own magistrates. The inferior ones, called *Stipendiaries*, were governed by officers under the Prefect's authority, and paid tribute to the Emperor.—Cassell's History of England, Vol. I., p. 19.

PART II.

MODERN COLONIZATION.

(1) IN AMERICA, AFRICA AND ASIA.

Spanish and Portuguese Colonies.—It was a great day in the world's history when Christopher Columbus, a Genoese pilot, set sail from Spain with a small fleet of three vessels bound on that memorable voyage which resulted in the discovery of America, and in the opening of new regions for the industrial activity and enterprise of civilized man. After years of endeavour he had convinced Ferdinand and Isabella of Spain that the realms of Indian wealth and treasure could be reached by sailing in the direction of the setting sun; that, the earth being round, the countries of the east could be attained by sailing to the west, so that communication could be established over the whole world across the sublime highway of the ocean. Bold mariner was he, indeed, in that age, when the lamp of science burnt dimly, to gaze across the wild waves of the Atlantic, and, beyond its primeval darkness, to see the light of promise with its glimmering rays leading on to modern civilization. How transported with delight he was when, after tossing about in strange seas for twenty-one days, without sight of land, he saw grass floating on the waves, and birds appeared on the western horizon as the gentle messengers of a harbour of safety. It was on the night of the 12th October, 1492, that Columbus from the deck of his vessel descried a dim light flickering across the waves; and at 2 o'clock in the morning a cannon shot from the *Pinta* announced that a sailor had discovered land.

That light was a spark that has since illuminated the whole world, and the cannon shot will be heard echoing through all time. To Christopher Columbus is due the immortal honour of having discovered the continent of America. He was the first of a long line of maritime pioneers and discoverers who lifted the curtain of the trackless deep—who ploughed their way from sea to sea, from ocean to ocean, from continent to continent, until the great work of circumnavigating the globe, so daringly begun, was duly accomplished.

The second great voyage which largely assisted to expand the dominion of European civilization was that performed six years after the discovery of America, by Vasco da Gama, a Portuguese navigator. To that distinguished man was entrusted the execution of the project of sailing from Portugal to India round the continent of Africa. It may seem strange that both the expedition of Columbus and that of Vasco da Gama were launched for the purpose of reaching India. But the fact is that the nearest and safest route to the riches of Cathay and the trade of India was, to the commercial nations of the south-west of Europe, a problem of vital importance; they wished to compete with Venice and Genoa, which long enjoyed the monopoly of that trade by way of eastern caravan routes. Hence it was that the

Portuguese were endeavouring to explore the western coast of Africa, with a view to reaching India by passing round its most southern promontory, many years before Columbus conceived the daring idea of sailing westward to India, in essaying which he was stopped by the Isthmus of Panama.

The Cape of Good Hope was discovered by Bartholomew Diaz in 1486. It was doubled by Vasco da Gama's fleet in November, 1497, and subsequently he arrived at Calicut, on the Malabar coast of India, the goal of his enterprise, where he established a trading station which marked the beginning of the European conquest of India. In comparing the achievements of Columbus and Da Gama as pioneers of oceanic exploration, it may be noted that whilst Columbus crossed a wild waste of waters, upon which man had never previously ventured, Da Gama, in circumnavigating Africa, followed the track of Pharoah Necho, an Egyptian king, whose ships had sailed round Africa more than 2,000 years before. But, for supreme grandeur, no exploit in the history of the human race is equal to the voyage of Fernando Magellan, a Portuguese mariner, who inaugurated an expedition which first sailed round the world, demonstrating beyond all doubt the rotundity of our planet, and leading the way to the discovery of new islands and a new continent in the Southern Hemisphere. In September of the year 1519 Magellan was entrusted by Charles V. of Spain with the command of a fleet of five ships fitted out for the purpose of exploring the southern seas. Magellan succeeded in discovering the famous straits which bear his name, running between the southern headland of South America and Terra-del-Fuego; thence he passed into the broad expanse of the Pacific Ocean, to which he gave its present name. Continuing his voyage, he sailed on, and on, month after month, undergoing privations and encountering perils, until at last, in the year 1521, he arrived at the Philippine Islands, north of Australia, where he was killed in a skirmish with the natives. His vessel, conveying his records, charts and observations, was brought back to Spain by way of the Cape of Good Hope. The circumnavigation of the globe was thus completed after a three years' voyage of unparalleled difficulty and danger; the saddest event of the expedition being the loss of its intrepid commander before he had seen the accomplishment of his world-wide enterprise. It must be admitted that this voyage was the most triumphant in the whole record of navigation, ancient or modern. It was Magellan who burst through the gates of the American continent; it was he who first navigated the majestic Pacific, with its numerous islands and its mighty highway from America to the Indian Ocean, preparing the way for much that was to follow in the fulness of time. Well has Dr. Draper written of Magellan—"He impressed his name on earth and sky; on the straits connecting two oceans, and on clouds of starry worlds seen in the southern sky."—The Intellectual Development of Europe, Vol. II., p. 169.

Pioneers of Modern Colonization.—Christopher Columbus, Vasco da Gama and Fernando Magellan were the first great pioneers of modern colonization to whom reference must necessarily be made in any account of the beginning and expansion of England's empire

beyond the seas; for, although their expeditions and discoveries were conducted in the interests and at the expense and direction of Spain and Portugal, the time came when England obtained possession of most of the countries which they added to the inheritance of civilized man. They prepared the way for Sir Francis Drake's circumnavigation of the earth in 1578, and for James Cook's voyage in 1769-70. The nation and the generation who sow the seed of progress do not always gather in the harvest, but sooner or later the human race, as a whole, enjoys and profits by what has been planted "with the blood and tears of a few." So it was in the case of those renowned navigators. Where now is the colonial empire of Spain? Nothing remains; her provinces were lost in the hurricane of revolution and conquest. Where is now the colonial empire of Portugal? Not an island of any consequence remains to speak of departed fame.

To England fell the greatest and richest share of the glorious result of those three great voyages which "broke the night of ages;" which ushered in modern times with all their bustling activity; which directed the course of civilization from the east to the west—from rivers such as the Nile, the Tiber, the Euphrates, the Danube and the Rhine, and from inland seas, such as the Black, the Baltic and the Mediterranean, to the broad Atlantic and the far-reaching stretches of the Pacific Ocean. From that time the nations of the Mediterranean were destined no longer to monopolize the commerce of the world. Egypt ceased to be the avenue to India; Europe was startled by the intelligence brought in quick succession from the new world, and an impetus of an unprecedented character was given to the spirit of adventure and discovery. Then began the mighty race for slices of the new world. England, of the sixteenth century, was not behindhand; she now began to lead the vanguard of nations in that grand struggle. See Seeley's "Growth of British Policy."

In many respects the English at that time were peculiarly qualified for the work to be done. For over a thousand years the people of the island had been going through various stages of preparation and apprenticeship calculated to fit them for the arts of navigation and colonization. In the first place, England itself had been for many centuries a colony belonging to different and successive nations. The Phœnicians, the Romans, the Danes, the Saxons and the Normans, had, in successive periods, planted colonies in British soil, which left enduring traces in the country and in the character of the inhabitants. Then, again, the main element of the amalgamated population of Britain was composed of a sea-faring people, having habits and instincts which attached them to the sea and its associations. Under these circumstances it is hardly surprising to see the English come to the front in this remarkable epoch of geographical discovery and maritime enterprise.

North American Discoveries.—Four years after Columbus had discovered America, and whilst Vasco da Gama was preparing to circumnavigate Africa, John Cabot, a Venetian pilot, with his son, Sebastian, a native of Bristol, obtained from King Henry VII. letters patent authorizing them to proceed on a voyage of exploration towards the north-west, in order, if possible, to find, conquer and

mittee had evidently intended to embody this scheme in their report; but at this stage they received the report of the Victorian Select Committee, and determined to fall into line with it.

Their report, which was brought up in October, stated that the Committee had become forcibly impressed with the expediency of adopting some comprehensive measure for a Federal Assembly at as early a date as possible. They recognized the difficulties of suggesting a measure acceptable to all the colonies, but conceived that these difficulties would rather increase than diminish with delay. They were confident that when the advantages were considered, there would be such a concurrence of opinion as would lead to the adoption of some safe and practicable measure. They had no hesitation in recommending immediate action, in the firm belief that the Federal Union of the Australian colonies would contribute more effectually to their general prosperity and advancement than any other measure that could be devised.

They pointed out that the matter could not be definitely settled without Imperial legislation, "to which there would, of course, be no objection if the general principles of the measure were previously agreed upon"—a phrase which indicates their acquiescence in Labouchere's reply to Wentworth. They also referred to that reply "as establishing the fact that no measure providing for federal union will be adopted unless initiated and recommended by the colonies themselves."

They heartily endorsed the Victorian proposition of a Conference, which they unanimously recommended to the House. They explained that before receiving the Victorian report they had made some progress in drawing up the outlines of a scheme, and they referred to these proceedings, not with the intention of dictating their views, but in the hope of assisting the delegates, if appointed.

Finally, they expressed a decided opinion that the matter could no longer be postponed without the danger of creating serious antagonism and jealousy, which would embarrass, if not entirely prevent, its future settlement on a satisfactory basis. Accordingly, they urged that the concurrence of the Assembly be invited, and further steps taken without delay.

The Committee were evidently in earnest; and had they been well backed up, union might have been achieved. Unfortunately, however, other influences were at work. During the deliberations of the Committee, the Parker Government, of which Deas-Thomson was a member, had been replaced by the Cowper administration, with Mr. (afterwards Sir) James Martin as Attorney-General and the dominating personality of the Cabinet. Neither Cowper nor Martin cared anything for federal union; and the colony, in the exercise of newly-won responsible government, was engrossed in such questions as the franchise, the reform of the Upper House, and the land question. Moreover the rivalry between New South Wales and Victoria was already leading to jealousy and bad feeling. The stream of immigration to the goldfields had suddenly given Victoria the lead in population; and Duffy's overtures were received with suspicion, as part of a scheme of Victorian aggrandisement. Deas-Thomson

succeeded in securing the adoption of his report by the Council, which then sent a message to the Assembly, asking its concurrence in joint resolutions. Joint resolutions, based on the Victorian recommendations, were agreed to in conference, and their consideration by the Assembly was fixed for 18th December; but on 17th December the Cowper Government was defeated on a Crown Lands Bill, and a dissolution followed. On the reassembling of Parliament in March, 1858, the federal question was shelved. The Governor's speech announced that "the question of a Federal Legislature is still under discussion by the Legislatures of the neighbouring colonies, but I am of opinion that the consideration of this subject may, without inconvenience, be deferred to future consideration." This announcement was received without protest. In the Address-in-Reply, the Assembly agreed that the discussion "may, under existing circumstances, be deferred;" whilst the Council resolved more emphatically that it "must, under existing circumstances, be deferred." No hint was given of what the "circumstances" were; but they doubtless comprised suspicion of Victoria, and an engrossing interest in domestic legislation. Deas-Thomson seems to have resigned himself to the inevitable.

South Australian Select Committees.—In South Australia, Select Committees of each House were appointed in 1857 to consider the question of federal union, and in November they brought up reports couched in identical terms. They were of opinion that under existing circumstances the formation of a Federal Legislature would be premature, but that nevertheless there were so many topics in which the colonies had a common interest, and in which uniform legislation would be desirable, that it was expedient to adopt some measures to secure these objects. They mentioned, as subjects which might be added to Wentworth's list, the following:—Patents and copyrights, law of insolvency, professional qualifications, uniform time of meeting of Parliaments. With a view to the discussion of the question, they adopted the Victorian suggestion that a Conference should be held; but they recommended that it should not be authorized to bind the Legislature, but only to discuss and report. These recommendations were adopted by both houses, and delegates were appointed to represent South Australia at any Conference which might be held.

Other Proceedings.—Notwithstanding the backwardness of New South Wales, Mr. Duffy kept up his exertions, and in December, 1857, obtained a second Select Committee of the Victorian Assembly, which in the following February brought up a progress report, urging that delegates should be appointed to meet the delegates from other colonies. This report was adopted by both Houses. Shortly afterwards the Tasmanian Parliament took the question up. The House of Assembly resolved "That in the event of the Conference of delegates from the Australian colonies assembling previously to the next meeting of Parliament, it will be expedient that this colony should be represented at such Conference." The Council concurred, and delegates were appointed, to act in such capacity only until the next session.

In January, 1860, Mr. Duffy obtained a third Select Committee,

which in February brought up a progress report recommending a renewal of negotiations with New South Wales, South Australia, and Tasmania, for a Conference on the subject of Federal Union. It was pointed out that the two latter colonies, when a Conference was first proposed, had promptly acceded; and "though an objection originated with New South Wales which retarded any joint action," there was reason to believe that it was of a temporary nature, and had disappeared before the urgency with which the question was invested by the necessity of a united defence of Australia in case of war. The disappearance of the "temporary objection" in New South Wales is presumably an allusion to the downfall of the Cowper Ministry; and Mr. Duffy's renewed invitation seems to have been inspired by the hope that Mr. William Forster, the new Premier of New South Wales, would be more favourable. But he was once more disappointed. The resolutions were forwarded to the other colonies, and the Governments of South Australia and Tasmania promised to give the matter attention. But New South Wales took no steps whatever. Dr. Lang, indeed, in the Legislative Assembly, obtained Select Committees in two consecutive sessions to consider the question; but though the Committees met and deliberated, no report was brought up.

Queensland.—In 1859 the Moreton Bay district was severed from New South Wales and became the new colony of Queensland. The Victorian Government accordingly included Queensland in their last invitation. The Colonial Secretary of that colony, Mr. (afterwards Sir) R. G. W. Herbert, in reply, stated that his Executive Council approved of the Conference, as a means of ascertaining the views of the colonies, and determining how far a federal union would be either practicable or expedient. On both these points the Council, with the information before them, entertained serious doubts. Without wishing to prejudge the question, they saw grave obstacles to the creation of a central authority which might "tend to limit the complete independence of the scattered communities peopling this continent," or interfere with their direct relations with the mother-country. At the same time, they were alive to the importance of uniform legislation on certain subjects, and were willing to discuss the matter in Conference.

Queensland, in short, was not enamoured of the federal idea. She was enjoying her new isolation, and looked on federation as a kind of re-annexation. "Complete independence" was her ideal for the moment.

Failure of Federal Proposals.—For the time, therefore, the project of a federal union failed. That there was no Conference on the subject was due to the backwardness of New South Wales; but even had a Conference been held, it is more than doubtful whether there would have been any practical result. In no colony was there any general enthusiasm, or even interest, in the subject; though in all there were a few far-sighted statesmen who recognized the essential unity of Australia. Even in Victoria, whose statesmen showed the most eagerness for union, there was nothing approaching a real federal movement. Local politics, and the development of local institutions, engrossed the attention of the people; and probably no colony would have been prepared to accept the compromises and the

partial sacrifice of local independence which a federal union would have involved. The best justification of the inaction of the Imperial Government is the want of interest shown by the colonies themselves.

(5) THE TARIFF QUESTION, 1855-1880.

Though Federation proved unattainable for the time, continued efforts were made to mitigate the evils arising from conflicting tariffs and intercolonial duties. These constituted the chief practical inconvenience of disunion; and there were many attempts to establish border treaties, commercial reciprocity, intercolonial freetrade, or customs unions. To take up the story of these it is necessary to go back a few years.

Tariff Differences.—We have seen (p. 79, *supra*) how the tariffs of the colonies drifted apart from the first. In August, 1852, shortly after the separation of Victoria, Deas-Thomson succeeded in greatly simplifying the tariff of New South Wales by restricting it to a very few articles—chiefly stimulants, narcotics, tea, coffee, and sugar. In the same month an almost identical tariff was established in Victoria. South Australia and Tasmania, however, retained longer lists of dutiable articles; and so early as 1854 Victoria began to increase her duties. Deas-Thomson, however, still hoped to see uniformity established; and in September, 1855—on the eve of the establishment of Responsible Government—the Governor-General, Sir W. Denison (presumably at Deas-Thomson's suggestion), sent a message to the Legislative Council recommending the assimilation of the New South Wales tariff to that of Victoria. (Notes and Proc., Leg. Ass. of N.S.W., 1855, i. 233.) He pointed out the objections which existed to the maintenance of custom-houses on the Murray border, and to differences between the tariffs of the two colonies. At the time of separation an attempt had been made to provide against these difficulties by creating a General Assembly; but this attempt had failed. The result had been the adoption of different tariffs in the two colonies, and as a corollary the establishment of custom-houses on the common border. That system, if continued, would lead to great annoyance; and he had suggested to Sir Charles Hotham, the Governor of Victoria, that it would be desirable for the Governments of the two colonies to agree not to levy any duties on goods passing by land from one colony to the other. The difference between the tariffs of the two colonies would, however, throw difficulties in the way of such an agreement; and seeing that the state of the revenue in New South Wales required a revision of the tariff, he suggested that it was a favourable opportunity to bring the two tariffs into harmony by adopting the Victorian tariff. In his letter to Sir Charles Hotham, Sir William Denison expressed his expectation that, when uniformity was once secured, future modifications of the respective tariffs would be discussed between the two Governments.

The Council, however, did not altogether accept this advice, and modified the Governor-General's tariff; but the tariff as finally adopted was still a rough approximation to that of Victoria.

Murray Customs Treaties.—Two kinds of traffic had to be dealt with in connection with the collection of customs on the Murray. First, there was the traffic across the river between the colonies of New South Wales and Victoria. Then there was the traffic up and down the river, which, when the navigability of the Murray had once been established, soon became considerable, and which involved the three colonies of New South Wales, Victoria, and South Australia. Immediately after the adoption of the New South Wales tariff of 1855, an agreement was made between the Governments of New South Wales, Victoria, and South Australia, that no duties should be collected on goods crossing the Murray, and that duties on goods carried up the Murray from South Australia, for consumption in New South Wales or Victoria, should be collected by the South Australian Government according to the South Australian tariff, the proceeds being divided equally between New South Wales and Victoria. These arrangements were validated by statute in each colony. (In Victoria, by the Customs Regulation Act, 1854, 17 Vic. No. 17; in New South Wales by the Murray Customs Duties Act, 1855, 19 Vic. No. 21; in South Australia by the Murray Customs Act, 1856, No. 6.) Accordingly, on 1st November, 1855, trade between New South Wales and Victoria, across the river Murray, became free. At that time the balance of trade was with New South Wales, and the freedom of the Murray was conceded by Victoria at the request of New South Wales. Dissatisfaction, however, soon arose. New South Wales complained that by the adoption of the South Australian tariff on Murray-borne goods she was losing revenue—especially on tobacco. Victoria complained that equal distribution of the duties collected by South Australia was not fair, seeing that most of the Murray-borne goods were for consumption in Victoria. In 1857, after much correspondence (Votes and Proc., L A. of N.S.W., 1862, ii. 647), during which an assimilation of tariffs was unsuccessfully mooted, a new arrangement was made, by which the New South Wales tariff was adopted as that which the Government of South Australia should levy on Murray-borne goods. This arrangement was sanctioned in New South Wales by the River Murray Customs Act, 1857, and in South Australia by the Murray Customs Act, 1857, No. 2, and remained in force until 1864.

Uniform Tariff Proposals.—In March, 1862, the Colonial Secretary of South Australia opened a correspondence with the other colonies on the subject of the desirability of a uniform tariff in all the colonies. (Votes and Proc., Leg. Ass. of N.S.W., 1862, ii. 647.) He expressed the opinion that, until the means of communication improved, complete Federation would be impossible. Meanwhile, as one step towards union, his Government intended to seek legislative authority for admitting free of duty the produce of any colony which made a reciprocal concession; and he suggested an intercolonial Conference at Melbourne to consider the question of a uniform tariff. The proposal was favourably received. Mr. Duffy, still intent on a Federal Union, promptly obtained a fourth Select Committee, which brought up a report urging that the Conference on a uniform tariff would afford a favourable opportunity to consider the larger question of Australian Federation. This report was adopted by both Houses of

the Victorian Parliament, but met with no response from the other colonies. The Conference, after some delay, met at Melbourne in March, 1863, being attended by three delegates from each of the colonies of New South Wales, Victoria, South Australia, and Tasmania. The subject of Federation was not considered at all; the Conference reporting that "although the question has, during some years, occupied the attention of several of the Legislatures, the delegates had no instructions in the matter, and it did not seem probable that its discussion at present would be attended with any benefit." Several subjects of intercolonial administration and legislation were dealt with; but the most important part of the business was the discussion of the question of a uniform tariff, intercolonial freetrade, and the fair distribution of the customs duties.

The Conference resolved that it was "desirable to settle the basis of a uniform tariff for the Australian colonies, and also for Tasmania." They agreed that the *ad valorem* mode of levying duties was open to so many objections that it ought not to be resorted to; and they framed a tariff, the adoption of which they undertook to urge upon their respective Parliaments. They also gave it as their opinion that the tariff which had been agreed upon, after the fullest deliberation, ought not to be altered by any one colony, nor without consideration at a future Conference.

Then came the question of intercolonial duties and their distribution. On this point the Conference resolved that "customs duties ought to be paid to the revenues of those colonies by whose population the dutiable articles were consumed." The strict fulfilment of this would have involved the maintenance of the objectionable border custom-houses; so they added a resolution to the effect that the colonies of New South Wales, Victoria, and South Australia ought to co-operate to secure to each the revenue to which it was legally entitled, either by distribution of the revenue in proportion to population, or by some other mode which might be considered equitable and practicable.

New South Wales and Victoria, however, failed to agree on any "equitable mode" of distributing the revenue. Cowper, for New South Wales, offered to accept any one of three methods: either (1) division according to population; or (2) keeping entries of border imports and making periodical settlements between the Governments; or (3) payment of a fixed annual sum to New South Wales, estimated on the excess of revenue lost by New South Wales, as compared with Victoria, by the freedom of the border. None of these propositions, however, satisfied the Victorian Premier, Mr. (afterwards Sir) James McCulloch, who "failed to discover any equitable grounds for disturbing the existing arrangement entered into at the instance of the Government of New South Wales." The "existing arrangement" was the freedom of the border without any adjustment of accounts. This did not suit New South Wales. The claim of that colony to receive the revenue on imports consumed in the colony arose from the fact that the balance of intercolonial trade was at that time with Victoria. As Victoria definitely rejected all the terms proposed, the New South Wales Government put an end to the "existing arrange-

ment," and on 19th September, 1864, began to collect duties on the Murray, having previously passed an Act (7 Vic. No. 24) to remove doubts as to the legality of this course.

In April, 1865, at the instance of New South Wales, a Conference was held at Sydney between representatives of the two colonies to reconsider the matter. (Votes and Proc., L.A. of N.S.W., 1865, i. 675). As a result a new agreement was entered into, by which on 1st September, 1865, the Murray border again became free, subject to a yearly payment of a fixed sum by Victoria to New South Wales. The duties on Murray-borne goods from South Australia were to be collected by Victoria, according to the Victorian tariff. This agreement was revised in 1867, and expired on 1st February, 1872. (Votes and Proc., L.A. of N.S.W., 1867-8, ii. 305; N.S.W. Act, 31 Vic. No. 1.) At the Conference of 1873 a new agreement was entered into; but Victoria retired from it on 31st January, 1873, owing to the abolition, under the Parkes Administration, of the New South Wales *ad valorem* duties which had been imposed by the Cowper Administration seven years previously. Since that date all attempts at agreement have failed, owing to the great difference between the tariffs of the two colonies, and duties have been collected on the border. For attempts at a similar agreement with Queensland, see N.S.W. Act, 25 Vic. No. 20; Votes and Proc., L.A. of N.S.W., 1871-2, i. 873. In 1876 an Act was passed in New South Wales (Border Duties Convention Act) to authorize Conventions with any of the adjoining colonies, but without any definite result.

Intercolonial Conferences, 1863-1880.—During the whole of this period Intercolonial Conferences were resorted to, with varying success, as the only available method of securing uniform legislation and concerted administration on subjects of common concern. A certain amount of joint action was thus secured with respect to such matters as lighthouses, ocean postal services, telegraphic communication with Europe, alien immigration, defence, and so forth. Most of these Conferences had no direct bearing on the question of Federation, except to show the utter inadequacy of this method of dealing with intercolonial questions. (See G. B. Barton, Historical Sketch of Australian Federation, pp. 12-14.)

One of these Conferences, which was held at Melbourne in March, 1867, is of special interest, as it brings Mr. (afterwards Sir) Henry Parkes—then Colonial Secretary of New South Wales in the second Martin administration—into prominent notice as an advocate of Federation. The Conference met to discuss the question of postal communication with Europe, the Imperial Government having offered to pay half the subsidy for a steam postal service between Point de Galle (in Ceylon) and Australia. The Conference, however, had larger ideas; it passed resolutions in favour of establishing a fortnightly service by three routes—Torres Straits, Suez, and Panama—the colonies undertaking to pay half the necessary subsidy. A memorial to the Queen was drawn up, and it was resolved that a Federal Council should be established to carry the resolutions into effect. Mr. Parkes addressed to the Conference these notable words:—

"I think the time has arrived when these colonies should be

united by some federal bond of connection. I think it must be manifest, to all thoughtful men, that there are questions projecting themselves upon our attention, which cannot be satisfactorily dealt with by any one of the individual Governments. I regard this occasion, therefore, with great interest, because I believe it will inevitably lead to a more permanent federal understanding. I do not mean to say that, when you leave this room to-night, you will see a new constellation of six stars in the heavens. I do not startle your imagination, by asking you to look for the footprints of six young giants in the morning dew, when the night rolls away; but this I feel certain of, that the mother-country will regard this congress of the colonies just in the same light as a father and mother may view the conduct of their children when they first observe those children beginning to look out for homes and connections for themselves. I am quite sure that the report of this meeting in your city of Melbourne, little as it may be thought of here, will make a profound impression upon the minds of thoughtful statesmen in England. They will see that, for the first time, these offshoots of Empire in the Southern Hemisphere can unite, and that, in their union, they are backed by nearly 2,000,000 souls."—Melbourne *Argus*, 18th March, 1867.

A Bill to establish the proposed Federal Council was shortly afterwards introduced by Mr. Parkes in the Legislative Assembly of New South Wales. This Bill, to which the resolutions of the Conference were annexed in the schedule, was carried through both Houses, and reserved for the Royal assent. It was, however, shelved by the Home Government. The Duke of Buckingham, then Secretary for State, informed the Governor of New South Wales, in a despatch dated 5th January, 1868, that if the resolutions in the schedule had received Imperial assent, or had continued to command the assent of the colonies, or if the Act had created a Federal Council to deal generally with postal communication or any other subject of inter-colonial interest, he would have recommended that it be assented to; but as the powers of the Council were confined to a definite scheme, to the details of which Her Majesty's Government could not agree, he was unable to submit it to the Queen.—Votes and Proc., Leg. Ass. of N.S.W., 1868-9, i. 535.

Commercial Federation.—Besides the border treaties, continued efforts were made to secure some more comprehensive scheme of customs union or commercial reciprocity. The Constitutions of all the Australasian colonies, except New Zealand, contained a prohibition —originating in the Australian Colonies Government Act of 1850 (13 and 14 Vic. c. 59, sec. 31)—against any duties upon imports from "any particular country or place" which were not equally imposed on imports from "all other countries and places whatsoever." These prohibitions stood in the way of colonial legislation for reciprocity; and in 1866 the Executive Council of New South Wales adopted a minute asking for their repeal so far as to allow free importation from any one colony. (See despatch from Sir John Young to the Secretary for State, 21st December, 1866; Votes and Proc., L.A. of N.S.W., 1868-9, ii. 109.) Lord Buckingham, the Secretary of State for the Colonies, replied in a despatch of 7th January, 1868, that the Home

Government would gladly aid the establishment of a Customs Union embracing all the adjacent colonies, and providing for a uniform tariff, intercolonial freetrade, and an equal division of the customs duties; they might even consider any partial relaxation of the existing rule; but they could not propose the repeal of the clause which prevented differential duties. That would enable the colonies to discriminate against foreign nations, and even against the mother-country, and might seriously embarrass treaty relations. Thereupon the Government of New Zealand proposed an intercolonial Conference to consider the question of a Customs Union. In 1870 Tasmania renewed the proposal; and a Conference was accordingly held at Melbourne, in June and July, 1870, between delegates from New South Wales, Victoria, South Australia, and Tasmania, at which the most important question considered was the establishment of a Customs Union, with a uniform tariff and intercolonial freetrade. (Votes and Proc., L.A. of N.S.W., i. 583.)

This time the uniform tariff was the stumbling-block. All the colonies agreed that a uniform tariff was desirable; but when they proceeded to frame such a tariff, the fiscal policies of New South Wales and Victoria proved irreconcilable. The Victorian delegates (Messrs. J. G. Francis and James McCulloch) absolutely declined to surrender the principle, recognized by the Victorian tariff, of discriminating between raw materials and manufactured goods. The New South Wales delegates (Messrs. Charles Cowper and Saul Samuel) declined to consider any proposition to amend their tariff in the direction of such a principle. On articles subject to a "fixed" duty—such as spirits, wines, beer, tobacco, tea, &c.—an agreement could probably have been arrived at; but the determination of each colony to adhere to its fiscal principles made a Customs Union between them impossible.

An effort was then made to patch up an agreement between Victoria, South Australia, and Tasmania; but here again insuperable difficulties disclosed themselves. With a Customs Union of all the colonies, Victoria had been willing to agree to intercolonial freetrade and the distribution of revenue on a population basis. But with New South Wales standing out, Victoria considered that "the prospective advantages were diminished," and offered very different terms —namely, that distribution should be governed by contribution, that the Victorian tariff should be accepted as the common basis, and that the Victorian Parliament should retain the power to alter the tariff. The other colonies promptly rejected this proposal, and all hope of a Customs Union fell through.

The Conference reported, however, that though they had not arrived at a definite conclusion, they had a deep conviction of the importance of the question; and they prepared a memorial to the Home Government praying for the removal of the existing restrictions on intercolonial commercial treaties.

On 31st July, 1871, Lord Kimberley, the Secretary of State for the Colonies, sent a circular despatch to the several Governors on the subject of colonial tariffs. (Votes and Proc., L.A. of N.S.W., 1871-2, i. 845.) He had received despatches from several of the Governors,

intimating a desire for reciprocal agreements, and had received reserved Bills from New Zealand and Tasmania dealing with the subject. Like the Duke of Buckingham, he objected to conceding a general power to make reciprocal arrangements, but was favourable to a Customs Union with a uniform tariff. He cited the British treaty with the German Zollverein, to show that differential duties in the colonies would infringe the treaty obligations of the Empire.

Thereupon a further Conference was held at Melbourne in September, 1871, at which New South Wales, Victoria, South Australia, Queensland, and Tasmania were represented. Lord Kimberley's despatch was discussed, and some very plainly-worded resolutions were passed, claiming that the colonies had a right to enter into arrangements for reciprocity, that no Imperial treaty should limit this right, and that Imperial interference with colonial fiscal policies should absolutely cease. Lord Kimberley replied in a lengthy despatch of 19th April, 1872, in which he invited a "friendly discussion" of the whole question. He argued that compliance with the request would involve not only the repeal of the prohibition in the various Constitutions, but also the exclusion of the colonies from future commercial treaties containing stipulations against differential duties. (Votes and Proc., L.A. of N.S.W., 1872, i. 1015.)

Finally, a Conference, convened by Sir Henry Parkes, was held at Sydney in January and February, 1873, at which all the seven colonies were represented. With regard to intercolonial reciprocity, it was resolved to urge on Lord Kimberley the claims of the colonies, and to adopt a memorial to the Home Government for the removal of the restrictions which prevented the colonies agreeing to admit the products of any colony into any other colony free of duty. As to a Customs Union, it was resolved by a majority of one that such a union would be desirable, on the understanding that customs duties ought only to be levied for purposes of revenue, and not for purposes of protection. (Votes and Proc., L.A. of N.S.W., 1872-3, i. 1161.)

Lord Kimberley, though he maintained his own opinion, yielded to these repeated demands of the colonies, and introduced the Australian Colonies Duties Bill of 1873, which was passed, though Earl Grey and others opposed it as a step to commercial disunion. It merely provides that the legislature of any of the Australian colonies shall, for the purpose of carrying into effect any agreement with any other of such colonies, have full power to make laws for the remission or imposition of import duties on articles imported from such other colonies.

The colonies thus obtained full statutory powers to enter into arrangements for reciprocity, but the power was never used. The constitutional obstacle was removed, but the practical difficulties in the way of any customs union, short of the establishment of a Federal Parliament, remained.

Victorian Royal Commission, 1870.—After the failure of Deas-Thomson's and Duffy's Select Committees, very little was heard of any real proposal for Federation until 1870, when Mr. Duffy made a final effort. He secured the appointment, on 31st August, of a Royal

Commission "to consider and report upon the necessity of a Federal Union of the Australian colonies for legislative purposes, and the best means of accomplishing such a union." On 3rd October the Commission brought up a "first report." As usual, there was unanimity as to the advantages of a Federal Union. As to the means of effecting a union, it was recognized that the form of union must be left to be decided by an accredited intercolonial Conference, and by the several legislatures. Opinion in the colonies seemed to be divided between a Constitution like that of the recently created Canadian Dominion on the one hand, or a mere Federal Council on the other. But they thought that a preliminary step, as to which there would probably be little difference of opinion, would be a permissive Imperial Act, authorizing the Queen to establish a Federal Union of any colonies which should agree upon terms. They thought that the best means of accomplishing a union was to remove, by such an Act, all legal impediments to it, and leave the colonies to determine, by negotiation among themselves, how and when they would avail themselves of the opportunity. They proposed to frame, and print with their second report, a Bill of this kind for transmission to the Imperial Parliament. Then followed some rather startling suggestions as to granting the colonies "sovereign rights" of making treaties, and remaining neutral in time of war—suggestions to which some of the delegates declined to subscribe. Neither the promised "second report" nor the proposed Bill were ever issued; and though the above report was circulated, no further steps were taken.

Conference of 1880-1.—A distinct stage in the Federal movement is marked by a Conference which met at Melbourne in November and December, 1880, and afterwards at Sydney in the following January. (Votes and Proc., L.A. of N.S.W., 1881, i. 329.) At its first meeting only the three colonies of New South Wales, Victoria, and South Australia were represented. Sir Henry Parkes submitted the "basis of a possible agreement as to customs duties." Briefly, it was to the effect that uniform duties of customs and excise should be levied on spirits, tobacco, and beer—such duties to be fixed, for the most part, at the highest rates then prevailing; that no customs duties should be levied except at the seaports; and that balances should be adjusted between the Governments on the basis of the intercolonial trade statistics of 1878-80. He declared that New South Wales was prepared to sign a Convention for three or five years on such a basis. The restriction of uniformity to the articles mentioned, of course, shirked the burning question of freetrade and protection. Mr. (afterwards Sir) Graham Berry, for Victoria, maintained that the only satisfactory solution of the border question was a completely uniform tariff—more than hinting, however, that the tariff must be mainly that of Victoria. The matter was discussed, and postponed to the Sydney session.

Resolutions were also passed, at the instance of Sir Henry Parkes, affirming (1) that the time had arrived when a Federal Council should be created to deal with intercolonial matters; (2) that such Council might be constituted, with limited powers, by Acts of the several Parliaments, each colony having an equal number of representatives:

(3) that the control of each colony over its own revenue should be preserved intact; and (4) that New South Wales should be requested to prepare the necessary Bill, to be submitted to the Conference at its next meeting.

The Sydney session in January was joined by delegates from all the seven colonies. The proposal of a uniform tariff ended with a mere recommendation that a joint commission should be appointed to frame a common tariff, and that the number of commissioners from each colony should be—Victoria, three; New South Wales, New Zealand, South Australia, and Queensland, two each; Tasmania and Western Australia, one each. No such commission was ever appointed, so that the proposal, like every other proposal for a uniform tariff, ended in talk.

The scheme for a Federal Council got a little further. Sir Henry Parkes brought up the promised Bill, together with the following interesting memorandum: "In respect to the Federal Council Bill now submitted, the following positions are assumed as hardly open to debate:—

"1. That the time is not come for the construction of a Federal Constitution, with an Australian Federal Parliament.

"2. That the time is come when a number of matters of much concern to all the colonies, might be dealt with more effectually by some federal authority than by the colonies separately.

"3. That an organization which would lead men to think in the direction of federation, and accustom the public mind to federal ideas, would be the best preparation for the foundation of Federal Government.

"The Bill has been prepared to carry out the idea of a mixed body, partly legislative and partly administrative, as the forerunner of a more matured system of Federal Government. Care has been taken throughout to give effective power to the proposed Federal Council within prescribed limits, without impairing the authority of the colonies represented in that body.

"No attempt has been made to constitute the proposed council on any historical model, but the object has been to meet the circumstances of the present Australian situation, and to pave the way to a complete federal organization hereafter."

This memorandum, and Sir Henry Parkes' previous resolutions, define very clearly his federal policy at that time. The main obstacle to complete Federation was the difference in fiscal policy between New South Wales and Victoria. Victorian statesmen would not listen to any uniform tariff proposal except on the basis of protection; New South Wales statesmen were equally determined to maintain freetrade; and neither were willing to entrust the question to the free decision of a Federal Legislature. Neither a simple customs union, nor a Federation involving a customs union, was for the time attainable. Sir Henry Parkes believed that a time would come when the people of both colonies would place Federation above the fiscal question, and would be ready to entrust the settlement of that question to their joint representatives; but meanwhile the only

form of Federation possible would be one which left the fiscal question out altogether. He believed that such a preliminary union would prepare the way for a more complete Federation.

The correctness of Sir Henry Parkes' judgment, that the time was not come for a more complete Federation, was strikingly shown in the Conference itself. An apple of discord was thrown into the discussion by Mr. Graham Berry, who made the startling proposition that, as the Council would need revenue of some kind, the revenues arising from the sale and occupation of public lands should be transferred to it. This suggestion received no support except from the Victorian delegates. It was presumably intended to prove, by a *reductio ad absurdum*, the uselessness and impracticability of a Federation which did not control the customs revenue.

A motion, that the Conference should agree to the Bill, and recommend it to the legislatures, was then put, and resulted in an equal division. New South Wales, South Australia, and Tasmania voted for it; Victoria, Queensland, and New Zealand against; whilst the West Australian delegates did not vote at all. The proposal for a Federal Council had, therefore, to be abandoned.

The only federal institution as to which the Conference could agree was an Australian Court of Appeal. A Bill for this purpose was framed and approved, and a resolution was passed recommending the Legislatures to memorialize the Home Government with a view to Imperial legislation on the subject. But recommendation is one thing, and action another; nothing further was done.

(6) THE FEDERAL COUNCIL.

Events of 1883.—Up to the year 1883 every proposal for any kind of Federation—complete or partial—had failed altogether. Some small degree of uniform legislation had been attained by conference; some temporary border treaties had been entered into between individual colonies; but no basis had been agreed on for any form of political union. But the events of 1883 helped to draw closer the bonds between the colonies, and to emphasize the need of joint action.

In June, 1883, the last section of the railway line between Sydney and Melbourne was completed, and the long-delayed junction between the railway systems of the two colonies was thus effected at the Murray River. A banquet held at Albury on that occasion, and attended by the Governors of both colonies and by many prominent statesmen, affords an interesting historical record of the after-dinner views of prominent men on the subject of Federation. The union of railways irresistibly suggested the greater political union; but most of the speakers spoke of Federation as a "far-off divine event" rather than as a practical policy. The Governors, of course, welcomed the joining of hands across the Murray as a step towards Federation. The speakers from the mother-colony did not respond very heartily. Sir John Robertson, in a characteristic speech, alluded to a "some-

thing called Federation," said that Victoria had separated of her own free will, and invited her to return as a repentant child to her mother. Mr. (afterwards Sir) Alexander Stuart, the New South Wales Premier, expressed his belief in slow development, and did not think that Federation could be "precipitated in a moment." Mr. James Service, the Victorian Premier, was the most ardent federalist of the gathering. "We want Federation" he said, "and we want it now. I have been now 30 years almost in public life, and I decline to subscribe to the doctrine that I am to die before I see the grand Federation of the colonies. There is no earthly reason for its being delayed. We imagine there are supreme difficulties in the way, but I believe they will crumble into dust; and I take this opportunity of telling my friend, the Premier of New South Wales, that we intend to test the question." Other Victorian speakers were less definite. Mr. Duncan Gillies said that a customs union must precede any other kind of Federation; whilst Mr. Graham Berry, though announcing that Victoria was "quite ready to unite," stipulated that Victorian manufacturing industries must be considered. In a word, every one was willing to federate; but Sir John Robertson's idea of Federation was the re-annexation of Victoria, Mr. Berry's idea was union under the Victorian tariff, and most of the others regarded it as a topic of after-dinner oratory rather than a matter of practical politics.

But whilst the development of intercolonial relations was deepening the conviction that union was needed, the real motive power—the stimulus to an active public interest—came from outside. Hitherto Australia had regarded foreign complications as antipodean matters which did not much concern her; but the external need of union was brought home to all the colonies by the increased activity of foreign Powers in the Pacific. In 1883 rumours became current of intended annexations by France and Germany. The Germans were credited with designs on New Guinea; and to forestall them Sir Thomas McIlwraith, Premier of Queensland, sent a magistrate to that island in April to take possession in the name of the Queen. His action, though generally approved in the colonies, was disavowed by the Home Government. The French, moreover, were openly coveting the New Hebrides, and were reported to be arranging to transport to New Caledonia a large number of *recidivistes*, or habitual criminals.

In this emergency the colonies found that disunion hampered them in making proper representations to the Imperial Government, and weakened the effect of what representations they made. Here was a practical and convincing argument for Federation; and it was made the most of. The Executive Council of Queensland, on 17th July, 1883, resolved that the Home Government should be invited to move in the direction of a federal union. What was wanted, however, was not Imperial action, but Australian action; and Mr. James Service—true to his promise at the Albury banquet—took the more practical step of urging an intercolonial conference. Accordingly, on 28th November, a "Convention" met in Sydney, at which the seven colonies were represented, and also Fiji.

Mr. Service immediately submitted a set of resolutions urging the annexation of, or a protectorate over, East New Guinea and the

West Pacific Islands from the equator to the New Hebrides, in order to prevent them falling into the hands of foreign powers; affirming that the colonies were willing to bear a share of the cost; protesting against the French *recidiviste* proposals; and concluding with the following resolution:—"That, in view of the foregoing resolutions, and of the many subjects of pressing importance on which the colonies, though of one mind, are unable to obtain united action owing to the absence of some common authority, the time has now arrived for drawing closer the ties which bind the colonies to each other by the establishment of a Federal Union in regard to such matters as this Convention shall specifically determine."

It is certain that Mr. Service had in his mind the establishment of a real federal Government. The other delegates, however, were not prepared to go to this length; and Mr. (afterwards Sir) Samuel Griffith, Premier of Queensland, submitted the following resolution in favour of a Federal Council:—

"That it is desirable that a Federal Australasian Council should be created for the purpose of dealing with the following matters:—

"1. The marine defences of Australasia, beyond territorial limits.

"2. Matters affecting the relations of Australasia with the islands of the Pacific.

"3. The prevention of the influx of criminals.

"4. The regulation of quarantine.

"5. Such other matters of general Australasian interest as may be referred to it by Her Majesty or by any of the Australian Legislatures."

Mr. Griffith's resolution was adopted, and on 3rd December a Committee was appointed, with Mr. William Bede Dalley (then Attorney-General of New South Wales in the Stuart Ministry) as chairman. The following day the Committee brought up its report, together with a "Bill to establish a Federal Council of Australasia," of which Mr. Griffith was the draftsman. The Bill was somewhat altered in Committee, the powers of the Federal Council (partly in consequence of outside criticism) being considerably reduced. The Bill provided for a Federal Council, and was to affect only those colonies whose legislatures passed Acts adopting it. It was not to come into force until four colonies at least had passed such adopting Acts. Each colony was to have two representatives, except Crown colonies, which were to have one each; and the mode of their appointment in each colony was left to the legislature. The first session was to be at Hobart, and subsequent sessions wherever the Council itself should decide.

The Council was to be a legislature merely, with no executive powers, and no control over revenue or expenditure. And even its legislative powers were very scanty. The matters over which it was given an independent legislative authority were only seven. Foremost of these were "the relations of Australasia with the islands of the Pacific," and "prevention of the influx of criminals"—the two burning questions which had led up to the Convention. The others related to fisheries in Australasian waters outside territorial limits, the service of civil process beyond the limits of a colony, the enforcement of judg-

ments and of criminal process beyond the limits of a colony, the extradition of offenders, and the custody of offenders on Government ships beyond territorial limits. Those were the only matters on which the Council could legislate of its own motion. But there was a second list of matters which the legislatures of two or more colonies might refer to the Council, and on which the Council might then legislate, but only so as to affect the referring or adopting colonies. This list of matters, as to which the Council could only legislate by request, comprised defence, quarantine, patents and copyright, bills of exchange and promissory notes, weights and measures, recognition of marriage and divorce, naturalization, status of corporations, and "any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application." All laws of the Council were to be presented, for the Royal assent, to the Governor of the colony in which the Council was sitting.

The Bill was adopted by the Convention in the following resolution:—"That this Convention, recognizing that the time has not yet arrived at which a complete federal union of the Australasian colonies can be attained, but considering that there are many matters of general interest with respect to which united action would be advantageous, adopts the accompanying draft Bill for the Constitution of a Federal Council, as defining the matters upon which such united action is both desirable and practicable at the present time, and as embodying the provisions best adapted to secure that object, so far as it is now capable of attainment." A resolution was also passed pledging the Governments of the several colonies to invite their Legislatures to pass addresses to the Queen praying for legislation on the lines of the Draft Bill.

Meanwhile the proceedings of the Convention, and the Constitution of the proposed Federal Council, were being severely criticised in the Sydney press, and also in the New South Wales Parliament. The Convention had sat with closed doors; and it seems that at one time, in its zeal for prompt action, it had contemplated asking the Home Government to pass the Bill at once, without reference to the Legislatures. Even the agreement arrived at only gave the Legislatures the option of accepting or rejecting the scheme as it stood, and gave them no voice in deciding its details. There was a strong feeling in Sydney against making so important a constitutional change with so little consideration; and the Bill itself was objected to because the Council, to which power was given to override the local Legislatures, was merely a small, peripatetic, and more or less irresponsible body of delegates. Objection was made, in fact, to handing over powers of federal legislation to any less important and less representative a body than a real Federal Parliament.

In July and August, 1884, addresses to the Crown, praying for the enactment of the Federal Council Bill, were passed by the Legislatures of Victoria, Tasmania, Queensland, Western Australia, and Fiji. New South Wales and New Zealand, however, stood aloof. In New South Wales the Government pleaded the pressure of more important

business for not dealing promptly with the matter. In the Legislative Assembly, on 25th March, a resolution had been carried, at the instance of Mr. L. F. Heydon, affirming that no Federal Council Bill should be enacted by the Imperial Parliament until it had been submitted to the Legislature of New South Wales. In the Legislative Council, in July, there had been considerable debate on resolutions moved by the Hon. John Stewart, protesting against any annexation of New Guinea as an unjustifiable interference with the liberty of the natives, and affirming that "any attempt to establish a Federal Government, having legislative jurisdiction over two or more colonies, is not at present necessary or desirable." The resolutions were eventually shelved by the "previous question." On 7th August, in consequence of telegraphic news from London that the Federal Council Bill was likely to be proceeded with shortly, Sir Alexander Stuart, the Premier of New South Wales, telegraphed to the Agent-General that such action would be premature until the Parliament of New South Wales had expressed an opinion. Political opinion in New South Wales was very much divided, and the attitude of the Government was consistently cautious and non-committal. At last, on 30th October, the resolutions were brought before both Houses—in the Assembly by the Treasurer, Mr. (afterwards Sir) George R. Dibbs, and in the Council by Mr. W. B. Dalley. In the Council the resolutions were carried by 13 votes to 9; in the Assembly they were defeated by one vote. Sir John Robertson and others frankly opposed union on the ground of mistrust of the other colonies; but the most general objection was that the scheme was premature, ill-conceived, and ineffective. The speech to which the most interest attaches was that of Sir Henry Parkes. He had taken no part in the proceedings of the "Convention," having been on a trip to England from early in 1883 until August, 1884. Since 1881, however, he had entirely changed his views as to the desirability of a Federal Council; and in his speech in opposition to the proposal he explained his position. His scheme of 1881 had been tentative, and avowedly designed to awaken interest in the question of Federation. He had long since given it up as impracticable. Federation had since become a living national question, and the proposed scheme for a Federal Council, besides being unauthorized in its origin, was incurably defective. The Council would be a "ricketty body," composed of a very few members, and unfit to be entrusted with the power of overriding the local Parliaments. It would not only cause dissatisfaction and conflict, but it would "impede the way for a sure and solid Federation."

"Is it not better," he said, "to let the idea of Federation mature, to grow in men's minds, until the time comes when we can have a solid, enduring Federation? No good object can be served by creating a body such as this Council. It will add to our strife, it will add to our dissatisfaction with the working of our institutions, it will lead to endless complications, and it must result, at a very early stage, in an entire breakdown. It has not any inherent power, the Legislatures of these free countries will never give it inherent power, and it can never exist for any useful purpose. Considering the proud position in which we stand now—as free as any country in the world, with power

to govern ourselves and maintain an attitude which commands the respect of great nations—we had better avoid joining in making a spectacle before the world which would cover us with ridicule." (See also Parkes' "Fifty Years in the Making of Australian History," p. 503.)

New South Wales and New Zealand, therefore, stood out of the Federal Council scheme. Nevertheless the Home Government, acting on the addresses passed in the other colonies, decided to carry it through; and on 23rd April, 1885, the Earl of Derby introduced the Bill, somewhat apologetically, in the House of Lords. He admitted that it was a rudimentary and imperfect measure, but it was what the colonies had asked for, and would make a beginning. A good deal hung on whether New South Wales would come into the union or not, but he hoped that the objections of the Legislature would not be permanent. A real Federation was impossible for a time, owing to the difference of fiscal policy; the colonists themselves did not wish it, and did not think themselves ripe for it.

The Bill thus introduced differed in a few respects from the Bill adopted by the "Convention." In the first place, a provision was inserted giving any colony the power to secede from the Council. This was done in the hope that New South Wales might thereby be induced to join, one of the objections of that colony being the irrevocableness of the compact. Next, power was given to the Queen, at the request of the colonies, to increase the number of members of the Council. It was hoped that this might lead to the gradual expansion and development of federal institutions. Lastly, the Council was given an additional power to legislate on any matter which, at the request of the colonial legislatures, the Queen should think fit to refer to it. The Home Government had further suggested a clause dealing with the question of expenditure involved in the action of the Council; but this was so strongly objected to by the colonial Governments that it was dropped, and in matters involving expenditure the Council was left powerless to do anything but advise or recommend.

The Bill passed through the British Parliament with very little debate. In the Lords it was supported by the Earl of Carnarvon, who had actively promoted the Canadian Union in 1867, and had endeavoured to secure a similar result among the South African colonies and States by the abortive "South African Union Act, 1877." In the Commons, it was opposed by Sir George Campbell on the ground that the colonies would do better by developing their own territory than by meddling with the islands of the Pacific; and it was severely criticised by Mr. James Bryce, who regarded it as "a very scanty, fragmentary, and imperfect sketch of a Federal Constitution," which did not seem to have been satisfactorily discussed in the colonies.

The Federal Council of Australasia Act, 1885, became law on 14th August. Between September and December in the same year the five colonies of Western Australia, Fiji, Queensland, Tasmania, and Victoria, in that order, passed adopting Acts; and all those colonies sent representatives to the first meeting of the Federal Council, which was held at Hobart from 25th January to 5th

February, 1886. It began in a business-like way by passing an Interpretation Act, to govern the interpretation of federal statutes, and an Evidence Act to prescribe the mode of proving them in Court. It then began its substantive legislative work by passing Acts for the intercolonial service of civil process and enforcement of judgments. At its second session, in January, 1888, it passed an Act to regulate the Queensland Pearl-shell and Bêche-de-mer fisheries beyond territorial limits; and at its third session in 1889 it passed a similar Act with respect to West Australian fisheries. Meanwhile, in December, 1888, South Australia passed an adopting Act agreeing to join the Council for a period of two years. From 1891 to 1899 it met in alternate years, but did little to justify its existence; a fact which its friends ascribed to the aloofness of New South Wales. Possibly if New South Wales had joined, there might have been a few more federal statutes passed; but the powers of the Council were too scanty to enable it to be of any great service.

Fiji, though not withdrawing from the Council, was never represented after the first meeting. In 1892 Mr. F. W. Holder, Premier of South Australia, introduced a Bill to enable his colony to re-enter the Federal Council; but it was rejected by the Upper House. The new movement for a national Convention had already made it clear that the road to Australian Federation lay in another direction. Efforts, however, were still made to extend the sphere of the Council's work. Acts referring different matters to the Council were passed in some of the colonies, but without practical result. In 1893, also, the Legislatures of all the colonies represented requested the Queen to increase the number of members; and accordingly, by Order-in-Council of 3rd March, 1894, it was directed that each colony (excepting Crown colonies) should have five representatives. But all efforts to galvanize the Council into life were unavailing; and in January, 1899, it met at Melbourne for the last time.

(7) THE COMMONWEALTH BILL OF 1891.

Federal Defence.—The great effort at Federation which led to the framing of the Commonwealth Bill of 1891 had for its immediate stimulus the recognized need of a national system of defence. The history of the new movement may, therefore, be appropriately introduced with a brief review of the attempts to deal with this subject.

The question of colonial defence began to assume prominence in 1878. In the previous year Lord Carnarvon (Secretary of State for the Colonies) had commissioned Lieutenant-General Sir W. D. Jervois to report upon the defences of the Australian colonies—a task which he carried out with the assistance of Lieutenant-Colonel Sir Peter Scratchley. As a result, the several colonies re-organized and increased their military forces, and devoted large sums to harbour defences and fortifications. The naval defence of Australia, and of Australian trade, was still left almost wholly to the Imperial Government; though Victoria established a small navy for the defence of Port

Phillip, and New South Wales spent considerable sums upon the naval station at Sydney.

At the Intercolonial Conference held in Sydney in 1881 (see p. 107, *supra*) it was resolved that the Australian squadron ought to be increased and ought to be the sole charge of the Imperial Government; the colonies on their part undertaking their own land defences. The Home Government, however, thought that Australia ought to contribute towards the naval defence of her own trade; and a Royal Commission which had been appointed in England in 1879, with Lord Carnarvon as chairman, "to enquire into the defence of British possessions and commerce abroad," endorsed this view in its second report, dated 23rd March, 1882. In 1885 Admiral Sir George Tryon was appointed to the command of the Australian station, with instructions to discuss the matter; and owing to his negotiations some approach was made to an understanding. At the Colonial Conference held in London in April and May, 1887, presided over by Sir Henry Holland, and attended by representatives from all the British possessions, the basis of an agreement was settled, subject to ratification by the Australian Parliaments.

This agreement provided for an auxiliary fleet to be equipped and maintained at the joint expense of Great Britain and the colonies. No reduction was to take place in the normal strength of the Imperial fleet on the Australian station. The auxiliary fleet was to consist of five fast cruisers and two torpedo gunboats of the *Archer* (improved type) and *Rattlesnake* classes; of which three cruisers and one gunboat were to be kept always in commission, and the remainder held in reserve in Australasian ports. Great Britain was to pay the first cost of these vessels, and the colonies were to pay interest at five per cent. on the first cost to a sum not exceeding £35,000, and also the actual cost of maintenance, not exceeding £91,000, making a total of £126,000 a year, which was to be contributed by the colonies on a population basis. The fleet was to be under the control of the Naval Commander-in-Chief on the Australian Naval Station, and was to be retained within the limits of the station, which is bounded as follows:—

(N.) On the north, from the meridian of 95° E. long. by the parallel of 10° S. lat. to the meridian of 130° E. long.; thence northward on that meridian to the parallel of 2° N. lat., and thence on that parallel to the meridian of 136° E. long.; thence northward to 12° N. lat., and along that parallel to 160° W. long.

(W.) On the west by the meridian of 95° E. long.

(S.) On the South by the Antarctic circle.

(E.) On the east by the meridian of 160° W. long.

In peace or war, the ships were not to be employed beyond those limits without the consent of the colonial Governments. The agreement was to be for ten years, and only terminable, after that time, by a two years' notice.

This agreement was ratified, within a few months, by "Australasian Naval Force Acts," passed in the colonies of Victoria, South Australia, New South Wales, Tasmania, New Zealand, and Western Australia. The Queensland Parliament at first declined to ratify, but

eventually came into line with the other colonies by passing the Australasian Naval Force Act, 1891. The Imperial Parliament made provision for its share of the expenditure by the Imperial Defence Act, 1888 (51 and 52 Vic. c. 32). The auxiliary fleet arrived at Sydney on 5th September, 1891.

With respect to naval defence, therefore, some degree of federal action had been attained; but with regard to military defence it was otherwise. Each colony had a separate military force, consisting chiefly of partially paid or unpaid volunteers, with a small permanent force. There was no uniformity of organization or equipment, and no co-operation. The (Imperial) Army Act, 1881 (44 and 45 Vic. c. 58, s. 177), provided that "where any force of volunteers or of militia, or any other force, is raised in India or a colony, any law of India or the colony may extend to the officers, non-commissioned officers, and men belonging to such force, whether within or without the limits of India or the colony." There was some doubt, however, whether this section was sufficient to authorize the employment of the troops of one colony in another colony. See remarks by Sir Samuel Griffith, Proceedings of the Colonial Conference of 1887, pp. 294, 438-40.

The Colonial Conference of 1887 suggested that an Imperial officer should be appointed to report on the defences of the Australian colonies. In 1889 Major-General Sir J. Bevan Edwards was commissioned by the Home Government to inspect the military forces and defences of the Australian colonies, and to report on them. He accordingly made separate reports (dated 9th October, 1889) in respect of each colony, to which he attached a memorandum containing propositions for the re-organization of the forces of all the colonies. The points on which he laid stress were:—

(1.) The federation of the forces of all the Australian colonies.
(2.) The appointment of an Imperial officer, to advise and inspect in peace, and to command in war.
(3.) A uniform system of organization and armament, and a common Defence Act.
(4.) Amalgamation of the permanent forces into a fortress corps.
(5.) A federal military college for the education of officers.
(6.) The extension of the rifle clubs.
(7.) A uniform gauge for railways.
(8.) A federal small-arms manufactory, gun-wharf, and ordnance store.

Sir Henry Parkes.—Earlier in 1889 Sir Henry Parkes, in a confidential correspondence with Mr. Duncan Gillies, Premier of Victoria, had suggested the creation of a Federal Parliament and Executive. In reply, Mr. Gillies had expressed the fear that the fiscal difficulty was insuperable at present, and had urged the claims of the Federal Council as the first step towards union.

On receipt of Major-General Edwards' memorandum, Sir Henry Parkes, on 15th October, telegraphed to the other Premiers suggesting a consultation on the subject. On the 22nd Mr Gillies telegraphed a reply to the effect that a mere Conference would probably be barren of results, as the local Parliaments had no power to frame the necessary federal legislation. He pointed out that the necessary

Imperial authority was already provided by the Federal Council Act, which enabled the Federal Council, upon a reference by the local Parliaments, to legislate as to "general defences." He therefore urged that Sir Henry Parkes should recommend his Parliament to give in its adhesion to the Federal Council.

This suggestion did not meet Sir Henry Parkes' approval. He had been watching the signs of the times, and had come to the conclusion that the popular sentiment was now ripe for a definite federal movement, at the head of which he resolved to place himself. At the time he was on a short visit to Brisbane, where he had been in consultation with, and had received encouragement from, the leading men of both political parties; and on his return journey he was no sooner within the territory of New South Wales than he opened out, at Tenterfield, with his famous speech of 24th October. He seized the opportunity of Major-General Edwards' report to emphasize the necessity of federal defence. For this purpose the Federal Council would be altogether inadequate, because it had no executive power, and it was not directly representative. Nor would it be enough to ask the Imperial Parliament to pass an Act authorizing the troops of the colonies to unite in one federal army under Imperial control. What was wanted was a strong central executive, under the control of the Australian people.

He believed that federal defence was necessary to the security of the colonies; and "feeling this, and seeing no other means of attaining the end, it seemed to him that the time was close at hand when they ought to set about creating a great national Government for all Australia. . . . As to the steps which should be taken to bring this about, a conference of the Governments had been pointed to, but they must take broader views in the initiation of the movement than had been taken hitherto; they must appoint a Convention of leading men from all the colonies—delegates appointed by the authority of Parliament who would fully represent the opinion of the different Parliaments of the colonies. This Convention would have to devise the Constitution which would be necessary for bringing into existence a Federal Government with a Federal Parliament for the conduct of national business."

Having thus set the ball rolling, Sir Henry Parkes, on 30th October, wrote to Mr. Gillies, reiterating his views as to the Federal Council, and making a definite proposition for the summoning of a Convention. "Believing that the time is ripe for consolidating the Australias into one, this Government respectfully invites you to join in taking the first great step—namely, to appoint representatives of Victoria to a National Convention for the purpose of devising and reporting upon an adequate scheme of Federal Government." He suggested that, in order to avoid any sense of inequality in debate or any party complexion, the number from each colony should be the same, and should be equally chosen from both sides in political life; and he further suggested six members from each colony as a convenient number. The form of union he had in mind is best described in his own words:—"The scheme of federal government, it is assumed, would necessarily follow close upon the type of the Dominion Govern-

ment of Canada. It would provide for the appointment of a Governor-General, for the creation of an Australian Privy Council, and a Parliament consisting of a Senate and a House of Commons. In the work of the Convention, no doubt, the rich stores of political knowledge which were collected by the framers of the Constitution of the United States would be largely resorted to, as well as the vast accumulations of learning on cognate subjects since that time." Copies of this despatch were also forwarded to all the other Australian Premiers, with requests for their concurrence.

Mr. Gillies, however, was still diffident as to the immediate practicability of a full-blown Federal Government. That the matter might be fully considered, yet without altogether passing over the Federal Council, he proposed to Sir Henry Parkes, in a letter of 13th November, that instead of a Parliamentary Convention the representatives of the various colonies to the Federal Council should meet representatives from New South Wales to discuss and, if deemed necessary, to devise and report upon a scheme of Federation. He also suggested that, as the adoption of any such scheme would take time, New South Wales might advantageously join the Federal Council in the meantime. The most pressing problems of defence could be dealt with by mere federal legislation, such as the Council could effect, without the need of any executive authority. The other Premiers wrote in much the same strain; and on 28th November Sir Henry Parkes replied to Mr. Gillies consenting to "an informal meeting of the colonies for the purposes of preliminary consultation."

Melbourne Conference of 1890.—Accordingly a Conference met in Melbourne on 6th February, 1890, at which the seven colonies were represented by the following delegates, accredited by their respective Governments:—New South Wales, Sir Henry Parkes (Premier) and Mr. William McMillan (Colonial Treasurer); Victoria, Mr. Duncan Gillies (Premier) and Mr. Alfred Deakin (Chief Secretary); Queensland, Sir Samuel Walker Griffith (Leader of Opposition) and Mr. John Murtagh Macrossan (Colonial Secretary); South Australia, Dr. (afterwards Sir) John Alexander Cockburn (Premier) and Mr. Thomas Playford (Leader of Opposition); Tasmania, Mr. Andrew Inglis Clark (Attorney-General) and Mr. Bolton Stafford Bird (Treasurer); Western Australia, Sir James George Lee Steere (Speaker); New Zealand, Captain William Russell Russell (Colonial Secretary) and Sir John Hall. Mr. Geo. H. Jenkins, C.M.G., Clerk of the Parliament (Victoria), acted as clerk of the Conference.

At a banquet held in celebration of the assembling of the Conference, two famous phrases originated. Mr. James Service, proposing the toast of "A United Australasia," spoke of the tariff question as "the lion in the path," which federalists must either slay or be slain by; and Sir Henry Parkes, in responding, made his historic utterance, "The crimson thread of kinship runs through us all."

It was recognized from the first that the Conference was only preliminary to a more representative and a more fully authorized gathering. Mr. Duncan Gillies was elected President of the Conference, and the course of procedure adopted was to frame resolutions in committee and to admit the public to the ensuing debates. The

principal debate, which occupied four out of the seven sitting days of the Conference, was on a motion by Sir Henry Parkes:—"That, in the opinion of this Conference, the best interests and the present and future prosperity of the Australian colonies will be promoted by an early union under the Crown, and while fully recognizing the valuable services of the Convention of 1883 in founding the Federal Council, it declares its opinion that the seven years which have since elapsed have developed the national life of Australia in population, in wealth, in the discovery of resources, and in self-governing capacity to an extent which justifies the higher act, at all times contemplated, of the union of the colonies, under one legislative and executive government, on principles just to the several colonies."

This resolution met with no opposition. Everyone recognized the need of a Federal Executive, and admitted the insufficiency of the Federal Council. The "lion in the path" was made light of, most of the delegates sharing Sir Henry Parkes' confident belief that the colonies would be willing to entrust the tariff question to the free decision of the Australian people; whilst Sir Samuel Griffith contended that a federal tariff, though desirable, was not absolutely essential, and that Federation without intercolonial freetrade would be better than no Federation at all. Mr. Playford expressed himself disappointed at Sir Henry Parkes' "bald resolution," and would have liked a series of resolutions indicating the proposed constitution in outline. He also introduced "one or two notes of discord" by questioning the federal motives of Victoria, and the federal sincerity of New South Wales. Sir James Lee Steere also asked for more practical detail, and complained that "this motion was a kind of blank shot fired across our bows by Sir Henry Parkes to make us show our colours." He doubted whether Western Australia could afford to sacrifice her provincial tariff, and he advocated a very limited Federation, by a process of development out of the Federal Council. The other delegates heartily supported the motion, though some of them still hoped that, pending the achievement of a national Federation, New South Wales would join the Federal Council. Sir Henry Parkes replied in an eloquent speech, in which he defined, for himself and his colony, the high national standpoint from which he always looked, and tried to urge others to look, at this great question. "The main object for which, representing New South Wales, I stand here, is to say that we desire to enter upon this work of Federation without making any condition to the advantage of ourselves, without any stipulation whatever, with a perfect preparedness to leave the proposed Convention free to devise its own scheme, and if a central Parliament comes into existence, with a perfect reliance upon its justice, upon its wisdom, and upon its honour. I think I know the people of New South Wales sufficiently to speak in their name; and I think I can answer for it that an overwhelming majority of my countrymen in that colony will approve of the grand step being taken of uniting all the colonies under one form of beneficent government, and under one national flag."

The debate was closed by Mr. Duncan Gillies, the President, who was now beginning to take a more hopeful view of the prospects—

"lions" notwithstanding. "Now there is no one who is more anxious to see a great Federation—a Federation complete in the largest sense—than I am; but I confess that I see great difficulties—not insuperable, but great difficulties—in the way of bringing about this Federation, and I am very much afraid that even when delegates are appointed to the Convention our troubles will only have just begun. . . . . And when we meet, as I hope we shall shortly meet, in Convention, I believe we shall be able, in thrashing out the whole of these questions, to come to a solution that will be satisfactory to the whole of our Parliaments. In fact, on the subject of the tariff, I feel perfectly confident that, if we are not able at once to level the barriers between the colonies so far as customs duties are concerned, we shall be able to arrive at some modification which will be satisfactory to all, and that modification may be a very reasonable one." Sir Henry Parkes' resolution was then unanimously agreed to, as were also the three following resolutions:—

"2. That to the union of the Australian colonies contemplated by the foregoing resolution, the remoter Australasian colonies shall be entitled to admission at such times and on such conditions as may be hereafter agreed upon.

"3. That the members of the Conference should take such steps as may be necessary to induce the Legislatures of their respective colonies to appoint, during the present year, delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a Federal Constitution.

"4. That the Convention should consist of not more than seven members from each of the self-governing colonies, and not more than four members from each of the Crown colonies."

It was also agreed that the Premier of Victoria should convene the Convention, and arrange, after consultation with the other Premiers, the time and place of meeting.

Mr. Deakin then moved a further resolution, affirming that as the adoption of a Federal Constitution must take some time, and united action for defence and other purposes was a matter of urgency, "it is advisable that the Federal Council be employed for such purposes so far as its powers will permit, and with such an extension of its powers as may be decided upon, and that all the colonies should be represented on the Council." This was, of course, an invitation for New South Wales and New Zealand to reconsider their attitude with regard to the Federal Council, and join that tentative body pending the adoption of a Federal Constitution. He thought that this would not only confer immediately the benefits of a partial union, but would also facilitate and hasten a more complete union. "If the two outstanding colonies," he said, "would only seek to induce their Parliaments to enter temporarily into the Federal Council, and wed with us from to-day, instead of putting off our marriage for two or three years, they would give striking evidence of the strength of the federal spirit." The representatives of the two truant colonies, however, declined to entertain the proposal for two reasons:—First, that they believed public opinion in those colonies to be against entering the

Federal Council; and next, that if the motion were carried, there was danger that the lesser issue would overshadow the greater—or, as Captain Russell put it, it was possible that if they were satisfied to go into "the shanty of the Federal Council, they might never enter the palatial mansion of a Dominion Governor." At the suggestion of several delegates, Mr. Deakin withdrew the motion. The proceedings closed with an address to the Queen, informing Her Majesty of the resolutions arrived at.

Resolutions of the Parliaments.—The Conference having thus recommended a National Convention, the next step was to obtain the requisite Parliamentary action. New South Wales led the way. On 7th May, Sir Henry Parkes introduced in the Legislative Assembly a series of resolutions, affirming the concurrence of the House in the resolutions of the Conference, appointing four members to act with three members of the Legislative Council as delegates to a National Convention to frame a Federal Constitution, and requiring "that the Constitution, as adopted by the Convention, be submitted as soon as possible for the approval of the Parliament of this colony." On the same day similar resolutions were introduced by Mr. W. H. Suttor in the Legislative Council. In both Houses a protracted debate followed, extending, with many adjournments, over several months. In the Assembly Mr. George R. Dibbs, the leader of the Opposition, opposed them strongly, announcing himself as in favour of an ultimate "complete union" of Australia as an independent nation, but condemning the scheme outlined by Sir Henry Parkes. Mr. J. H. Want also opposed the whole scheme as being a fashionable fad. Mr. G. H. Reid, while admitting the advantages of Federation, was not prepared to sacrifice the freetrade policy of the colony, and suggested an amendment to make it clear that when the Constitution was drafted it should be submitted to Parliament, not merely for approval or disapproval as a whole, but for consideration in detail. Mr. T. M. Slattery moved an amendment recommending a "mutual system of defence," and joint action on a basis somewhat similar to that of the Federal Council, with the addition of a general Court of Appeal; but this was defeated by an overwhelming vote of 92 against 10. The resolutions were finally agreed to, on the voices, on 10th September. Some discussion occurred over the delegates nominated by Sir Henry Parkes, inasmuch as Mr. Dibbs, though opposed to the scheme, claimed a right to be nominated. The question was settled by balloting for the delegates. In the Council, the resolutions were not finally passed until the 8th October. The whole discussion, in both Houses, showed a general passive assent to the general principle of Federation, coupled, however, with very divergent views as to the basis of union, considerable jealousy and mistrust of the other colonies, and a disinclination on the part of many members to any compromise on the tariff and other vital questions. Theoretical federalists were many, but earnest federalists were few; and there was as yet no popular impetus behind the movement—nothing more than a vague intellectual and sentimental assent to the principle.

In Victoria the matter was much more expeditiously dealt with. Resolutions similar to those carried in New South Wales were intro-

duced in the Legislative Assembly by Mr. Gillies on 10th June, and carried on the same day. An amendment moved by Sir Bryan O'Loghlen, demanding a definite outline of the proposed scheme of Federation before the House concurred in the resolutions, received little support. In the Legislative Council, the resolutions were introduced by Mr. (afterwards Sir) H. Cuthbert on 1st July, and carried on 2nd July. Five delegates were appointed by the Assembly, and two by the Council, the Council carrying a resolution regretting that its right to a larger representation had not been recognized.

In the South Australian Assembly, the resolutions were moved by Dr. Cockburn (Premier) in the Assembly on 26th June, were supported by Mr. Thomas Playford (Leader of Opposition), and carried after considerable debate on 22nd July. In the Council they were moved by Mr. J. H. Gordon on 24th June, and carried on 2nd July. Five delegates were appointed by the Assembly and two by the Council.

In Tasmania, the resolutions were moved in the House of Assembly by Mr. B. S. Bird (Colonial Treasurer) on 3rd July, and passed on the following day. They were then concurred in by the Council, and delegates elected—four by the Assembly, two by the Council, and one by both Houses together.

In Queensland, the resolutions were moved in the Assembly by Mr. B. D. Morehead (Premier) on 9th July, and carried on the 15th. In the Council, they were moved by Mr. A. J. Thynne, on 23rd July, and carried on 6th August. Five delegates were appointed by the Assembly and two by the Council.

In New Zealand, Federation was a matter of remote interest, and in spite of repeated inquiries by Sir George Grey as to the intentions of the Government, nothing was done till 6th September, when Captain Russell introduced the resolutions in the House of Representatives, with an addendum "that the delegates so appointed shall not be authorized to bind this colony in any way." The debate showed a friendly but non-committal interest in the question, the balancing considerations being the Australasian trade of the colony on the oue hand, and its foreign trade on the other. The resolutions were carried on the 12th September, and on the 15th were moved and carried in the Council. Two delegates were appointed by the House of Representatives and one by the Council.

In Western Australia nothing was done until the 23rd February, 1891, when the Federal Convention was on the point of meeting. The resolutions were then moved and carried in both Houses on the same day, and seven delegates were appointed—five members of the Assembly and two of the Council.

The Sydney Convention of 1891.—The first National Australasian Convention, "empowered to consider and report upon an adequate scheme for a Federal Constitution," was duly convened at Sydney on the 2nd March, 1891. The delegates from the several colonies were:—

New South Wales: Sir Henry Parkes (Premier), Mr. W. McMillan (Treasurer), Sir J. P. Abbott (Speaker), Mr. G. R. Dibbs (Leader of Opposition), Mr. W. H. Suttor (Vice-President of Executive Council), Mr. Edmund Barton, and Sir Patrick Jennings.

Victoria: Mr. Alfred Deakin (ex-Chief Secretary), Mr. James Munro (Premier), Lieutenant-Colonel W. Collard Smith, Mr. H. J. Wrixon (ex-Attorney-General), Mr. Duncan Gillies (ex-Premier), Mr. H. Cuthbert (ex-Minister of Justice), and Mr. Nicholas Fitzgerald.

Queensland: Mr. J. M. Macrossan (ex-Colonial Secretary), Mr. John Donaldson (ex-Colonial Treasurer), Sir S. W. Griffith (Premier), Sir Thomas McIlwraith (Treasurer), Mr. A. Rutledge, Mr. A. J. Thynne (ex-Minister for Justice), and Mr. Thomas Macdonald-Paterson.

South Australia: Mr. Richard Chaffey Baker, Mr. John H. Gordon (ex-Minister of Education), Sir John C. Bray (Chief Secretary), Dr. John A. Cockburn (ex-Premier), Sir John W. Downer, Mr. Charles C. Kingston, and Mr. Thomas Playford (Premier).

Tasmania: Mr. William Moore (President of Legislative Council), Mr. Adye Douglas (ex-Premier), Mr. A. Inglis Clark (Attorney-General), Mr. W. H. Burgess, Mr. Nicholas J. Brown (Speaker), Mr. Bolton S. Bird (Treasurer), and Mr. Philip O. Fysh (Premier).

Western Australia: Mr. John Forrest (Premier), Mr. W. E. Marmion (Commissioner of Crown Lands), Sir James G. Lee Steere (Speaker), Mr. John A. Wright, Mr. John W. Hackett, Mr. Alexander Forrest, and Mr. W. T. Loton.

New Zealand: Sir George Grey, Captain W. R. Russell, and Sir Harry A. Atkinson (Premier).

In each colony the delegates had been chosen from both sides of political life; so that, although in three colonies (Victoria, Queensland and South Australia) there had been a change of Ministry since the appointment of delegates, yet the Premier of each colony was among its representatives. Of the other delegates, nine were ex-Premiers, whilst nearly all either were or had been Ministers of the Crown.

The first business done by the Convention was to appoint Sir Henry Parkes as President—an honour accorded to him as being not only the Premier of the colony where the Convention sat, but also "the immediate author of the present movement." Sir Samuel Griffith was appointed Vice-President. Mr. Frederick William Webb, Clerk of the Legislative Assembly of New South Wales, was appointed Secretary to the Convention. The question of the admission of the press and public was then dealt with. The general feeling was that the debates, whether in Convention or in Committee of the Whole, ought to be public; and it was resolved "that the press and public be admitted, unless otherwise ordered, during the sittings of the Convention, on the order of the President."

Parkes' Resolutions.—Before entering on the task of drafting a constitution, the Convention proceeded to debate at length a series of resolutions proposed by Sir Henry Parkes, with the object of obtaining a preliminary interchange of ideas, and of laying down a few guiding principles. The discussion of these resolutions, first in a general debate, and then in Committee, occupied eleven sitting days, and fills more than half of the printed debates of the Convention. These resolutions enunciated a few essential federal principles, and outlined the basis of a federal legislature, judiciary, and executive; the text of them, as introduced, being as follows:—

"That in order to establish and secure an enduring foundation for the structure of a federal government, the principles embodied in the resolutions following be agreed to:—

"1. That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.

"2. That the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free.

"3. That the power and authority to impose customs duties shall be exclusively lodged in the Federal Government and Parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.

"4. That the military and naval defence of Australia shall be entrusted to federal forces, under one command.

"Subject to these and other necessary provisions, this Convention approves of the framing of a federal constitution, which shall establish:—

"1. A parliament, to consist of a senate and a house of representatives, the former consisting of an equal number of members from each province, to be elected by a system which shall provide for the retirement of one-third of the members every years, so securing to the body itself a perpetual existence combined with definite responsibility to the electors, the latter to be elected by districts formed on a population basis, and to possess the sole power of originating and amending all bills appropriating revenue or imposing taxation.

"2. A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such, shall be final.

"3. An executive, consisting of a governor-general and such persons as may from time to time be appointed as his advisers, such persons sitting in Parliament, and whose term of office shall depend upon their possessing the confidence of the house of representatives, expressed by the support of the majority."

The first draft of these resolutions had been framed by Sir Henry Parkes before the Convention met, and submitted by him to an informal meeting of the New South Wales delegates. (See Parkes' Fifty Years in the Making of Australian History, pp. 603-6.) This original draft differed in several important respects from the resolutions as moved. The clause as to the reservation of the "powers and privileges and territorial rights" of the colonies was absent from the original draft; but there was a clause providing for a federal High Commission to devise "an equitable scheme for the distribution of the public lands, and the satisfying of existing territorial rights," such scheme keeping in view both the necessary strength of the National

Government and the just claims of the respective provinces. This High Commission was to be appointed by at least a two-thirds majority of the colonies, and was to report within two years; the final settlement to be made by a federal law, approved by a majority of the provincial Parliaments. In drafting this clause, Sir Henry Parkes had in view the vast unoccupied areas in North Queensland, the Northern Territory of South Australia, and Western Australia; but his colleagues urged that any mention of the public lands would be inadvisable, and he deferred to their opinion. The first draft moreover provided for the disposal of customs revenues not merely "as shall be agreed upon," but "as shall be approved by the Federal and Provincial Parliaments." The clause as to defence provided for the raising of bodies of Militia or Volunteers by the Federal Parliament. As to the Senate, the retirement of members was to be "one-third every seven years." The provision that the House of Representatives was to "possess the sole power of originating and amending all Bills appropriating revenue or imposing taxation" was absent; as were also the words requiring that the members of the federal executive should sit in Parliament. And lastly, the federal Supreme Court was to consist of "not fewer than ten judges." The resolutions as submitted were therefore the President's own draft, as amended after consultation with his colleagues. He proposed them, not as embodying his final convictions, but as a ground-work of debate, and as expressing an outline of the required Constitution as it existed in his own mind. They were based, beyond all doubt, on a comparative study of the Constitutions of the United States and Canada. The fundamental principles of union thus laid down were —intercolonial freetrade, a federal tariff, federal defence, and the reservation of provincial rights in provincial matters; whilst the essential features of the proposed national machinery were—a complete national government, with legislative, judicial, and executive departments; a legislature of two chambers, representing respectively the States and the nation; and a system of responsible government.

Sir Henry Parkes prefaced his exposition of these resolutions by an appeal to the Convention to enter upon the work "in a broad federal spirit." "We cannot hope for any just conclusion—we cannot hope reasonably for any amount of valid success—unless we lose sight, to a large extent, of the local interests which we represent at the same time as we represent the great cause. There can be no Federation if we should happen, any of us, to insist upon conditions which stand in the way of Federation. . . . . It does seem to me in the highest degree necessary that we should approach the general question in the most federal spirit that we can call to our support."

In the general discussion which followed, most of the delegates took part. As to the greater part of the resolutions there was practical unanimity. The discussion turned mainly on the powers of the two Houses, and their relation to the executive. Sir Samuel Griffith began by arguing that the double principle of representation logically involved the proposition that every federal law should receive the assent of a majority of the people and a majority of the States. The Senate ought to have an absolute power of veto, and to refuse it

the power of amending money bills was to refuse it the power of "veto in detail" as to those Bills. He admitted that the principle of two co-ordinate Houses was new in conjunction with responsible government, and thought that the Constitution should be elastic enough to allow the problem of the responsibility of Ministers to Parliament to work out its own development. The Senate's power to amend money bills was supported by the representatives of all the smaller colonies, but was vehemently opposed by the Victorian delegates (with the exception of the veteran Legislative Councillor, Mr. Nicholas Fitzgerald). The New South Wales representatives were divided on the subject. In Victoria—which, curiously enough, was the only colony whose Constitution expressly forebade the Upper House to amend money bills—there had been serious deadlocks on financial matters, and the financial predominance of the Lower House was a prominent article of political faith. Mr. Deakin, however, admitted that the degree of power which might be entrusted to the Senate would depend largely on the mode of election adopted; and Mr. Cuthbert threw out the idea that the matter might be compromised by the South Australian method of allowing the Senate to "suggest" amendments. The problem of responsible government with a strong Senate was discussed, and Mr. Hackett propounded the dilemma that "either responsible government would kill federation, or federation would kill responsible government." Mr. Munro raised the difficulty that the Senate's power of absolute veto meant power for the minority to rule. Mr. Deakin objected to the veto being extended to all kinds of legislation, whether State-rights were involved or not; and Mr. Barton pointed out that State-interests as well as State-rights were involved. In fact, all the elements of the subsequent discussions on "State-rights" and "majority rule" were present at the outset—except that there was no suggestion as yet of constituting the Senate in any other way than by equal representation.

The fiscal question was also prominent in the debate. Some of the Victorians suggested a "guarantee" against ruthless interference with the vested interests created by their protective policy. They asked that it should be made clear that intercolonial freetrade was not to come about until the federal tariff was in force, and further suggested that for the first few years it should not be possible to reduce existing duties too suddenly. The latter suggestion, however, was somewhat satirically criticised by the representatives of other colonies, and was not pressed. The general feeling was that the fiscal policy of Australia must be absolutely entrusted to the Federal Parliament.

One or two other elements of discord obtruded themselves during the debate. Sir George Grey, following the precedent of the original Constitution of New Zealand, proposed to place no limits on the legislative scope of the Federal Parliament—thus reducing the State legislatures to subordinate bodies; he also advocated the election of the Governor-General by the people, and believed it to be "the duty of the Convention" to give the electors of each State full power to reform their own Constitutions—an end which should be achieved by the simple process of giving them elective Governors and elective Legislative Councils. This proposal to meddle with the State Consti-

tutions received no support at all. Mr. Dibbs next threw into the Convention the "bombshell" of the federal capital—a bombshell which, however, failed altogether to explode.

The Resolutions in Committee.—The Convention then, on 13th March, went into Committee of the Whole to consider the resolutions in detail. Some discussion took place on the advisability of amplifying the resolutions for the better guidance of those who might be appointed to draft a Bill. On Mr. Deakin's motion, the paragraph vesting exclusively in the Federal Parliament the power to impose customs duties was extended to duties of excise, but with the limitation —designed to prevent the unfair treatment of the products of any colony—that such duties should only be imposed "upon goods the subject of customs duties." On Mr. Gordon's motion, the paragraph was further extended to include the offering of bounties.

But the main debate, extending over two days, was on the power of the Senate with regard to money bills. This was the critical question which divided the Convention, and as to which the watchword of "compromise" was not at first listened to. Sir Henry Parkes' resolution proposed to give the House of Representatives "the sole power of originating *and amending* all Bills appropriating revenue or imposing taxation." The smaller States, however, claimed for the Senate "co-equal powers," with the sole exception of initiating money Bills; they asked for full powers of amendment and rejection —of "veto in detail" and "veto in bulk." An amendment by Sir John Downer, to strike out the words "and amending," was agreed to, by way of preliminary, not as deciding the question, but as leaving it open for discussion. The real battle then took place on two amendments: one by Sir John Downer, giving the Senate "the power of rejecting in whole or in part any of such last-mentioned Bills;" the other by Mr. Wrixon, providing (1) that the powers of the Houses should be equal except with regard to money Bills, which the Senate should be entitled to affirm or reject, but not to amend; and (2) that it should be unlawful to "tack" anything to the annual appropriation Bill. Sir John Downer's amendment represented practically the extreme claims of the small States; Mr. Wrixon's that of the large States, with the provision against "tacking" thrown in as a concession. The debate became warm; neither side seemed inclined to give way, and hints were thrown out that the delegates might as well "pack up their portmanteaux." At last, however, the "spirit of compromise" was successfully appealed to; and though no basis of compromise could as yet be found, it was agreed not to press the matter to a vote at that stage, but to withdraw both amendments and let the decision stand over.

The resolution dealing with the executive was amended by leaving out the words which provided that Ministers should sit in Parliament, and that their term of office should depend on the confidence of the House of Representatives. It was not deemed advisable to stereotype the conventional rules of responsible government in this way. Sir Samuel Griffith thought it ought to be distinctly provided, as in the Constitutions of the colonies, that Ministers "may" sit in Parliament; but it was decided to leave the whole question open till a later stage.

The judiciary resolution was amended by omitting the provision that the decisions of the Supreme Court should be final, and this question also was left open. On Mr. Barton's motion, a resolution was added to forbid the subdivision or amalgamation of States without the consent of the Legislatures of the States concerned. Sir George Grey moved a resolution to allow the people of each State "to adopt, by the vote of a majority of voters, their own forms of State Constitution." This was objected to, as being an interference with the States. It was agreed, however, that the States ought not to have to go to the Imperial Government for power to change their Constitutions, and it was resolved "that provision should be made in the Federal Constitution which will enable each State to make such amendments in its Constitution as may be necessary for the purposes of the Federation." The resolutions, as amended, were then reported and agreed to.

Appointment of Committees.—So far, the formal result of the Convention's work was merely a few resolutions, dealing with matters of general principle, and no decision had been reached upon any of the critical questions. The discussion, however, had pretty well tested the feelings of the Convention, and the time was now ripe to formulate the details of a complete scheme in the shape of a Bill. Accordingly, on 18th March, resolutions were passed for the appointment of three Committees; one, consisting of three members from each delegation, to consider constitutional machinery; a second, consisting of one member from each delegation, to consider finance, taxation, and trade regulation; and a third, consisting of one member from each delegation, to deal with the judiciary. The two latter Committees were to report to the Constitutional Committee, which was to prepare and submit to the Convention a Bill for the establishment of a Federal Constitution. The different delegations made their own nominations to these Committees, which were composed as follows:—

Constitutional Committee: Sir H. Parkes, Mr. Barton, Mr. Gillies, Mr. Deakin, Sir Samuel Griffith, Mr. Thynne, Mr. Playford, Sir John Downer, Mr. Clark, Mr. Douglas, Sir Geo. Grey, Captain Russell, Mr. John Forrest, Sir James Lee-Steere.

Finance Committee: Mr. McMillan, Mr. Munro, Sir Thomas McIlwraith, Sir John Bray, Mr. Burgess, Sir Harry Atkinson, Mr. Marmion.

Judiciary Committee: Mr. Dibbs, Mr. Wrixon, Mr. Rutledge, Mr. Kingston, Mr. Clark, Sir Harry Atkinson, Mr. Hackett.

These Committees set to work on 19th March, and in the course of the next twelve days was framed the first draft of a Bill to constitute the Commonwealth of Australia. The framing of that Bill marks an epoch in the history of the movement. In those few days Federation came down from the clouds to the earth; it changed from a dream to a tangible reality. The idea was once for all crystallized into a practical scheme, complete in all its details. As to many of the details, and even many of the principles, there was still to be keen and protracted dispute; but with their definition the era of vague generalities ended, and the era of close criticism began.

So important was the work of the Convention, and so great was its influence in the development of the Constitution, that it is necessary to review the material which the Convention had at their disposal. First of all, they had the Constitution Acts of the several colonies—all drawn from the common model of the British Constitution, but all differing from it and from one another in many important respects. Then they had their own experience, as practical politicians, of the working of those Constitutions, and a close familiarity with their merits and defects. As some guide to the form of union needed, they had the various reports and debates which made up the history of the federal movement in Australia—a history in whose more recent stages many of the delegates had been actors. As a warning of faults to avoid, they had the example of the weak and impotent Federal Council—just as the Philadelphia Convention of 1787 had the example of the earlier confederation. Lastly, as models of federal government, they had the constitutions of the United States of America and the Dominion of Canada—and, in a less degree, of the Swiss Republic—together with all the critical, historical, philosophical, and constitutional literature on the subject of federal systems and institutions. They were better equipped than the framers of the American constitution by the variety of federal examples available to them, and by a whole century's advance in political science. The Convention numbered many constitutional students who had deeply interested themselves in the subject—among whom may be specially mentioned Sir Samuel Griffith of Queensland, Sir Henry Parkes and Mr. Barton of New South Wales, Mr. Deakin and Mr. Wrixon of Victoria, Mr. R. C. Baker and Mr. Kingston of South Australia, and Mr. Inglis Clark of Tasmania. Mr. Baker had prepared a "Manual of Reference to Authorities" for the use of the Convention; whilst Mr. Clark had prepared an entire draft Constitution.

The deliberations of the Committee were private. The last stage in the process of drafting was completed on board the S.S. *Lucinda*, on the Hawkesbury River, from 27th to 29th March, by a sub-committee consisting of Sir Samuel Griffith, Mr. Kingston, Mr. Barton, and Mr. Inglis Clark. On 31st March Sir Samuel Griffith, who had been appointed Chairman of the Constitutional Committee, and who had the chief hand in the actual drafting of the Bill, brought up the Report of that Committee, together with a draft Bill to constitute the Commonwealth of Australia. The reports of the Finance and Judiciary Committees were also appended.

The real work of the Convention was now practically finished; for although the subsequent discussion in Committee occupies nearly half the printed volume of debates, not half a dozen substantial amendments were made. Indeed, with the single exception that the mode of distributing the surplus was readjusted, the Bill as it came from the draftsmen was, with a few verbal and minor alterations, adopted in its entirety. A good number of amendments were moved; but so well had the Constitutional Committee gauged the sense of the Convention that these were nearly all defeated. Only 21 divisions were taken in all; and of these only three resulted in favour of a modification.

The framework of the Bill was on the lines which have since become familiar by being adopted in all the subsequent stages of the movement. It was cast in the shape of a Bill for submission to the Imperial Parliament—the few clauses dealing with the establishment of the Federation being placed first by themselves, and the Federal Constitution itself following as a separate document. The Constitution provided for the machinery of a complete central government, with a federal legislature, executive, and judiciary. In the matter of nomenclature, the only novelty was the use of the word "Commonwealth," which was at first adopted provisionally for want of a better, but which was so apt and descriptive, so simple and dignified, that it came to stay. It is not too much to say that this grand old word, rich in meaning and tradition, and intimately associated with the literature and history of the English people, did more to arrest the public attention and kindle the public imagination than any other word in the English language could have done. For a little while, indeed, it jarred upon some ears with a slight revolutionary echo, owing to association with Cromwell's Protectorate; but its older and deeper meaning soon prevailed, and it stands to-day for the type and the ideal of Australian nationhood. For the component members of the union, the word "States" was preferred to either "provinces" or "colonies;" and for the two Houses of the Federal Parliament the words "Senate" and "House of Representatives"—sanctioned by the usages of more than one English-speaking community—were adopted.

The Main Compromises.—The serious "lions in the path" were of course the differences of population, and the differences of fiscal policy; and accordingly the chief issues in the Convention were (1) between large States and small States, and (2) between a high-tariff policy and a low-tariff policy.

As regards the former question, the necessity of equal representation of States in the Senate was conceded from the outset, and Sir Henry Parkes, in his preliminary resolutions, had voluntarily offered it. This concession was made, however, subject to the definite and unequivocal condition that the House of Representatives should have the predominating voice in finance and in the control of the executive. "I offered voluntarily, as far as I was individually concerned," he had said (Convention Debates, 1891, p. 448), "an equal representation to Western Australia as either Victoria or New South Wales would have in the Senate. But I stipulated that that power which is held by the House of Commons should be held by the House of Representatives—that is in as effective a way as the words of a written resolution could prescribe." But some of the colonies, not content with equal representation in the Senate, had claimed equal power for the Senate, and round these two standards the real battle of the Convention was fought. The draft Bill embodied what was subsequently referred to as the "compromise of 1891." The Senate was given equal power with the House of Representatives, except that Appropriation Bills and Taxation Bills were to originate in the House of Representatives alone; and that the Senate was forbidden to amend Taxation Bills or Bills "appropriating the necessary supplies for the ordinary annual services of the Government," or to amend any Bill "in such a manner

as to increase any proposed charge or burden on the people." As some compensation for these restrictions, the Senate was given, with respect to Bills which it might not amend, a power to suggest amendments. That is to say, the Senate might at any stage return any such Bill to the House of Representatives "with a message requesting the omission or amendment of any items or provisions therein." As a further compensation, and as a guarantee to the Senate of some measure of "veto in detail," Taxation Bills were to deal with taxation only, and with only one kind of taxation; and no extraordinary appropriations were to be tacked to the ordinary Appropriation Bill. As regards the responsibility of the executive, Sir Henry Parkes' original proposition requiring Ministers to sit in Parliament and to hold office subject to their "possessing the confidence of the House of Representatives, expressed by the support of the majority," was not adopted; but responsible government was indicated by the provisions that there should be a "Federal Executive Council" to advise the Governor-General, and that the chief heads of departments should hold office during the Governor-General's pleasure, should be capable of sitting in either House of Parliament, and should be members of the Federal Executive Council. The intention was (to quote Sir Samuel Griffith's words of a later date) "so to frame the Constitution that responsible government may—not that it must—find a place in it."

The compromise with regard to the tariff was of a different kind. It was obviously out of the question for the Convention to frame a tariff, or even to fix the principles on which the Federal Parliament should frame a tariff. Yet the Victorians were anxious for some "guarantee" that their manufacturing interests should not be injured by a sudden reversal of their protectionist policy; whilst the freetrade majority of New South Wales were equally afraid that their fiscal faith would not be shared by the Federal Parliament. Sir Henry Parkes had always taken the high federal ground that the fiscal question must be left unreservedly and unconditionally to the Australian people to decide for themselves. He placed Federation above any fiscal policy, and claimed that the other colonies should do the same. Vested interests—whether they were the interests of manufacturers or the interests of importers and consumers—must be entrusted on both sides to the good faith of the Parliament and people whom they were about to create. This settlement, which was the only one possible, was embodied in the draft Bill. The Federal Parliament was given full powers of raising money, not only by customs and excise, but by every other mode of taxation; and the only conditions imposed upon this power were that federal taxation must be uniform in all the colonies, and that, on the adoption of a uniform tariff, trade between the colonies should be free. Until the adoption of a federal tariff, the provincial tariffs were to remain, not only as against the outside world, but as between the States; and after that event the power to impose customs and excise was to be vested exclusively in the Federal Parliament, though the States were to retain concurrent powers of raising money by every other mode of taxation.

Other Provisions.—For the rest, the Bill will be best described,

not by a complete summary of its provisions, but by reference to its main points of difference from the Constitution as now enacted.

Federal Parliament.—The Senators were to be elected by the Parliaments of the several States. The number from each State was fixed at eight; and equal representation was conceded, not only to original States, but to all the existing colonies. In the House of Representatives, each State was to have one member for every 30,000 of its people; but this quota was alterable by Parliament. Each State was to have a minimum of four representatives. There was no ratio fixed between the number of members of the two Houses; the size of the Senate depending upon the number of States, whilst the size of the House of Representatives would depend upon the quota fixed by the Constitution or by Parliament. Each State was to determine its own electoral divisions, and was to elect its members upon its own provincial franchise. Plural voting was not prohibited, and the Federal Parliament was not empowered to frame a uniform franchise. There was no express provision for the settlement of deadlocks between the two Houses.

The legislative powers of the Federal Parliament were substantially the same as at present, with the following exceptions:—Astronomical and meteorological observations, insurance, invalid and old age pensions, conciliation and arbitration, and the acquisition of property for public purposes, were not included. In the "banking" sub-clause there was no exception of State banking. The river question was only represented by a power to legislate as to "river navigation with respect to the common purposes of two or more States, or of the Commonwealth." There was no clause providing for the acquisition of State railways, or railway construction and extension; but the power to make laws for the control of railways "with respect to transport for the purposes of the Commonwealth" was not limited, as it now is, to "naval and military purposes."

Federal Supreme Court.—The Federal Supreme Court was not established by the Constitution itself, but was left to be established by the Federal Parliament. The form of the judiciary clauses was somewhat different from what it is now; but the only important difference of substance was with regard to appeals. Not only was the Supreme Court given a general jurisdiction to hear appeals from the Supreme Courts of the States, but Parliament was empowered to abolish, in part or in whole, the existing right of appeal from the State Courts direct to the Privy Council. The judgment of the Supreme Court was made final in all cases; except that the Queen might, "in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's dominions are concerned," grant leave to appeal to the Privy Council.

Finance.—With regard to finance, the question which gave the Committees the most trouble was the basis of apportionment of surplus revenue among the States. It was recognized that the customs revenue must be collected by the Commonwealth; but as it was decided that the Commonwealth was not, at the outset, to be saddled with the public debts of the States, it was soon seen that only a fraction of the revenue would be needed for federal expenditure, whilst the States

would require much of it to meet their own expenditure. "The great difficulty" (said Sir Samuel Griffith in introducing the Bill)—"and it is a difficulty peculiar to this Constitution, so far as I have any knowledge—is that the customs revenue of the colonies in all cases forms a very large share of the means of meeting the expenses of government; and as we should take over only a very small part of the expenditure, the Commonwealth would start with an enormous annual surplus of many millions, which it could not retain or expend, but must return to the different States. That is a difficulty almost as great as the difficulty of making a levy upon the different States as States. It is a great difficulty, but we have to face it, and the question is, what is to be done?" (Conv. Deb., Syd., 1891, p. 528.) Should revenue be credited to the several States in proportion to their populations, or in proportion to their contributions? Should expenditure be charged against the several States in proportion to their populations, or on the basis of services rendered? So far as revenue was concerned, the population basis of adjustment seemed the most federal, but not the most fair. Statistics showed that the consumption of dutiable articles varied greatly in the different colonies, and it was anticipated that even under a uniform tariff considerable differences might continue. The contribution basis seemed fairer, but less federal; and it was open to the objection that with intercolonial freedom of trade it would be difficult to ascertain accurately what share of dutiable articles was consumed in each State.

Here, at the outset, was the whole financial difficulty which was afterwards to cause so much trouble. The recommendation of the Finance Committee had been as follows:—"That after a uniform tariff has come into operation, the surplus revenue may fairly be distributed amongst the various colonies according to population; but as the duties contributed by the various colonies are so unequal, it would be unfair at the present time to distribute the surplus on this basis; it is, therefore, recommended that the revenue from customs and excise be devoted, first, to the payment of all expenditure authorized by the Federal Government, such expenditure to be charged to the several colonies according to population; the balance to be returned to the colonies in such a way that the amount paid by each colony for such federal expenditure, added to the amount returned, shall be, as nearly as can be ascertained, the total amount contributed by each colony on the dutiable articles consumed." (It seems that the resolution had originally run "that *some time* after," &c.; but the words "*some time*" were eventually omitted. See Conv. Deb., Syd., 1891, p. 814.)

In other words, the Committee recommended that the federal expenditure, both before and after the uniform tariff, should be charged against the colonies in proportion to population. The revenue, however, was to be credited differently for the two periods. As long as the provincial tariffs remained in force, each State was to get back the amount of its contribution, subject to a deduction of its population share of the federal expenditure. But as soon as the uniform tariff came into force, and the border custom-houses disappeared, the "contribution" basis was to be done away with, and population was to be the basis for distributing revenue as well as for charging expenditure.

The Constitutional Committee, however, in framing the Bill, departed altogether from these recommendations. They provided that the federal revenue, both before and after the uniform tariff, should be applied in the first instance to paying the federal expenditure, and the surplus should be returned to the several States "in proportion to the amount of revenue raised therein respectively," subject to certain provisions that taxes should be "taken to be collected" in the State where the dutiable articles were consumed; or, in the case of direct taxation, where the taxable property was situated. In other words, they cut the "population" basis out altogether, and made "contribution" the basis, not only for distributing the surplus, but also for charging expenditure—and after as well as before the uniform tariff.

Trade and Commerce.—As to trade and commerce, the only provisions explanatory of the federal power (in addition to the clause as to "river navigation" already mentioned) were two short clauses; one, copied from the United States Constitution (Art. I., sec. ix., 5), forbidding any preference to be given to the ports of one State over those of another; and the other empowering the Federal Parliament to annul State laws derogating from freedom of inter-state trade. The questions of preferential railway rates, and of the possible conflicting claims of river navigation and irrigation, were as yet only vaguely recognized as difficulties, and no attempt was made to define the basis of a settlement.

Federal Capital.—The federal capital was left to be determined by the Federal Parliament; and until such determination, the Parliament was to meet at such place as should be appointed by a majority of the Governors—or, if they were equally divided, by the Governor-General.

Amendment.—The mode prescribed for the amendment of the Constitution introduced the American principle of ratification by elected State Conventions—not, as now provided, by the electors directly. Any law for amendment was first to be passed by an absolute majority of both Federal Houses, and then submitted to Conventions chosen in each State on the Parliamentary franchise; and if approved by Conventions of a majority of the States, it was to become law, subject to the Queen's power of disallowance.

Summary.—The foregoing sketch shows that in the first draft of 1891 the whole foundation and framework of the present Constitution was contained. Its general characteristics, as compared with the Constitution as it now stands, may be summed up in a few words. In the first place—as is natural in a first draft—it followed more closely, in substance and in language, the literary models—American, Canadian, and Australian—which were available to the Convention. In the next place, it was in some few respects less essentially democratic in its basis—a circumstance which is also natural, in view both of the continuous development of democratic ideas, and of the more completely popular impulse of the later stages of the federal movement. And lastly, it was less definite and less elaborate in its treatment of some of the vexed problems—problems which had not yet been the subject of exhaustive discussion, and some of which had only

been mooted in vague and general terms. The peculiarities of our railway development, the unique characteristics of our river system, the special difficulties arising out of our tariff policies and requirements, had not yet been adequately studied.

The constitutional problem of reconciling the representation of State interests with British principles of legislation and finance—of bringing into harmony the conflicting elements of State rights and interests on the one hand, and of national rights and interests on the other—in short, of securing responsible government, legislative finality, and the general predominance of the House of Representatives, without "killing Federalism," was as yet incompletely solved. All these things were inevitable at the first attempt to grapple practically with the question. But in spite of imperfections, the first draft stands as a convincing monument of the wisdom, the statesmanlike ability, and the patriotism of its framers. In those few days they laid down the main lines from which the movement has never since wavered. On 2nd March, 1891, Australian Federation was a misty abstraction; on 31st March it had definite outlines and a practical policy.

Commonwealth Bill in Committee.—The Bill was brought up by the Constitutional Committee on 31st March, and a short "second reading" debate took place on Sir Samuel Griffith's motion to refer it to Committee of the Whole. The Convention was anxious to get to close quarters with the Bill, and the only members who followed Sir Samuel Griffith in the general debate were Mr. Wrixon, Mr. Baker, and Mr. Inglis Clark. Mr. Wrixon's speech was specially remarkable for its almost prophetic insight into the modifications that would be necessary before the Bill could be wholly acceptable; reading his criticisms, it is hard to believe that they bear so early a date as 1891.

The motion to go into Committee was passed, and from 1st to 8th April the Convention was occupied with the discussion of the clauses of the Bill. The debates of those days are interesting, as being the first discussion in public of the details of the proposed Constitution. The amendments carried were few, and in most cases unimportant; but a good deal of light is thrown on the views of the Convention by some of the proposals that were rejected—and also by the lack of debate on some questions which afterwards assumed prominence.

The word "Commonwealth," though somewhat apologetically supported, was retained on division by a large majority; none of the alternative suggestions—such as "Federated States," "Federation," "United Australia"—finding many friends. An amendment moved by the veteran democrat, Sir George Grey, for the purpose of providing that the Governor-General should be elected by the Australian people, was sympathetically received, but summarily dealt with; and a tentative amendment by Mr. Baker, to define in a schedule some of the powers and functions of the Governor-General, was withdrawn after a short debate on the question of ministerial responsibility.

Election of Senators.—In place of the provision for the election of Senators by the State Parliaments, Mr. Kingston proposed to leave each State free to elect its own Senators in its own way. He argued that uniformity was not attained by the clause as it stood, because the various Upper Houses, which would share in the election, were not

uniformly constituted. If uniformity were the all-important thing, he would have preferred to prescribe direct election by the people in large constituencies; but the chief consideration was to satisfy the several States. The proposal, however, was negatived by a large majority. The Convention felt that a want of homogeneity in the Senate would be undesirable; and as the alternative system of uniform election by the people did not as yet find enough favour to be worth proposing, the American plan was adhered to.

Federal Franchise.—The franchise for the House of Representatives was the subject of two unsuccessful amendments, for which the hour was not yet ripe. Dr. Cockburn moved an amendment to forbid property qualifications, and to give each elector a vote only for one electorate—in other words, to embody the principles of manhood suffrage and "one man one vote." And Mr. Barton moved an amendment to allow the Parliament to prescribe a uniform federal franchise. "It does seem to me," he said, "that if you are going to trust the Parliament of the Commonwealth at all, you must trust it to fix its own franchise." Both these amendments, though they received some support, met with much opposition. The suggestion that either the Federal Constitution or the Federal Parliament should meddle with the franchise—though only for federal purposes—was criticized as an invasion of State rights; and though this argument was answered, it prevailed. Mr. Gillies appealed to the Convention to "abandon these fads," for which there was no practical necessity, and which would throw difficulties in the way of Federation. Mr. Barton's amendment was put first and negatived without division; and Dr. Cockburn's was then defeated on division by 28 votes to 9.

Trade and Commerce.—The clause defining the powers of the Federal Parliament opened up several questions of which more was afterwards to be heard. On the "trade and commerce" sub-clause, Mr. Gordon—confessedly with an eye to South Australian interests in the Broken Hill trade—asked whether the power to regulate trade and commerce gave any authority to regulate railway rates on inter-colonial lines. Mr. Clark argued that the American interpretation showed that the clause implied considerable power of control; but Mr. Gordon asked that the powers intended should be definitely given, and announced his intention of framing a sub-clause for the purpose. Sir Samuel Griffith feared there was no middle course between giving the Commonwealth complete "control of railway tariffs," and leaving the States to do as they liked; and said that the only federal control which the Constitutional Committee had seen fit to recommend was contained in the clause empowering the Federal Parliament to annul State laws "having the effect of derogating from freedom of trade or commerce" between the States. Mr. Donaldson suggested that the real solution both of the "differential rates" problem and of the "distribution of surplus" problem was to federate the debts and railways. The discussion was merely a preliminary one, and no amendment was proposed in the sub-clause; but shortly afterwards Mr. Gordon proposed a new sub-clause giving the Federal Parliament power to regulate railway traffic and traffic charges where required "for freedom of trade and commerce, and to prevent any undue

preference to any particular locality within the Commonwealth, or to any description of traffic." These words were criticized as being much too wide, and as giving the Federal Parliament excessive powers of interfering with State railway management. It was argued that so long as the States retained the financial responsibility over the railways, they must retain full control except so far as their action might interfere with the federal principle. Mr. Deakin pointed out that rates which "derogated from freedom of trade" were already prohibited; and Mr. McMillan argued that differential rates which did not so derogate might be perfectly legitimate. There was a general agreement that some kinds of differential rates should be prohibited, but no satisfactory clause could be suggested; so Mr. Gordon's amendment was negatived. A similar fate befell a clause proposed by Mr. Clark to prevent "discriminating rates" which gave a preference to any locality, or any description of traffic; and the "trade and commerce" power was left unexplained, save for the "derogation" clause.

Rivers.—The river question also raised some debate. The Finance and Trade Committee—foreseeing that federal control might be needed for other purposes than navigation—had recommended a federal legislative power as to "Intercolonial rivers and the navigation thereof;" but the Constitutional Committee had cut this power down to "River navigation with respect to the common purposes of two or more States." Mr. McMillan argued that federal powers with regard to the use of the water for irrigation and conservation should be added; and accordingly Sir Samuel Griffith moved tentatively to insert the words "and conservation of water." This was objected to as affecting property and riparian rights; though on the other hand it was argued by Mr. Deakin that powers of conservation for the purpose of maintaining and improving navigability were conferred by the clause as it stood. Discussion showed that the question was too difficult to be dealt with off-hand, and the amendment was withdrawn.

Powers of Senate.—The chief debate, however, was on the vexed question of the powers of the Senate. When the clause embodying the Committee's compromise on this matter was reached, Mr. Baker at once raised the whole question by submitting an amendment for the purpose of giving the Senate absolutely co-equal powers with the House of Representatives. Dr. Cockburn supported him, on the broad ground that "the principle of Federation" required, not merely equal representation in the Senate, but the equal power of both Houses; and that centralization was incompatible with, and State-rights were essential to, a real democracy. This doctrine was upheld, more or less, by most of the representatives of the small States; whilst, apart altogether from the question of State-rights, the principle of a strong Upper House was favoured by the more Conservative representatives, not only of the small States, but of New South Wales as well. Both these aspects were vigorously combated by the solid phalanx of Victorian representatives, by Sir Henry Parkes and others for New South Wales, and by Mr. Playford for South Australia. Mr. Deakin denounced the combination of "reactionary radicals and iconoclastic conservatives" who would place an absolute veto in the path of the people. Mr. Munro warned the Convention that the clause as it stood

was the utmost limit of compromise which Victoria would accept. Adherence to the compromise reached was urged by Sir Samuel Griffith for Queensland, by Mr. Bird for Tasmania, by Mr. Playford and Mr. Kingston for South Australia, by Mr. Hackett for Western Australia. From large States and small States alike came the appeal "keep to the compromise;" and the amendment was defeated on division by 22 votes to 16. Mr. McMillan then moved an amendment with the object of giving the Senate full power to amend, in the first instance, all Bills except Appropriation Bills; but forbidding it to amend Taxation Bills a second time. This also was rejected.

Mr. Wrixon, however, feared that even the power of suggestion might lead to deadlocks; and to guard against this he put forward an embryo "deadlock provision," to the effect that if a "suggestion" of the Senate were declined by the House of Representatives, the Senate might request a joint meeting of the two Houses, at which a majority should decide. It should be noticed that this proposition was fundamentally different from the joint sitting as now embodied in the Constitution. It was only available to deal with suggestions by the Senate—the precise subject which a joint sitting is now forbidden to consider. The suggestion failed to find favour with the friends of either House. It was criticized as dangerous and "mechanical," and was negatived with little debate.

Responsible Government.—With regard to the Executive Government, the only debate of importance arose on the question of the best words in which to suggest the responsibility of Ministers. The Bill as drafted provided that the chief departmental heads should be members of the Federal Executive Council; to which Mr. Wrixon proposed to add, "and responsible Ministers of the Crown." The word "responsible," however, was criticized as being of uncertain meaning; and on Sir Samuel Griffith's suggestion the phrase "the Queen's Ministers of State for the Commonwealth" was adopted.

Finance.—The finance clauses gave rise, not only to an important debate, but to some important alterations. The "contribution" basis of apportioning expenditure and revenue came in for severe criticism, and the members of the Finance Committee wanted an explanation of the reasons why their recommendation had been departed from. So far as expenditure was concerned, no satisfactory explanation was forthcoming, except that Sir Samuel Griffith and some others seemed to think there would be some inconsistency in charging expenditure against the several States on a different basis from that on which revenue was credited. This idea, however, was demolished by Sir Thomas McIlwraith, on whose motion an amendment was carried providing that federal expenditure, from the outset, should be borne by the several States in proportion to population. The apportionment of revenue caused more difficulty. Sir John Bray objected to the "contribution" basis, as requiring an account to be kept of the ultimate destination of dutiable goods, and argued that as soon as a federal tariff was adopted, revenue ought to be credited on the basis of population. "We ought to assume" he said "that any uniform customs tariff that bears fairly on the inhabitants of Australia will result in the inhabitants of each colony paying the same per head *pro rata* as the

inhabitants of Australia generally pay." Sir Thomas McIlwraith and Sir Samuel Griffith were prepared to admit that there might ultimately be an approximation to equality, but argued that for many years to come there would be inequality of contribution, and that meanwhile the population basis would be unfair. Mr. McMillan agreed that there would be some inequality of incidence, but was inclined nevertheless to favour the population basis as being the most federal. However, he suggested a compromise; to leave the contribution basis in force, after the adoption of a federal tariff, until the Federal Parliament should decide to alter it. This suggestion found favour and was adopted. The Convention recognized that the Federal Parliament, with experience of the working of a federal tariff, would have a solid foundation to build upon, which was lacking to the Convention. Some figures had indeed been prepared by the statisticians as an estimate of what each colony would contribute under different tariffs—the Victorian tariff being taken as the basis of one estimate, and an "imaginary tariff" of fixed duties on narcotics and stimulants, with an all round *ad valorem* duty of 13 per cent. on other imports, as the basis of another. These figures had been before the Finance Committee, but were not printed with its report; and they were the cause of some skirmishing in the Convention, being alluded to by their friends as the "suppressed tables" and by their critics as "imaginary tariffs." In fact the battle of statistical forecasts, which was afterwards to be the fiercest fight of all, had its small beginnings in this debate.

But though the problem of the distribution of the federal surplus had been thus dealt with, the Convention was awake to the difficulties and dangers which might arise from the fact that the revenues controlled by the federal government would be immensely greater than the liabilities imposed upon it. Some need was felt of a "guarantee" that this surplus revenue would not be wastefully expended, but would be applied to the necessary purposes of the State Governments. Any such guarantee must be based on one of two principles—either an obligation on the Commonwealth to return some part of its revenue to the States, or an obligation to take over some of the liabilities of the States. The former plan was not mooted at all in 1891; but the latter one came up in the shape of a proposal by Sir John Bray to make the Commonwealth liable for the existing public debts of the States—each State being in turn liable for the amount (if any) by which its debt exceeded a fixed sum per head of its population. There was a disposition on the part of the Convention, however, to think that this was going too far. Some of the delegates thought that the debts ought not to be handed over without the "assets" which they represented; and though Mr. Bird pointed out that the federal revenue powers were a sufficient asset, the argument that the debts ought not to be separated from the reproductive works in which they were sunk carried great weight. But over and above this, the proposal was unpalatable to New South Wales for a reason which was only hinted at, but which probably was the deciding factor. To saddle the Commonwealth with the interest on the public debts would practically have meant imposing on the Federal Parliament the duty

of raising a large amount through the Customs, and would have placed the freetrade party at a disadvantage in federal politics. It was seen that the amendment touched on dangerous ground, and it was accordingly negatived without division.

State Governors.—The clauses relating to the Governors of States gave some trouble, and showed a marked difference of opinion. The clause providing that communications between the State Governors and the Queen should be made through the Governor-General was on the one hand approved as a necessary consequence of the unity of Australia as regards the outside world; it was objected to on the other hand as a wanton interference with matters of purely State concern. On division, the clause was carried by a small majority. The clause providing that "in each State of the Commonwealth there shall be a Governor" was criticized as an unnecessary and inadvisable dictation to the States. Sir Samuel Griffith had no definite apology for the clause, except the somewhat unsatisfactory suggestion that it indicated that the States were sovereign; however, it was retained. Finally, the clause giving the Parliament of each State power to determine the mode of appointment of its Governor, and his tenure of office, was objected to as another unnecessary interference with the State Constitutions, and supported on the other hand as being merely the gift of a discretionary power. On division, the clause was carried by a majority of one.

Amendment.—In the clause dealing with the amendment of the Constitution, several members pointed out that the provision for ratification by "Conventions of a majority of the States" gave a second veto to the States, but none to the people as a whole. Sir Samuel Griffith admitted the force of the argument, and proposed to add a requirement that the people of the affirming States must contain a majority of the people of the Commonwealth. Mr. Playford pointed out that this was a clumsy contrivance, and that the whole difficulty arose from the false principle of taking the voice of the people indirectly through Conventions instead of directly at the polls. He advocated the Swiss plan of a referendum, requiring the assent of a majority of the people, and separate majorities in more than half the States. This view was supported by Dr. Cockburn and Mr. Deakin; but an amendment to that effect moved by Dr. Cockburn was defeated by a large majority, and Sir Samuel Griffith's suggestion was adopted.

The Committee stage ended with Mr. Dibbs' "bomb-shell"—an amendment providing that the site of the federal capital, instead of being left for the Federal Parliament to determine, should be fixed at Sydney. This was promptly rejected by 26 votes to 4—Mr. Dibbs alone, of the New South Wales delegation, voting for it; and the Bill was reported with amendments.

Adoption of the Bill.—A short debate then followed on a motion by Sir Samuel Griffith that the Bill as reported from the Committee be adopted by the Convention. The debate showed that, on the whole, the Convention were satisfied with their work. Sir Henry Parkes thought it "a wise, temperate, and successful compromise," and ventured upon the prophecy that all the colonies would accept it. At the same time, he warned his hearers of the opposition to be ex-

pected from opponents of Federation outside the Convention. "We may be sure," he said, "that the Bill will meet with perhaps virulent opposition. We know with what violence of feeling, with what violence of expression, every great work at every period of history has been assailed by those who were opposed to it, and still more by those who assailed it for no reason at all, and under no guidance that could be intelligible." He reminded them that already they had been accused of "giving away the liberties of New South Wales," of "giving the lands," of "giving up the control of the inland rivers;" and similar accusations would probably be made against the representatives of the other colonies. But in spite of the "anathemas hurled at us by certain people out of doors," and based either upon ignorance or upon wilful misrepresentation, he expressed his firm belief that the Bill would be ratified. And even assuming the contrary—assuming that the day of Federation had not yet come—"it cannot," he said, "be far off; and whenever the time comes, this admirably-drawn Bill, so clear, so instinct with a spirit of well-ordered liberty, so instinct with a true appreciation of stable and sober laws, so pervaded by the very spirit of toleration and mutual consideration—come whenever that time may, this Bill must be in the foundation of the edifice of federal liberty. It can never be forgotten, it can never be depreciated, it can never be made less than it is to-day; and supposing another Constitution should be framed by other men, to a very large extent the provisions of this Bill must be embodied in that Constitution, so that this Convention has breathed into this Bill the breath of an immortal life." Other delegates spoke more critically, but no less hopefully. Mr. Baker and Dr. Cockburn, from the small State point of view, regarded the Bill less cheerfully. Sir John Downer feared that the powers of the Senate were defined in words which were designedly ambiguous, and would lead to discord. Sir George Grey lamented that plural voting was not abolished. But doubts and fears were over-borne by the general chorus of satisfaction. Nearly every member was prepared, on the whole, to accept the Bill as it stood, as a good Constitution and a fair compromise; and it was adopted by the Convention without division.

The Mode of Submission.—The draft Constitution having been passed, the next thing to consider was what steps should be taken to secure its acceptance by the several colonies. Sir George Grey had already, immediately the Committee stage was over, moved a resolution that it should be "submitted to and adopted by a majority of a plebiscite of the people of Australia." This had been objected to as inconsistent with the idea of a voluntary acceptance by each individual colony, and Sir George had accepted an amendment providing for a plebiscite in each separate colony; but the motion as amended was rejected. As soon as the Convention had adopted the Constitution, Sir Samuel Griffith moved "That this Convention recommends that provision be made by the Parliaments of the several colonies for submitting for the approval of the people of the colonies respectively the Constitution of the Commonwealth of Australia as passed by this Convention." He argued—and the Convention as a whole agreed with him—that it was not for them to dictate to the colonies the

manner in which they should accept the Constitution; all they could do was to refer that question to the several Parliaments. The question arose, however, whether the Constitution ought to be submitted to some ratifying body to accept or reject as a whole, or whether opportunity ought to be allowed for further reconsideration of its provisions. Most of the members were very averse to any re-opening of the decisions arrived at by the Convention. The work of the Convention had involved compromise and concession, and they feared that to allow each colony to pick it to pieces in its own interests, and undo all that had been done, would lead to endless confusion and delay. A few voices, however, were raised to urge them to "hasten slowly." Sir John Bray suggested consideration in detail by the Parliaments, and a second Convention, if necessary, to harmonize differences. To prevent the colonies from thinking that the Bill was being "crammed down their throats" he moved to substitute "consideration" for "approval." Mr. Wrixon supported the amendment, arguing that "this subject comes down on the people from above," and that a few years' delay was nothing compared with the importance of thorough consideration. The amendment, however, only secured seven supporters, and Sir Samuel Griffith's resolution was carried. It was followed by a further resolution recommending that as soon as the Constitution were adopted by three colonies, the Home Government should be requested to take steps to establish it in respect of those colonies. After some complimentary resolutions, Sir Henry Parkes, on 9th April, 1891, declared the Convention dissolved.

(8) THE FATE OF THE COMMONWEALTH BILL OF 1891.

Reception of the Bill.—The framing of the Commonwealth Bill marked a notable advance in the movement. In place of vague abstractions, federationists had now a definite rallying ground, anti-federationists a definite line of attack. Advocacy and criticism became at once more direct, more circumstantial, more practical. The text of the Bill itself obtained a wide circulation, and was studied and preached upon by politicians of every class and type, by the metropolitan and provincial press, by debating societies, and political associations. An annotated edition, in pamphlet form, by Mr. G. B. Barton, was issued from the Government Printing Office of New South Wales; and the idea of Federation began to assume a definite shape in the minds of the people as a whole. Federation had long been in the air; it now came down to the earth. It had long been dreamed of, and sung of, as a destiny one day to be realized; it now could be examined and analyzed as a practical political scheme.

There can be no doubt that many members of the Convention had hoped that the work of construction was complete, and that the Bill as it stood might be adopted without delay as the Federal Constitution of Australia. But they were doomed to disappointment. It soon became clear that neither the Parliaments nor the people would accept the work of the Convention as final. The Parliaments, natur-

ally enough, resented the idea that a constitutional change of such vast importance should be effected without their having any voice in the details of the scheme. And in the minds of many of the people there was a vague feeling of distrust of the Constitution, as the work of a body somewhat conservative in composition, only indirectly representative of the people, and entrusted with no very definite or detailed mandate even by the Parliaments which created it. The consequence was that while the Bill received unstinted praise in some quarters, it was subjected to unsparing criticism in others.

One circumstance in particular swelled the chorus of discontent, especially in New South Wales—the colony which was thenceforth to be the main battle-field of the movement. The "new democracy" was just then trying its wings. In 1891 the Labour Party made its first appearance in the Parliament of New South Wales, with great zeal for reform, with constitutional theories of its own, but with scanty political experience. To this party and its constituents the draft Constitution seemed to bristle with imaginary dangers. It conferred "enormous powers" on the Governor-General; it was steeped in "Imperialism;" it meant the crushing of the workers by a "military despotism." These unreal terrors had much to do with the want of enthusiasm for Federation displayed at that stage by the Labour Party and its adherents.

Of course, however, there were other and less flimsy grounds of opposition. The Constitution was a compromise, with the faults as well as the merits of a compromise; the federal principles it contained were new to Australia, and their application to new circumstances gave room for much difference of opinion. In the large colonies, the composition and powers of the Senate were especially criticized. Equal representation, the power to suggest amendments in money bills, the absence of any provision for solving deadlocks, were in turn condemned and defended. The inadequacy of the financial provisions —the possibility that, under the trade and commerce power, trade might be unfairly diverted from one colony to another—the risk that the federal tariff might be too protective, or not protective enough—these and many other questions of constitutional principle and provincial interest were raised and debated.

Delay in New South Wales.—New South Wales was expected to take the lead in dealing with the Bill; and when Parliament opened on 19th May, the Governor's speech announced that no time would be lost in submitting a resolution for that purpose. On the same day Sir Henry Parkes gave notice of the following resolutions:—

"That this House reaffirms its opinion in favour of the Federation of the Australian colonies, and taking into consideration all the circumstances of the constitution of the National Convention which met in Sydney in March last, as a duly authorized body appointed by all the Parliaments of Australia, and having due regard for the difficulties and the necessity for compromise in reconciling conflicting interests and coming to a common ground of agreement, it hereby approves of the scheme for an adequate Federal Constitution embodied in the draft Bill of the Convention. But it reserves to itself the right to propose amendments, to be fully set forth by the proposer in each case

in a schedule, and to be fully considered, if deemed advisable, by another Convention similarly constituted, and in like manner representing all the colonies.

"2. That this House is further of opinion that the question, as dealt with by this Parliament, should be submitted to the people in their electoral capacity for final approval."

The somewhat elaborate and argumentative form of these resolutions, and the haste to give notice of them before the debate on the Address in Reply, were strategic devices to answer in advance the expected attack. The attack came from Mr. G. H. Reid, who moved an amendment on the address, to the effect that the House recognized the distinguished ability and zealous labours of the Convention, and was desirous of federal union "on principles just to the several colonies," but affirmed that the Bill was not just "in some important respects, two of which we desire to indicate, namely:—(1) The powers over revenue, taxation, and expenditure conferred on the proposed Senate; (2) the rejection by the Convention, and the omission from the Bill, of responsible government as a necessary part of the Constitution." The amendment also complained that the federal power of legislative interference with the general commercial management of the railway and river systems, without any provision for assuming obligations in respect of them, was not founded upon just principles. In the course of his speech, Mr. Reid laid great stress on the danger to which the freetrade policy of New South Wales would be exposed by Federation. He compared New South Wales to a teetotaler who contemplated keeping house with five drunkards. "I will not put my principle of freetrade," he said, "in the power of the Victorian protectionists." He resented any attempt to "cram this Bill down the throats of Parliament," but at the same time expressed himself ready to accept the right kind of Bill. The amendment was negatived on division by a substantial majority.

Sir Henry Parkes, however, was not destined to move the resolutions of which he had given notice. The House was within eight months of expiry by effluxion of time, and the Ministry were anxious, for obvious political reasons, not to neglect "urgent local legislation" for the sake of what their opponents termed the "fad" of Federation. Then came a motion of censure, resulting in an equal division; and on 6th June the Assembly was dissolved.

The new Parliament met in July, with the new element—the Labour Party—some 30 strong in a House of 141. The new party cared little for Federation, and less for the Convention Bill; they were elected to secure "urgent provincial legislation" in the interests of their fellow-workers. They supported the Government; and the Government on its part consented to place Federation third on the programme—where it remained until the defeat and resignation of the Ministry in October. Some weeks previously to this event, a debate had occurred which throws some light on the attitude of the New South Wales Assembly at that time towards Federation. Mr. Henry Copeland, on 1st September, moved a resolution in favour of a protective tariff. Mr. Barton moved an amendment to the effect that inasmuch as the anticipated federal union would bring about a common

fiscal policy for all Australia, and as meanwhile the co-operation of all parties was necessary in securing urgent legislation, "the financial requirements of the colony, rather than the rigid doctrines of any system of political economy, should regulate the mode of raising any further revenue through the Customs." During the debate, the labour party reiterated their demand for "useful legislation," and did not commit themselves to any particular federal views; though they would support Federation on their own lines. Mr. Reid expressed himself confident that Federation would not come soon, "because the position taken by several of the smaller colonies, on certain points, is so firm, that the inevitable amendments that will be effected in this House, and which have already to some extent been effected in Victoria, will put off any agreement on the subject for a long time to come." Though there was actually a majority of protectionists in the House, the direct protectionist vote could not be carried. Sincere Federalists on both sides of the House were prepared to forego the fiscal fight for the sake of Federation; the greater part of the labour party were prepared to do the same for the sake of social legislation; so that the two new issues of Federation and Labour combined, for the time being, to keep the fiscal issue in check. In the end, Mr. Barton's amendment to the resolution was carried, and the resolution as amended was then defeated.

Victoria.—Meanwhile the Parliaments of Victoria, South Australia, and Tasmania had attempted to make some progress with the discussion of the Commonwealth Bill. On 30th June, Mr. Munro, in the Victorian Assembly, moved a resolution "That this House approves generally of" the Bill; it being understood that there would be an opportunity afterwards for consideration in detail. The general debate extended over eight sitting days, and showed the House on the whole to be distinctly favourable, though there was a determined section of critics led by Sir Bryan O'Loghlen, who were for insisting on the principle of "one man one vote" as a condition precedent, and complained bitterly of the excessive powers of the Senate. The manufacturing interests had long been eager for Federation, for the sake of wider markets, and were prepared to take their chance with the competition of the other colonies; but the farming and agricultural interests, though not anti-federal, were always fighting for more protection against intercolonial produce, and especially for an increase of the stock-tax. The resolution having been carried, the discussion in Committee began on 21st July, and lasted until 27th August, extending over nine sitting days. Many amendments were proposed—mostly by Sir Bryan O'Loghlen—but few were carried. The most notable amendment made was the striking out of the Senate's power to suggest amendments in money bills; a proceeding which was partly a protest against the claims of the Victorian Upper House. The right of the Lower House to sole financial control had long been a prominent article of liberal faith in Victoria; for curiously enough that colony—the only one in which the Constitution expressly forbids the Legislative Council to amend Appropriation or Tax Bills—has seen the most serious "deadlocks" that have occurred in Australia. Another instructive feature of the debate was the strong opposition shown, by

the representatives of Victorian farming interests, to the admission of New Zealand within the magic circle of the Commonwealth. An amendment to substitute "Australian" for "Australasian," and another to omit "New Zealand" from the number of States entitled to adopt the Constitution, were narrowly defeated; but later on an amendment was carried to except New Zealand from the colonies which might be subsequently admitted as "New States."

In the Legislative Council of Victoria, the general resolution was moved by Mr. Cuthbert on 8th July, and carried after a three nights' debate. The Council then waited for the Assembly, and between 29th September and 21st October, with only four sittings, it dealt with the Bill and with the Assembly's amendments. It restored the power of suggestion, which the Assembly had struck out; and it forwarded to the Assembly a message which was never considered.

South Australia.—The South Australian Assembly began the consideration of the Bill simultaneously with the Victorian Assembly. Mr. Playford, on 30th June, moved a resolution approving generally of the Bill, and of a second Convention, if necessary. While New South Wales remained passive, there was no hurry, and the debate proceeded slowly. The six nights which it occupied were spread out over nearly three months; and a fragmentary consideration in Committee, begun on 29th September, was not quite finished when the Assembly prorogued on 19th December. The two chief amendments made were for the election of Senators by the people, and for the submission of constitutional amendments to a referendum in each colony, instead of to a Convention.

In the Legislative Council the debate was even more leisurely. The resolution was moved by Mr. W. Copley on 7th July, debated on nine evenings, and carried on 8th September. The following week its consideration in Committee got as far as the omission of the word "Commonwealth"—for which, however, no substitute could be agreed on. Then the Council decided to wait for the Assembly—with the result that nothing more was done that session. Next year, however, the discussion was resumed, in a somewhat perfunctory way, and in December, 1892, the Bill was reported with amendments.

Tasmania.—Tasmania, too, made some effort to deal with the question, but on rather different lines. There it was proposed to ask the Houses to consider the Bill first, and then to remit it to the consideration of a provincial Convention elected by the voters of Tasmania. Accordingly in July a "Commonwealth of Australia Bill" was introduced by the Attorney-General (Mr. A. Inglis Clark) providing for 50 representatives being elected, upon the House of Assembly rolls, to consider the Bill. The draft Constitution was also considered by the House in Committee, and the amendments made were attached to Mr. Clark's Bill, which was passed and sent to the Council. It there reached its second reading, but after several adjournments it was ultimately shelved, on the ground that Tasmania's part in the matter was to follow, not to lead.

New South Wales.—The Parliaments of three colonies had thus found time to deal partially, if somewhat perfunctorily, with the matter; but neither Queensland, Western Australia, nor New Zealand

had taken any steps at all. The two latter colonies took little interest in the matter; and indeed in New Zealand an abstract motion by Sir George Grey on the subject of Federation, but having no direct reference to the Convention Bill, was unceremoniously counted out. In Queensland, however, the Chief Secretary, Sir Samuel Griffith, announced his readiness, and that of his colony, to follow the lead of New South Wales. All Australia, in fact, was waiting for New South Wales; and we must now direct our attention once more to the course of events in that colony.

The retirement from office, in October, 1891, of Sir Henry Parkes, the recognized leader of the movement, left but a slender prospect of immediate action being taken by the New South Wales Parliament. Mr. Reid, and a large section of the freetraders, put freetrade before Federation; the labour party put social questions before Federation. Mr. G. R. Dibbs, the new Premier, was no friend of the Commonwealth Bill; nor were most of his colleagues. Mr. Barton, however, who was already recognized as Sir Henry Parkes' federal lieutenant—though in provincial party politics they were on opposite sides—accepted the Attorney-Generalship in the new Ministry, on the understanding that he was to have a free hand in dealing with Federation. Mr. R. E. O'Connor, also an earnest federalist, took the portfolio of Minister of Justice, with a seat in the Upper House. Mr. Barton, at the general election and also at his re-election as Minister, laid down his federal programme clearly, on the following lines:—(1) The draft Constitution to be fully debated; (2) Parliament to specify its amendments; (3) the Bill and desired amendments to be laid before a second Convention; (4) the Bill as amended by the second Convention to be submitted to each Parliament; and (5) to be finally submitted to the people, each man to have only one vote.

But Mr. Barton had a difficult task. He was surrounded by unsympathetic colleagues in an unsympathetic House. The Parliament was interested in "urgent local legislation"—notably the tariff and the Electoral Bill—and was not keenly interested in Federation. Though the general feeling of the community was supposed to be federal, no active political pressure was as yet being brought to bear on members by their constituencies. On 21st December Mr. Andrew Kelly, a labour member, moved a resolution in the Assembly "That no system for the federation of the colonies will be acceptable to this House until the electoral system provides for the principle of one man one vote at the election for members of the House of Representatives." After half an hour's debate, in a thin House, this was carried.

Early in 1892 Sir Henry Parkes wrote a letter to Mr. Dibbs, informing him that he would propose an entirely new course for dealing with Federation, "founded upon the proceedings of the thirteen original States of the American union." He seems to have lost faith in the possibility of carrying Federation through by Parliamentary action alone; and accordingly, in March, 1892, he moved the adjournment of the House to discuss "the movement in favour of Federation, and the most expedient course to be pursued in bringing it to a successful conclusion." He reviewed the movement, complained bitterly of the tactics of opponents, dealt with the causes of delay, and affirmed that

Parliament was a very unfit body to deal with the question, because it was elected for other purposes. Finally he unfolded his new plan:—

"Now, if my contention be at all sustainable, that Parliament is not elected to deal with this question, but that on the contrary it ought to be elected to deal with quite different questions, we are driven to enquire what steps should be taken; and though we may be excused from our inexperience in not adopting this step at an earlier stage, still it seems to me to be the only step that can be taken, if we are in earnest in desiring to bring this great question of the union of the colonies to a successful issue—that is, for the people themselves, the electors who sent us into this Assembly, the electors themselves throughout the colonies, to elect another Convention to revise the draft Constitution of the late Convention, and to frame a new Bill, if in their wisdom they think proper to do so."

Mr. Barton, however, favoured adhering to the lines already laid down of Parliamentary discussion and a second Parliamentary Convention. Shortly afterwards, on 23rd November—notwithstanding protests from those whose chief desire was "urgent legislation"—he introduced the federal resolutions, re-affirming the principle of Federation, approving the main principles of the Commonwealth Bill, and expressing the opinion that the Bill should be dealt with in Committee, and the amendments of the several Parliaments remitted to a second Convention, similarly appointed and reporting to the Parliaments, and that the question of final adoption should be submitted to the electors.

The debate which followed was somewhat languid. Mr. J. H. Want moved an amendment, limiting the resolutions to an affirmance of the principle of Federation, and the desirability of discussing the Bill in Committee. Mr. Reid announced that he now took a more sanguine view of the prospects of Federation; and that the general movement, in Australia and elsewhere, in favour of freetrade, encouraged "a more rational and better idea that my principles will not be sacrificed." His objections to the Commonwealth Bill, however, remained as strong as ever. The debate was interrupted by a motion of censure, but was resumed on 11th January, 1893. Mr. Kelly again moved his amendment that no Federation would be acceptable that did not provide for "one man one vote;" but the absurdity of dictating conditions was pointed out, and the amendment was negatived. An attempt was made to shelve the question, on the two grounds of "urgent legislation" and the wickedness of the Bill; but this also failed, and the resolutions were carried. Circumstances again conspired to delay the consideration in Committee, but this was promised for the following session.

In the Legislative Council, after several postponements, Mr. R. E. O'Connor on 17th May moved the same resolutions. His speech was noteworthy for a suggestion in regard to "deadlocks"—that if a Bill granting supplies were thrown out by the Senate in one session, and the disagreement continued in the next session, the two Houses should sit together, and some specified majority of the joint sitting should decide the matter finally. The resolutions were carried, but, the end of the session being near, the consideration of the Bill in Committee had to stand over.

In September Parliament was again convened, and on 12th October Mr. Barton moved that the House go into Committee to consider the Bill. Mr. Arthur Rae, a labour member, moved an amendment to the effect that Federation would "do nothing to meet those social and industrial problems so urgently pressing for solution," and that the draft Constitution was "of too rigid a character to suit the progressive spirit of Australian democracy, and should not be proceeded with without a special mandate from the people of New South Wales." Sir Henry Parkes moved the adjournment of the debate, and it was never again reached. In the Council the first few clauses were actually discussed in Committee during November and December, but in a very desultory way; and little progress had been made when a prorogation intervened. A few days later both Mr. Barton and Mr. O'Connor resigned their portfolios, owing to a resolution passed in the Assembly criticizing their action in accepting briefs against the Railway Commissioners; and all hope of Parliamentary action was for the time at an end. In short, the Parliamentary process of dealing with the Commonwealth Bill had broken down hopelessly.

(9) THE POPULAR MOVEMENT.

Growth of Federal Sentiment.—Sir John Robertson's boast that "Federation is as dead as Julius Cæsar," was coming to be a favourite saying of anti-federalists; but as a matter of fact the federal spirit was only just beginning to awaken. The Commonwealth Bill, though neglected by the Parliaments, had helped to educate the people. Since 1891, public interest in the question of Federation had been steadily gaining ground; from 1892 onwards it began to advance rapidly, as a result of the collapse of the "land boom," the financial panic, and the resulting commercial depression. The crisis showed plainly that the prosperity of each colony was bound up in that of the others; that disaster to one meant loss to all; and that strength lay in co-operation. These considerations helped to break down the spirit of isolation and mutual jealousy which prosperity had fostered, and to emphasize the dangers of disunion.

Moreover, bad times helped the cause of Federation in another way. The general stagnation of trade set every one enquiring for himself into the causes which clogged the wheels; and the folly of inter-provincial barriers became increasingly apparent. Federation began to appeal to the pocket as well as to the heart; and the people began to wake up to the fact that the "fad of Federation," with which politicians and Parliaments had been dallying so long, meant the salvation of Australia.

Australian Natives' Association.—It had long become apparent that the Parliaments would accomplish little without a stimulus from their constituents; and the conviction grew that federalists must create a public organization, with the twofold object of demonstrating to the Parliaments the strength of the federal sentiment, and of further solidifying and educating that sentiment. For the chief share

in the initiation of that movement, credit must be given to the Australian Natives' Association—an organization which, though less extensive in the other colonies, had in Victoria attained an extraordinary development, and represented the bulk of the political activity and enthusiasm of the younger generation. This Association, which was not only a power in politics, but also a political training school of the greatest value, had always been unswerving in its zeal for Federation; and it was natural that the impulse for organization should spring from it. Under the leadership of such able successive Presidents as Mr. A. J. Peacock (1885-1886), Mr. T. J. Connelly (1887), Mr. J. L. Purves, Q.C. (1888-1889), Mr. D. J. Wheal (1890), Mr. G. H. Wise (1891), this Association had helped to develop the federal sentiment widely throughout the colony, and was persistent in its agitation for definite action. At the end of January, 1890, a few days before the sitting of the Federal Conference convened by Sir Henry Parkes, a federal demonstration under the auspices of the Association was held in Melbourne. It was composed of delegates from its branches in all the colonies. This gathering, which is regarded by the Association with just pride, was presided over by Sir John Bray, of South Australia. Great enthusiasm and an intelligent interest in the cause of Australian union were displayed, and the following resolutions formulating the basis of a Federal Constitution were passed:—

1. That the time has now arrived for the Federation of the Australian colonies.
2. That a Federal Legislature should be established, to consist of a Governor-General and two Houses of Parliament.
3. That the members of one House should be elected by the Legislatures, and those of the other House by the people of the several colonies.
4. That in one House each colony should be represented by an equal number of members.
5. That the Federal Legislature should be empowered to deal with national matters, including:—(1) General defences; (2) Federal Court of Appeal; (3) relations of Australia with the islands of the Pacific; (4) naturalization; (5) uniform customs duties, after a date to be agreed upon by the Legislatures of the several colonies; (6) railways; (7) post and telegraph; (8) the public debt; (9) federal revenue; (10) the division of any colony; (11) marriage and divorce laws; (12) insolvency; (13) quarantine regulations; (14) coinage; (15) patents, copyrights, and trade marks; (16) all legislation affecting provincial affairs should be left to the Parliament of each colony.

Federation Leagues.—In March, 1893, at the annual conference of the Australian Natives' Association, held at Kyneton, the dissatisfaction with Parliamentary dallying found vent, and it was recognized that active popular organization was needed to impress the provincial Parliaments with the necessity for action. As the outcome of the Kyneton Conference, a deputation waited upon Mr. Barton to urge him to form a central Federation League in Sydney.

Mr. Barton himself had already been moving in the same direc-

tion. Though he had been unable to do much in Parliament, he had endeavoured by a series of public meetings in different parts of the colony to keep the Federal lamp alight. In December, 1892, he had visited Corowa and Albury on this mission, and had assured the folk on both sides of the Border that a Federal League, on strictly non-party lines, would greatly strengthen the hands of federalists in Sydney and Melbourne. The advice was acted upon; in January, 1893, Corowa and Albury each formed an "Australian Federation League;" and by the end of May there were 15 branches of the League in the valley of the Murray. But the need was still felt of a central organization to keep all the colonies in touch; and accordingly in June Mr. Barton convened a preliminary meeting of federalists, at which it was resolved to form an Australasian Federation League in Sydney; and at a public meeting in the Town Hall on 3rd July, the League was formed. Its auspices were not at first very favourable. Sir Henry Parkes stood aloof. He claimed that the idea of forming Federal Leagues had originated with himself, and was afterwards appropriated by others who ignored his right to leadership (speech at Liverpool, N.S.W., reported *Sydney Morning Herald*, 30th July, 1893). A meeting of the freetrade party, called by Mr. G. H. Reid, seemed suspicious of the new League, and resolved that in the then state of party politics no alliances could be formed even on the question of Federation, but that individual members of the party should be left free to use their own discretion. Opposition also turned up in another quarter; the members of the "Democratic Social Federation" made a determined but unsuccessful effort to capture the Town Hall meeting, and to pass resolutions in favour of an Australian Republic.

However, the League was duly formed, with a Constitution which pledged it "to advance the cause of Australian Federation by an organization of citizens owning no class distinction or party influence, and using its best energies to assist Parliamentary action, from whatever source proceeding, calculated to further the common aim of Australian patriotism." It did not commit itself to any particular scheme of Federation, but advocated "the Federal Union of Australasia on such lines as may be constitutionally approved by all the colonies concerned after further deliberation and report by assembled representatives of each." The League never had a sensational history, but thenceforward to the end of the fight it shows a record of steady organizing and educating work. It formed a nucleus for an active body of earnest federalists in Sydney, and a connecting link between the country leagues, which began to spring up in numbers, especially in the border districts. This result was largely due to the indefatigable work of Mr. Edward Dowling, who from first to last was principal honorary secretary to the League. The example spread. At the end of 1893 and the beginning of 1894, leagues were formed in Melbourne, Bendigo, Ballarat, Echuca and other Victorian towns. In August, 1895, a league was formed at Adelaide; in July, 1898, one was inaugurated in Brisbane, and in July, 1899, one was formed in Auckland.

Corowa Conference, 1893.—In the new movement the Border Leagues at once began to take an active part. The policy of hostile

tariffs and commercial isolation doubtless affected the great cities in an equal degree; but to the dwellers near the border the disadvantages were more direct and more obvious. The Border Leagues, therefore, were among the most active missionaries in the movement; and on their invitation a Conference was held at Corowa, on 31st July and 1st August, 1893, to which representatives from trading and commercial bodies, Federation Leagues, branches of the Australian Natives' Association, and kindred associations on both sides of the Murray, were invited. The Sydney League sent two delegates, all the Border Leagues were represented, and representatives from various branches of the Australian Natives' Association—especially on the Victorian side—mustered in force. The usual resolutions expressing the urgent need for Federation were proposed and warmly supported, and united organization were resolved upon; but as the proceedings drew to a close it was felt that something more was required. Of enthusiastic speaking there was no end; the demand was now made for some definite and practical basis of action. To meet this, Dr. John Quick, a representative of the Bendigo branch of the A.N.A., proposed a resolution which marked a new epoch and initiated a new mode of dealing with the question:—"That in the opinion of this Conference the Legislature of each Australasian colony should pass an Act providing for the election of representatives to attend a statutory Convention or Congress to consider and adopt a Bill to establish a Federal Constitution for Australia, and upon the adoption of such Bill or measure it be submitted by some process of referendum to the verdict of each colony." This resolution was carried unanimously, and was the achievement which makes the Corowa Conference historically important.

Dr. Quick did not leave the resolution to its fate, but, upon his return to Bendigo, elaborated it into a definite scheme. He framed an "Australian Federal Congress Bill," which he submitted to the Bendigo League, and which was discussed and adopted by that body and was published on 1st January, 1894. This Bill in its main features became the basis of the Enabling Acts which were afterwards passed in all the colonies, and by means of which the cause of Australian union was ultimately brought to a successful issue. It purported to "provide for the representation of Victoria at an Australasian Congress legally created to frame a Constitution for the Federation of the Australasian colonies, and further to provide for the reference of such Constitution when framed to the vote of the people," and was designed as the model for a series of Acts to be passed, in substantially uniform shape, in all the colonies. The procedure which such a series of Acts would have laid down is shortly this:—

(1.) That each colony should elect, on its Parliamentary franchise, ten representatives to a Federal Congress.
(2.) That the Congress should frame a Federal Constitution.
(3.) That, on a day to be arranged between the Governments, the Federal Constitution should be referred to the electors of each colony for acceptance or rejection.
(4.) That if the Constitution were accepted by majorities in two or more colonies, it should be forwarded to the Imperial Government to be passed into law.

The novel and all-important element in this proposal was the idea of mapping out the whole process in advance by Acts of Parliament—of making statutory provision for the last step before the first step was taken. Hitherto, each successive step in the framing of a Constitution had been left dependent on the concurrence of all the Parliaments or all the Governments for the time being; with the result that every hitch, every discouragement, had led to delay, and all the zeal and labour expended on the Commonwealth Bill of 1891 seemed in danger of being lost, and the prospect of bringing the question to a final issue was as remote as ever. But here was a scheme which, when once launched, would ensure the framing of a Constitution and its submission to the people. Every step in the process would thus be invested, in the minds of the people, with a seriousness and importance otherwise unattainable. Those who had jested at the Convention of 1891 as a body of men engaged in the amiable and amusing task of drawing up a Constitution for the waste-paper basket would have to admit that there was something serious about a Constitution which, when framed, the Government would be obliged by law to submit to the electors for their acceptance or rejection.

Another feature of the scheme, equally important, but not absolutely new, was the principle of the direct popular initiative in the election of the Congress or Convention. The two things now wanted were popular interest in the framing of a Constitution, and popular confidence in the Constitution when framed; and the best guarantee of both these things was that the people should be asked to choose for themselves the men to whom the task was to be entrusted. The adherents of the Parliamentary system had thought that the people would be less likely than the Parliaments to select men who by ability and training were most suited for the work of Constitution-making; but they had forgotten that more important even than the *personnel* of the Convention was the public confidence in the Convention. The result showed that the chosen representatives of the people were for the most part those who would have been the chosen representatives of the Parliaments; but from the fact of their election by the people they had a power, and they enjoyed a confidence, which election by the Parliaments could never have given them.

But though Dr. Quick's scheme meant a new start, it did not mean that the work already done was to be wasted. It was intended to supersede, not the Commonwealth Bill, but the process of dealing with that Bill; not the work of the Sydney Convention, but the abortive attempts to complete that work. The assembling of a second convention—the expediency of having it elected by the people—the necessity of a final referendum—had already been suggested in connection with the Bill of 1891. What had not hitherto been suggested was that all these steps should first be pre-ordained by Enabling Acts in all the colonies.

The new proposals at once attracted attention. They were favourably noticed in the press, they were discussed and reported upon by Federation Leagues and kindred bodies; they were expounded by the framer himself at meetings at various places. In January, 1894, he came to Sydney, and explained his scheme to a

meeting of the Central League, which referred it to a Select Committee for consideration and report. This Committee presented its report at a meeting of the League held on 15th March, when the report was unanimously adopted. The report heartily endorsed the idea of mapping out the programme by Enabling Bills in all the colonies, but suggested a modification in the process of framing the Constitution—namely, that each colony should first elect, on its Parliamentary suffrage, a provincial Convention to formulate its own ideas of a scheme of Federation, and that these schemes should then be submitted to a Federal Convention, elected by the Parliaments, which should frame a Federal Constitution in which the views of the several colonies should as far as practicable be harmonized. It was feared that the attempt to strike off a Federal Constitution at one sitting, without consulting the separate colonies except for the final vote on the completed Constitution, might fail to secure adequate adjustment of conflicting interests, and thus lead to the rejection of the Constitution at the polls.

Dibbs' Unification Scheme.—At this stage an interlude occurred in the shape of an alternative scheme of union, drawn up by Sir George Dibbs, the Premier of New South Wales. He had always been a severe critic of the Commonwealth Bill; and on 22nd May, 1894, in a speech to his constituents at Tamworth, he propounded a scheme of complete unification. This scheme was immediately condemned by Sir Henry Parkes and Mr. Barton, and by the federalist press, as being impracticable; but Sir George Dibbs shortly afterwards formulated it in a letter dated 12th June to Sir James Patterson, Premier of Victoria, in which he announced that the consideration he had given to the federal question since the Convention of 1891, but "more especially since the fiasco of the banking crisis found us so injuriously divided," had led him to the conclusion "that it would be easier first to completely unify the interests of the two great colonies of Victoria and New South Wales, and then to attract neighbouring colonies within the sphere of our extended influence." He set out his objections to the Commonwealth Bill; it leant too much to American ideas, too little to Canadian; it involved the expense of State and Federal establishments; its financial provisions were unfair and unworkable; equal representation in the Senate was absurd. On the other hand, it secured no federal control over public debts, railways, or land revenues, and would tend to perpetuate existing rivalries. "How far more beneficial in every way; how far more likely to extend our revenues and minimise our expenditures; how far more impressive to the outside world and to our creditors in England, would be a complete pooling of our debts, our railways, our national establishments generally. We are none of us so badly off that we cannot be permitted to meet each other on equal terms. In such a partnership New South Wales would not be disposed to say to her neighbours, 'Your debts are more burdensome, your railways and lands less productive than ours.' We would give to the United Government that prestige and supreme control which is almost entirely denied under the Commonwealth scheme, wherein the Federal Legislature would be numerically and structurally wholly overshadowed by

the provincial Governments; and without haggling over the items, we would be prepared to hand over our Custom-houses, post offices, and other necessary establishments for the common good, provided others did the same." That there must be local governments in the provinces he admitted; but he would confine these local governments, "as in Canada," within subordinate limits, and to strictly local purposes. He practically admitted that the other colonies could not be induced to join such a union at the outset; but he submitted the following draft outline of a scheme for the consideration of the people of the two colonies of New South Wales and Victoria:—

"*Unification of New South Wales and Victoria as a preliminary to complete Australian Union.*

"Union for all national purposes to be complete as under:—

(1.) One Viceroy, or Governor.
(2.) One Parliament of two Chambers.
(3.) One Customs tariff.
(4.) One scale of excise duties.
(5.) One joint debt.
(6.) One railway management.
(7.) One land revenue and one land law. Until the laws are consolidated, existing regulations to hold good.
(8.) One Defence Administration.
(9.) One postal and telegraph administration.
(10.) Provincial Government, with wide local powers.
(11.) Surplus revenue of the Supreme Government to be apportioned to the Provinces—partly on a population basis, partly on an occupied mileage area basis.
(12.) Certain departments of the Public Service removed from political influence may have their headquarters in Melbourne, others in Sydney.
(13.) One High Commissioner's establishment in London, representing the whole.
(14.) One Supreme Court.
(15.) Title, 'The United Colonies.' Afterwards, when South Australia and Queensland come in, the title to be 'The Dominion of Australia.'"

This letter evoked merely a non-committal reply from Sir James Patterson, but it was printed and circulated, and found a certain number of adherents. Unification—assuming it to be practicable—does undeniably present certain advantages over Federation, and has always, in the minds of many people, seemed a preferable form of Government. Sir George Dibbs, of course, was not the first apostle of unification—an idea which really meant little more than undoing the work of separation and re-establishing the earlier complete unity. Sir John Robertson—a typical New South Wales anti-federalist—had always expressed his willingness to welcome Victoria back as a "repentant child;" and there is reason to believe that even Sir Henry Parkes, at the very outset of his career, had some leaning to a complete amalgamation. He had soon convinced himself, however, that a federal union was the only form of union to which the assent of

the Australian colonies could possibly be secured. The history of the colonies as self-governing communities had given rise to local sentiments and local patriotisms; their several free institutions were the results of long and arduous political struggles; and any attempt to abolish the constitutions of the colonies entirely, to overthrow their existing Parliaments and their existing local independence, would be an impossible task. Nor, if possible, is it clear that it would be desirable; for unification has its disadvantages as well as its advantages. The immense areas of the different colonies, and their climatic and industrial conditions, make the preservation of their individuality highly important; whilst they also afford a strong argument against entrusting unlimited powers to a central government which, in the nature of things, cannot have complete knowledge of, nor complete sympathy with, all the different local requirements of the different colonies.

Much that Sir George Dibbs said about the omissions of the Commonwealth Bill and the desirableness of federating the railways and the debts, had a great deal of force. Still, this was criticism which did not involve the federal principle of the Bill, but merely the extent of federal control. The shortcomings which he mentioned were curable without any departure from the federal principle, and have indeed for the most part been cured by the subsequent elaboration of the Bill.

One serious blemish of the Dibbs scheme was that it deliberately contemplated dividing Australia into two sections—the large States and the small States—and denying to the latter any voice in the form of the union. New South Wales and Victoria were to frame the Constitution, and the other colonies were to accept the terms dictated, or stay outside. The impossibility of getting them willingly to consent to practical annexation was apparent; but whether—if the initial difficulty of amalgamating the two large colonies had been surmounted—the others could ever have been forced in, is highly doubtful. The irritation which such an attempt would have caused would have been, to say the least of it, an unfavourable auspice for union.

The unification idea has undoubtedly had some influence on the structure of the Constitution as it stands to-day; but not enough to satisfy the extreme unificationists, whose weight, curiously enough, has chiefly been thrown into the anti-federal scale. Sir George Dibbs' scheme has been more or less prominent, throughout the whole history of the movement, as a counterblast to the panegyrists of the Federal Constitution. It has afforded an opportunity to assert that the federalists are only half and half unionists—are in fact the "real provincialists"—and that the real unionists are those who preach an impracticable unification. But it has never been an active mission on its own account and for its own sake.

The Reid Ministry.—On 2nd August, 1894, after a general election, the Dibbs Government resigned, and next day the Reid Administration came into office. Mr. Reid immediately placed Federation on his programme, and in his manifesto to the electors of King Division declared that his Government would "lose no time in restoring the subject of Australian Federation to its rightful position of commanding

importance and urgency." He soon announced that he was in favour of a new Convention elected by the people of all the colonies, and he communicated with the other Premiers with a view to a preliminary conference. Federation, however, did not occupy the first place in the list. Matters of local legislation, and particularly the question with which the Ministerial party were most closely associated—the repeal of the Dibbs duties and the substitution of a purely freetrade tariff, with land and income taxes—took precedence. On 12th November the Premier was waited upon by a deputation from the Federation League, which placed before him Dr. Quick's scheme and the League's report upon it. He received them favourably, and declared himself deeply impressed with the merits of the two schemes; but said that as the procedure to be adopted was to be discussed with his brother Premiers, and must be the result of joint deliberations, he could not at that stage commit himself to a definite course.

Next day Sir Henry Parkes moved in the Assembly the following resolution :—"That in view of the rapid growth of Australia in the elements of national life, and the number of questions arising out of that growth which can only be dealt with adequately by a national Legislature, it is in the highest sense desirable that Parliament, without loss of time, should resume the consideration of the Federation of these colonies under one national Government." He emphasized the fact that this motion had no relation to any party, or to any personal feeling—though he hinted that there was somebody of whom he strongly disapproved. In a dignified and statesmanlike speech he urged the importance of prompt action, but oracularly refrained from any definite proposal. He deprecated, however, throwing aside the Convention of 1891, and starting afresh with any less representative body; and he insisted that every step must be made in concurrence with all the other colonies—words which excluded the Dibbs scheme, but which left his attitude with regard to the Enabling Bill process in doubt. Mr. Reid, in reply, reiterated the views he had expressed to the deputation. The debate disclosed little opposition, but not very much enthusiasm; speakers from the labour party especially maintaining that other matters were more urgent. The resolution was carried, after several hours' debate, by 55 votes to 10—the noes mostly consisting of labour members.

The Premiers' Conference.—The Conference of Premiers met at Hobart, on 29th January, 1895, the Premiers present being Mr. Reid (New South Wales), Mr. (afterwards Sir) George Turner (Victoria), Mr. (afterwards Sir) Hugh M. Nelson (Queensland), Mr. C. C. Kingston (South Australia), Sir Edward Braddon (Tasmania), and Sir John Forrest (Western Australia). The following resolutions, submitted by Mr. Reid, were carried :—

(1.) That this Conference regards Federation as the great and pressing question of Australasian politics.

(2.) That a Convention, consisting of ten representatives from each colony, directly chosen by the electors, be charged with the duty of framing a Federal Constitution.

(3.) That the Constitution so framed be submitted to the electors for acceptance or rejection by a direct vote.

(4.) That such Constitution, if accepted by the electors of three or more colonies, be transmitted to the Queen by an Address from the Parliaments of those colonies praying for the necessary legislative enactment.

(5.) That a Bill be submitted to the Parliament of each colony for the purpose of giving effect to the foregoing resolutions.

(6.) That Messrs. Turner and Kingston be requested to prepare a draft Bill for the consideration of this Conference.

Except for Mr. Nelson and Sir John Forrest, these resolutions were carried unanimously. Mr. Nelson agreed to everything except the proposal that the Constitution should be submitted for the approval of the electors of each colony; he thought that the approval of the colonies "should be obtained in such manner as each colony may prescribe in the Act authorizing such Convention." Sir John Forrest appended the following statement:—"While agreeing that Federation is the great and pressing question of Australasian politics, I am opposed to the procedure proposed to be adopted, and I am of opinion (1) that the draft Commonwealth Bill of 1891 should be first considered by the Parliaments of the respective colonies; (2) that any amendments made by the several Parliaments should be referred to a second Convention to be appointed by the several Parliaments after a general election, and that the Bill, as approved by this second Convention, be final, and be submitted for the necessary Imperial legislation."

Mr. Kingston would have preferred to begin with an Imperial Federal Enabling Act which would enable the colonies, without further Imperial legislation, to adopt any Constitution framed as above, subject only to the Royal assent. He did not, however, think that this view ought to prevent South Australia's co-operation in the scheme proposed.

On 6th February the draft Bill prepared by Mr. Turner and Mr. Kingston was "considered, amended, and agreed to as the draft of a type of Bill suitable for giving effect to the resolutions of the Conference." Mr. Reid intimated that "so soon as practicable after the reassembling of the New South Wales Parliament his Government would introduce a measure providing for the chief objects of the Bill as defined in the draft." Messrs. Turner, Kingston, Nelson, and Sir Edward Braddon intimated that as soon as New South Wales had passed the Bill they would follow suit—Mr. Nelson, however, reserving the right to dispense with the direct reference to the electors. Sir John Forrest was not present, and was not committed in any way.

The draft Bill framed by the Conference provided in detail for the procedure outlined by the resolutions; and it embodied one very important amplification of them. It provided that the Convention, after framing a draft Constitution, should adjourn for a period of not less than 30 and not more than 60 days; and that it should then reassemble, reconsider the Constitution with any amendments that might be proposed, and finally adopt it with any amendments that might be agreed to. This provision obviated the objections which the Sydney league had made to Dr. Quick's scheme. It gave time for reflection and reconsideration; it gave an opportunity for the several

colonies, through their legislatures or otherwise, to formulate their criticisms and objections; and it thus ensured a more thorough threshing out of all questions of conflicting interest. The Premiers' plan thus followed in the main the outlines of Dr. Quick's proposal.

The merits of this scheme were obvious and notable. It avoided all the great defects of the process of 1891. It secured popular interest, by providing that the members of the Convention should be elected by the people themselves, and that the Constitution should be submitted to the people themselves for acceptance. It conciliated the Parliaments by giving them a voice in initiating the process, a voice in criticizing the Constitution before its completion, and a voice in requesting the enactment of the Constitution after acceptance. In other words, whilst necessarily assigning to a single body, representative of all the colonies, the task of framing the Constitution in the first instance and finally revising it, it ensured that both the peoples and the Parliaments of the several colonies should be consulted at every stage—in initiation, in deliberation, and in adoption. And lastly, by making statutory provision in advance for every step of the process, it ensured that the matter once begun should be brought to an issue. No fuller security could have been given that the Constitution would be based upon the will of the people and of the people's representatives.

The Enabling Acts.—There was not even yet an end of all delays. The fiscal legislation of the Reid Government involved a dispute between the Houses, a dissolution, and a general election. In December, 1895, however, the new policy was carried into effect, and Acts imposing taxes on the unimproved value of land and upon incomes were passed, as well as a Customs Duties Act, which repealed the Dibbs duties of 1891, and substituted an extremely freetrade tariff. This fiscal system had afterwards an important bearing on the criticisms directed against the financial provisions of the Federal Constitution.

Meanwhile in October an Enabling Bill had been introduced, following for the most part the lines of the Premiers' draft Bill. The only alteration of importance was that the interval between the two sittings of the Convention was increased to "not less than 60 and not more than 120 days," with the object of allowing ample time for Parliamentary discussion of the Constitution. On the motion to introduce the Bill, Mr. Henry Copeland moved an amendment to the effect that the proper basis for advancing the federal movement was the consideration of the Commonwealth Bill of 1891 by means of the procedure laid down by the Convention. This proposal however received little support, and was defeated on division by 59 votes to 7. On the second reading, Mr. McMillan opposed the principle of a Convention elected by the people, arguing that the selection of a suitable combination of trained men would be better performed by Parliament; and he moved an amendment to refer the question to a Select Committee. This also was defeated, and the second reading was carried on division by 62 votes to 5.

In Committee, an amendment was moved by Mr. A. B. Piddington to provide for the selection of the representatives by a college of

federal electors; but this found no favour, and was negatived. Mr. W. M. Hughes (a labour member) moved an amendment to provide that the several colonies, instead of being represented equally in the Convention, should be represented in proportion to population; but with a maximum of ten and a minimum of five representatives. This caused considerable debate; it being argued on the one side that the Convention could not represent the people of Australia fairly unless it represented them proportionately, and pointed out on the other that the Convention did not purport to represent the people of Australia, but only the peoples of the colonies gathered together to confer on equal terms. Ultimately the amendment was negatived on division by 45 votes to 26, the minority consisting for the most part of labour members. On the question of the acceptance of the Constitution by a majority of the voters, it was argued that there ought to be some provision to prevent the Bill being accepted if the number of votes polled was not large enough to be representative. An amendment requiring a total poll of one-third of the electors was defeated by 36 votes to 17; another requiring a total poll of one-fourth of the electors was defeated by 34 votes to 14; but subsequently Mr. Reid agreed to an amendment requiring 50,000 affirmative votes.

On 11th December, the Bill was debated in the Legislative Council. Considerable opposition was manifested, but no division was taken on the Bill, which was passed with unimportant amendments, and received the royal assent on 23rd December.

There can be no doubt that the Enabling Bill would have encountered more serious opposition in both Houses had the opponents of Federation realized the importance of the step that was being taken. They misjudged the vitality of the movement, and did not anticipate the stimulating effect of placing it on a popular basis. They expected that the new Convention, if it ever met, would be as futile as the last had apparently been; and they trusted, in the last resort, to be able to secure the rejection of any Constitution which did not satisfy what they believed would be the demands of New South Wales. They thought that Federation could be trifled with again as it had been in the past; and did not foresee the irresistible momentum which the federal cause would gather, or the completeness with which it was about to sweep away minor issues, and leap to the front as the first great practical question of Australian politics.

New South Wales having redeemed her pledge and led the way, other colonies were not slow to follow. South Australia, under Mr. Kingston's leadership, took action as soon as it was clear that New South Wales was in earnest, and dealt with the Enabling Bill so promptly that it became law on 20th December—three days in advance of the mother colony. The only substantial variation in the South Australian Bill was that no minimum vote was required for the acceptance of the Constitution. The Tasmanian Bill, introduced by Sir Edward Braddon, came next, and was passed on 10th January, 1896. It required for acceptance of the Constitution a minimum affirmative vote of 6000—representing about the same proportion of voters as the New South Wales minimum. In Victoria, an Enabling

Act had been introduced by Sir George Turner in December, and had passed the Assembly almost without opposition, the division on the second reading being 71 to 4. In the Council an amendment was made which the Assembly regarded as infringing its money powers, and which resulted in a temporary deadlock. In February, however, a second Bill was introduced, which became law on 7th March, 1896. It required a minimum affirmative vote of 50,000.

Queensland and Western Australia were now being waited for. But Sir Hugh Nelson, the Queensland Premier, had meanwhile discovered difficulties in the way of passing a Bill in the form agreed upon. Queensland was tripartite in interest, the North and the Centre being arrayed against the South in their demand to be erected into separate colonies. This question of separation became interwoven with the question of Federation. The North and the Centre looked forward to Federation, not only for its own sake, but also as a step towards subdivision; whilst Brisbane and the South feared that their trade would suffer from open competition with New South Wales and its metropolis. Each of the three divisions preferred to have separate representation in the Convention rather than to trust to the chances of a single electorate. Moreover, the Government and a large section of the Parliament favoured Parliamentary rather than direct election. Sir Hugh Nelson accordingly provided in his Bill that the Queensland representatives should be elected by the members of the Legislative Assembly, grouped according to the three great districts. The Premiers of the four colonies which had substantially adopted the model Bill joined in a remonstrance against this departure from the Hobart understanding; but without avail. Sir Hugh Nelson proceeded with the Bill, but somewhat half-heartedly, without committing himself to the whole of the process, and reserving to the Parliament the right to send the Constitution to the people or not, as it pleased. He made no profession of being an ardent federalist, but argued that it could do no harm to have a voice in framing the Constitution, which they would afterwards be free to accept or reject. On the motion for the second reading, Mr. G. S. Curtis moved an amendment affirming that no Enabling Bill would be acceptable which did not provide for the election of representatives by direct popular vote. This was negatived by 36 votes to 26, and the Bill passed the Assembly in July, 1896. But in the Council it was not unnaturally claimed that if the election was to be Parliamentary, both Houses should take part in it; and accordingly the Bill was returned to the Assembly amended to that effect. The Assembly, however, denied the representative character of a nominee House. The difference between the Houses proved irreconcilable; and in November—though Mr. Reid journeyed to Brisbane to assist a settlement—the Bill was laid aside.

Meanwhile Western Australia had decided to fall partially into line with the movement, and had on 27th October, 1896, passed an Enabling Act, which, however, differed in important respects from the others. In the first place, the federal representatives of that colony were to be chosen, not by the people, but by both Houses of Parliament sitting together. And in the next place, the Constitution as framed by the Convention was only to be submitted to the people "if approved by

Parliament." The Parliament of Western Australia, therefore, only gave a conditional adherence to the Enabling process, reserving to itself the right to draw back before the final stage.

THE BATHURST CONVENTION.—A symptom of awakening public interest, and at the same time a means of stimulating that interest, was afforded in November, 1896, by a "People's Federal Convention" held at Bathurst—an unofficial assemblage to which delegates were invited from leagues and organizations of all kinds throughout Australia. The Convention numbered nearly 200 representatives, mostly from New South Wales, but including several from other colonies. Its aim was both educative and deliberative; and its chief work took the form of a detailed discussion of the Commonwealth Bill of 1891. Federation was just then, for the first time, a question in which the people could take a practical and responsible interest, because on the statute book of four colonies were Acts requiring the people first to elect representatives to frame a Constitution, and then to say "Yes" or "No" to the adoption of that Constitution. The Bathurst Convention was opportune; its proceedings were reported at length by the press, and followed with interest throughout Australia. The debates not only showed a general appreciation of the federal spirit, but contributed some really valuable suggestions—particularly in respect of the difficult question of finance. But perhaps the Convention did best service in helping to dissipate the atmosphere of suspicion which, in the minds of a section of the people, had always hung round the Commonwealth Bill. Vague impressions were abroad that the Bill was a compound of "Toryism," "Imperialism," "Militarism," and other unpopular qualities; but the Bathurst Convention, though reflecting every shade of political and social belief, failed to find these defects. The fact that the Commonwealth Bill was by general consent taken as the basis of discussion, and that it came so well out of the ordeal, helped to establish its position as a draft Constitution which must be the basis of all future deliberations.

THE CONVENTION ELECTIONS.—It was decided to wait no longer for Queensland; and 4th March, 1897, was fixed as the date for the election of federal representatives of New South Wales, Victoria, South Australia, and Tasmania. In each colony the election was preceded by a campaign; though, owing to the large size of the constituencies—each colony being one electorate for the purpose—no thorough canvass was possible, and printed addresses largely took the place of speeches.

In New South Wales the 10 seats were contested by 49 candidates. First there were a number of public men of various political faiths and constitutional views, but who may all be classed as federalists. Cardinal Moran, Roman Catholic Archbishop of Sydney, was among the candidates. Then there were the "Labour Ten," a bunch chosen by the Political Labour League of New South Wales. They insisted on a Federal Legislature of one chamber, elected on a population basis; a federal franchise giving "one man one vote;" payment of members of the Federal Parliament; elective Ministers; the Initiative and the Referendum. On these terms they were prepared to give the Federal Parliament large powers; but they announced that "on any

other conditions we are opposed to Federation." There was also a bunch of five gentlemen nominated by the "Patriotic League of New South Wales," whose patriotism was avowedly provincial, and who styled themselves "Prudent Federalists." They wished each colony to retain its provincial tariff, and objected to the Federal Government having any taxing powers, except by way of a levy on the States. The list was filled up by a few comparatively unknown candidates, of little representative importance.

The election was in no sense a party fight; and although some organizations put forward "tickets," the candidates were mostly voted for on their public reputations. The result was a triumph for the federalists, the ten representatives being elected in the following order:—Mr. Edmund Barton, Q.C.; Hon. G. H. Reid, M.L.A. (Premier); Hon. J. H. Carruthers, M.L.A. (Minister for Lands); Mr. W. McMillan, M.L.A. (ex-Treasurer); Mr. W. J. Lyne, M.L.A. (Leader of Opposition); Hon. J. N. Brunker, M.L.A. (Chief Secretary); Hon. R. E. O'Connor, Q.C., M.L.C.; Hon. Sir J. P. Abbott, K.C.M.G. (Speaker); Mr. J. T. Walker; Mr. B. R. Wise (ex-Attorney-General).

Each voter had to vote for 10 candidates; and the number of those who recorded their votes was 139,850, out of a total of some 260,000 electors—a poll not quite up to the usual standard of a general election, but very satisfactory considering the unusual conditions of the contest. Mr. Barton headed the poll with a magnificent vote of nearly 100,000, and the lowest elected candidate secured some 53,000 votes. The Labour Party, with their impossible programme, were very low in the list; though their leader, Mr. J. S. T. McGowen, polled some 40,000 votes, and would doubtless have been higher but for the bold attempt of his "bunch" to capture the Convention. The "Prudent Federalists" were nowhere. But though all the selected candidates were federalists, it cannot be said that the election disclosed any definite "mandate" as to constitutional principles.

In Victoria 29 candidates were nominated. The voting, on the whole, was more on party lines than in New South Wales—the "tickets" of the *Argus* and the *Age*, the two daily morning newspapers of Melbourne, being voted extensively; yet the polling was not nearly so heavy—votes being recorded by only 99,108 electors out of some 238,000 on the rolls. The ten representatives were elected in the following order:—Hon. Sir George Turner, K.C.M.G., M.L.A. (Premier); Dr. John Quick (ex-M.L.A.); Hon. Alfred Deakin, M.L.A. (ex-Minister); Hon. A. J. Peacock, M.L.A. (Chief Secretary); Hon. I. A. Isaacs, M.L.A. (Attorney-General); Mr. W. A. Trenwith, M.L.A.; Hon. Sir Graham Berry, K.C.M.G. (Speaker); Hon. Simon Fraser, M.L.C.; Hon. Sir William A. Zeal, K.C.M.G. (President Legislative Council); Mr. H. B. Higgins, M.L.A.

In South Australia there were 33 candidates. The elected representatives were:—Hon. C. C. Kingston, Q.C., M.L.A. (Premier); Hon. F. W. Holder, M.L.A. (Treasurer); Hon. J. A. Cockburn, M.L.A. (Minister for Education); Hon. Sir R. C. Baker, K.C.M.G. (President Legislative Council); Hon. J. H. Gordon, M.L.C.; Mr. J. H. Symon, Q.C. (ex-Attorney-General); Hon. Sir John W. Downer, Q.C.,

K.C.M.G., M.L.A. (ex-Premier); Mr. P. McM. Glynn; Hon. J. H. Howe, M.L.A. (ex-Minister); Mr. V. L. Solomon, M.L.A.

In Tasmania there were 32 candidates; and owing to the comparatively small area of the colony a larger proportion of the electors than elsewhere could be reached by public meetings—a circumstance which contributed much to the federal education of the people. The elected representatives were:—Hon. Sir Philip O. Fysh, K.C.M.G., M.H.A. (Treasurer); Hon. Sir Edward N. C. Braddon, K.C.M.G., M.H.A. (Premier); Hon. Henry Dobson, M.H.A. (ex-Premier); Hon. John Henry, M.H.A. (ex-Treasurer); Hon. N. E. Lewis, M.H.A. (ex-Attorney-General); Hon. Nicholas J. Brown, M.H.A. (Speaker); Hon. C. H. Grant, M.L.C.; Hon. Adye Douglas (President Legislative Council); Hon. William Moore, M.L.C. (Chief Secretary); Mr. M. J. Clarke, M.H.A.

The first meeting of the Convention was fixed for 22nd March; and on 12th March, almost at the last moment, the West Australian Parliament amended its Enabling Act, so as to allow the more speedy selection of the representatives of that colony. Next day the polling took place, the members of both Houses electing the following representatives:—Hon. Sir John Forrest, K.C.M.G., M.L.A. (Premier); Hon. Sir James G. Lee-Steere (Speaker); Mr. George Leake, M.L.A. (Leader of Opposition); Hon. F. H. Piesse, M.L.A. (Commissioner of Railways); Hon. J. W. Hackett, M.L.C.; Mr. W. T. Loton, M.L.A.; Mr. W. H. James, M.L.A.; Mr. A. Y. Hassell, M.L.A.; Mr. R. F. Sholl, M.L.A.; Hon. J. H. Taylor, M.L.C.

(10) ADELAIDE SESSION OF THE CONVENTION, 1897.

The first meeting of the Convention took place at Adelaide on 22nd March, 1897; though the West Australian representatives did not arrive till four days later. Before the Convention opened, each delegation met to consult, and then all the members held a private caucus for the preliminary discussion of methods of procedure. The representatives met at noon in the House of Assembly Chamber, when the Clerk of the Parliaments (Mr. E. G. Blackmore) read the proclamation convening the Convention, and the representatives present signed the roll. Mr. Kingston, as Premier of the colony in which the Convention was held, was appointed President, and Mr. E. G. Blackmore Clerk of the Convention.

The first thing to decide was whether the Convention should openly take the Bill of 1891 for its basis, and work upon that, or should proceed to originate a new Constitution. It leaked out that the caucus had decided to begin by discussing general resolutions, and then appoint a Committee to draft a Bill; but the matter was discussed again in Convention. Each plan had its advantages, and opinion was divided. It was obvious that any new draft would borrow largely from the old, and some of the members thought it merely affectation, as well as waste of time, to throw aside a Bill which admittedly would make an excellent foundation. But the argument

prevailed that the Convention, having been chosen by the people to "frame" a Constitution, would best carry out its mandate, and best earn the confidence of its constituents, by beginning at the beginning, and not formally building its work on the foundations, however excellent, laid down by others.

Federal Resolutions.—The Convention was as yet "a Parliament without an Executive." Sir George Turner suggested that Mr. Barton should be entrusted with the task of drawing up preliminary resolutions; and at a further suggestion by Mr. Symon, Mr. Barton undertook the duties of "Leader of the Convention." His first step was to move a series of resolutions enunciating a few leading principles and the general outlines of a Constitution, almost exactly in the form of Parkes' resolutions of 1891. One new feature, however, was a preliminary affirmation, understood to have been suggested by Mr. Wise, that the purpose of the union was "to enlarge the powers of self-government of the people of Australia." The debate on these resolutions occupied seven sitting days, and had the important practical result of bringing the members of the Convention into touch with one another, and of making known their different views. Mr. Barton, in an admirable speech, appealed to the Convention to approach the question with an open mind and in a spirit of compromise; and explained that the object of the resolutions was to have a preliminary debate wide enough in its scope to bring out every view and opinion on the main issues, and yet to avoid, at this stage, any final judgment upon non-essentials. He touched upon the different features of the resolutions, in a non-contentious way; but thought it more important for the new members, whose opinions were not on record, to have an opportunity of being heard. Sir Richard Baker followed with a weighty presentation of the argument for giving the Senate equal power with the House of Representatives. Responsible Government was, he said, inconsistent with true Federation; it would either kill Federation or Federation would kill it. No Government could carry on if it needed majorities in both Chambers; and if it were only responsible to one—if one Chamber were to predominate—the whole principle of Federation would be gone. Responsible Government had never been tried in a Federation—for Canada was none—and was inconsistent with the essential conditions of Federation. He therefore favoured the Swiss form of Executive.

Sir George Turner set the example of giving his views in greater detail. He indicated his attitude on most of the debatable questions, and from then onward the debate spread over the whole ground covered by the resolutions. A few points of difference began to loom up and assume importance from the first. Foremost among these was the power to amend money Bills, as to which it soon became apparent that the representatives of the larger and the smaller colonies were both disinclined to compromise. The representatives of the small colonies stood out for a strong Senate, and were disposed to let Responsible Government take its chance. The representatives of the large colonies either denied Sir Richard Baker's premiss that two Houses with equal powers were necessary for an ideal Federation, or argued that the ideal must be sacrificed to practical necessities.

The need of some provision for deadlocks was forcibly urged by the Victorians. Both a joint sitting and a dissolution of the Senate were suggested, but the preference seemed to be for some form of referendum—the Victorian Premier and his Attorney-General, Mr. Isaacs, especially favouring a dual referendum to the people and the States. By other members, every deadlock provision was objected to as destroying the Senate's power to protect State interests. The financial question was debated at some length—especially by Mr. Holder, Mr. McMillan, Sir Phillip Fysh, and Mr. Walker—but rather by way of stating the difficulties than of solving them. The debate closed on 31st March, when Mr. Barton replied, and the resolutions were carried.

Although the resolutions were practically those which had been debated in 1891, this discussion was by no means a waste of time. It showed that the point of view had moved onward considerably in these six years; and whilst on certain matters—such as the money Bill question—which had been thoroughly threshed out in the former Convention, there was little new light to be had, yet on matters which had previously been touched slightly or not at all, the debates showed a preparedness to come to closer quarters. It was now possible to proceed to frame a new Bill on lines which the opinion of the new Convention seemed to suggest.

Select Committees.—The next step was to frame a first draft of the new Bill; and for this purpose Mr. Barton moved resolutions for apportioning all the members of the Convention among three Committees. Committee No. 1, for the consideration of constitutional machinery and the distribution of functions and powers, was to consist of four members from each delegation; Committee No. 2, for the consideration of provisions relating to finance, taxation, railways, and trade regulations, of three members from each delegation; and Committee No. 3, for the consideration of provisions relating to the establishment of a federal judiciary, of two members from each delegation; whilst the several Premiers were to be *ex officio* members of each Committee. The Finance and Judiciary Committees were to report to the Constitutional Committee, which was then to prepare and submit to the Convention a draft Constitution Bill. The various delegations then selected their members for the different Committees, which were formed as follows:—

Constitutional Committee.—*New South Wales:* Sir Joseph Abbott, Mr. Barton, Mr. Carruthers, Mr. O'Connor. *Victoria:* Mr. Deakin, Mr. Isaacs, Dr. Quick, Mr. Trenwith. *South Australia:* Sir Richard Baker, Dr. Cockburn, Sir John Downer, Mr. Gordon. *Tasmania:* Mr. Brown, Mr. Douglas, Mr. Lewis, Mr. Moore. *Western Australia:* Mr. Hackett, Mr. Hassell, Sir James Lee-Steere, Mr. Sholl.

Finance Committee.—*New South Wales:* Mr. Brunker, Mr. Lyne, Mr. McMillan. *Victoria:* Sir Graham Berry, Mr. Fraser, Sir William Zeal. *South Australia:* Mr. Holder, Mr. Howe, Mr. Solomon. *Tasmania:* Sir Phillip Fysh, Mr. Grant, Mr. Henry. *Western Australia:* Mr. Loton, Mr. Piesse, Mr. Taylor.

Judiciary Committee.—*New South Wales:* Mr. Walker, Mr. Wise. *Victoria:* Mr. Higgins, Mr. Peacock. *South Australia:* Mr.

Glynn, Mr. Symon. *Tasmania:* Mr. Clarke, Mr. Dobson. *Western Australia:* Mr. James, Mr. Leake.

The Judiciary Committee finished its work on 6th April; in the other two Committees the debates were somewhat prolonged, and they did not finish till 8th April. Then a Drafting Committee, appointed by the Constitutional Committee, and consisting of Mr. Barton, Sir John Downer, and Mr. O'Connor, prepared a Bill, which was submitted to the Convention on 12th April.

The First Adelaide Draft.—Mr. Barton, who was chairman of both Constitutional and Drafting Committees, brought the Bill up, and on the motion to consider it in Committee he explained its provisions categorically, with special reference to the points in which it differed from the Bill of 1891.—Conv. Deb., Adel., pp. 432-59.

The framework and form of the Bill followed closely the Bill of 1891, which the draftsmen had "endeavoured to treat as reverently as possible." To facilitate reference, however, the numeration of clauses, instead of beginning afresh with every chapter, was made consecutive through the whole Constitution. The chief differences from the Bill of 1891 were as follows:—

A change in nomenclature had been made by substituting the more expressive and more accurate term "States Assembly" for "Senate." As to the constitution of the States Assembly, the important change—previously recommended by the Bathurst Convention—had been made, of substituting, for election by the Parliaments, direct election by the people of each State as one electorate. The States Assembly was to be composed of six members from each State.

The Parliament.—For the House of Representatives, in place of the quota of one representative for every 30,000 people, alterable by Parliament, there was a provision for calculating the quota in such a way as to make the number of members as nearly as practicable twice the number of the members of the States Assembly. The minimum of representatives to which any State should be entitled was raised from four to five. The duration of the House of Representatives was extended from three to four years; and the salary of members of both Houses was reduced from £500 to £400. The federal franchise in each State was, "until the Parliament otherwise provides," to be that of the State, but without plural voting. The power thus given to the Parliament to supersede the State franchises (at federal elections) by a federal franchise was a recognition, which the Bill of 1891 had not contained, that the national franchise was a matter of federal concern. This principle was emphasized by the prohibition of plural voting.

The legislative powers of the Parliament were somewhat extended. New powers were given to make laws with respect to astronomical and meteorological observations, fisheries in intercolonial rivers, insurance, parental rights and the custody and guardianship of infants. The sub-clause giving legislative power as to the status in the Commonwealth of foreign and other corporations was extended to cover the general subject of foreign and trading corporations. In place of the sub-clause as to river navigation with respect to common purposes was a new provision giving the Parliament a far wider legislative power as to "the control and regulation of navigable

streams and their tributaries within the Commonwealth, and the use of the waters thereof." On the other hand, the control of railways with respect to "transport for the purposes of the Commonwealth" was, to prevent misconception as to the extent of the power intended to be given, defined to apply to "military purposes" only.

Money Bills.—One of the most important changes of all was in the powers of the Senate to amend Money Bills. In the Constitutional Committee, the representatives of the two most populous colonies had been outvoted, and the "compromise of 1891" had been set aside. The settlement reached in 1891 had been that the House of Representatives should have the sole power to originate bills appropriating revenue or imposing taxation, and that the Senate should have no power to amend Bills imposing taxation or appropriating the necessary supplies for the ordinary annual services, but might instead suggest amendments in such Bills. The exclusive originating power of the House of Representatives was now cut down to Bills "having for their main object" the appropriation of revenue or the imposition of taxation; and the provision that the Senate should not amend Bills imposing taxation was struck out altogether.

Responsible Government.—A further safeguard was introduced to ensure the responsibility of Ministers to Parliament. In addition to the provision that Ministers of the Commonwealth should be capable of sitting in Parliament, it was expressly provided—following a provision of the Constitution of South Australia—that no Minister should hold office for more than three months without a seat in Parliament.

Judiciary.—The judiciary clauses, though rearranged, were not seriously altered. The term "The High Court of Australia" was substituted for "The Supreme Court of Australia;" and the High Court, instead of being left to the Parliament to establish, was established by the Constitution itself. A new power was given to "invest with federal jurisdiction" courts other than those established by the Commonwealth. Under the Bill of 1891, the Parliament might provide that appeals which had previously been allowed from the State Courts to the Privy Council should for the future be brought to the Supreme Court of Australia; the new Bill went further, and embodied this transfer of appellate jurisdiction in the Constitution itself.

Finance.—The financial clauses were considerably altered. In the first place, a new provision was inserted requiring uniform customs duties to be imposed within two years after the establishment of the Commonwealth. As regards the basis of distributing the surplus revenue of the Commonwealth, three periods must be distinguished:—(1) Before the imposition of uniform duties; (2) for five years after the imposition of uniform duties; (3) after that period. For these three periods the basis of distribution was to be as follows:—

(1) Before the imposition of uniform duties (that is, so long as the provincial tariffs should remain in force) each State was to be credited with the revenues collected in it from customs and excise duties, and from "the performance of the services and the exercise of the powers" transferred to the Commonwealth. Each State was to be debited with the expenditure of the Commonwealth in respect of these duties, services, and powers, and also with a population share of

the expenditure of the Commonwealth in the exercise of its original powers. The balance due to each State was to be paid monthly.

(2) During the first five years after the imposition of uniform duties, expenditure was to be charged in the same way, and revenue was still to be credited to each State on the basis of its contributions. But with a federal tariff and intercolonial freetrade, the State in which customs duty was paid would not necessarily be the State in which the dutiable article was consumed; and it was therefore provided that, notwithstanding the abolition of intercolonial tariffs, an account should be kept of imported dutiable articles passing from one State to another, and the duty chargeable thereon should be credited to the consuming State, and not to the State in which the duty was collected.

(3) After that period, all expenditure was to be charged, and all surplus revenue distributed monthly, in proportion to population.

The differences between this system and the system of 1891 were shortly these: under the Bill of 1891 all expenditure was to be charged in proportion to population, there being no distinction between expenditure in connection with transferred services and expenditure in connection with original powers. Moreover, under the Bill of 1891 the second period, instead of being fixed for five years, was to last only "until the Parliament otherwise prescribes;" and though it was no doubt contemplated that Parliament would ultimately prescribe the population basis, it was not imperatively required to do so.

Other novel provisions of great importance were inserted, in the direction of guarantees that the Commonwealth should be economical in expenditure, and should return to the States a substantial share of the surplus revenue. A clause was inserted that for four years after the establishment of the Commonwealth (*i.e.*, practically during the prospective life of the first Parliament) the total yearly expenditure of the Commonwealth in the exercise of its original powers and its transferred powers respectively should not exceed certain specified sums—which at this stage were left blank, but which were afterwards filled in by the figures £300,000 for original powers, and £1,250,000 for transferred powers. (Conv. Deb., Adel., pp. 1053-6. The sum of £1,250,000 was intended to represent, not gross expenditure, but the excess of expenditure over revenue, other than taxation revenue, derived from the transferred services.) This provision had been suggested in the Finance Committee by Mr. Reid in order to indirectly satisfy the demands of the colonies which required a guarantee that their provincial finances would not be unduly disturbed, and at the same time to avoid imposing on the Commonwealth the necessity—which would have been very obnoxious to freetraders—of raising heavy taxation through the Customs. The clause was supplemented by a further "guarantee" that during the first five years after the imposition of uniform duties the *aggregate* amount to be paid to the States for any year should not be less than the aggregate amount returned to them during the year last preceding the imposition of such duties. This was a compromise which, with the help of the clause limiting federal expenditure, Mr. Reid and his New South Wales colleagues on the Finance Committee had succeeded

in obtaining. Some of the other colonies had required the guarantee to be for each State individually, instead of for all in the aggregate, which would have thrown a far heavier obligation on the Commonwealth; but in view of the strong objections from New South Wales the lesser guarantee had been accepted.

Equality of Trade.—In the clauses dealing with equality of trade, the prohibition of preferences was practically the same as before; but in place of empowering the Parliament to annul State laws derogating from freedom of inter-State trade, the new Bill contained an express provision that any law of the Commonwealth or a State which had the effect of derogating from such freedom should be null and void. Parliament was also empowered to establish an Inter-State Commission to maintain and execute, upon railways and inter-State rivers, the provisions of the Constitution relating to trade and commerce. The members of the Commission were to be appointed in the same way and on the same tenure as the Justices of the High Court, and the Commission was to have such necessary powers of adjudication and administration as the Parliament should give it: but with the important limitation that it was to have no powers in reference to any railway rates or regulations unless they were "preferential in effect and made and used for the purpose of drawing traffic to that railway from the railway of a neighbouring State." This was the first definite form of words proposed for the difficult purpose of forbidding unfair competition by the railways of the several States, whilst reserving to each State the control and general management of its own railway system.

State Debts.—The clause empowering the Federal Parliament, with the consent of the States, to take over the whole or part of the debts of the States, was practically the same as in the Bill of 1891; though it seems that some members of the Finance Committee interpreted their instructions to the Drafting Committee as giving the power to take over the debts without such consent.—Conv. Deb., Adel., p. 453.

State Governors.—In the chapter relating to "The States," the clause requiring that all communications by the Governors of the States to the Queen should be made through the Governor-General was omitted; as was also the clause empowering the State Parliaments to determine the mode of appointment of the Governors. Both these clauses were thought to be an unnecessary interference with the State Constitutions.

Amendment.—Lastly, an important change was made in the mode proposed for amending the Constitution. Every amending law was first to be passed, as before, by an absolute majority of each House of the Parliament; but it was then to be submitted, not to State Conventions, but to the electors of the several States, and was not to be presented for the Royal assent unless approved by the electors of a majority of States, and unless the people of the approving States were also a majority of the people of the Commonwealth.

Mr. Barton having expounded the draft Bill, and explained that it represented not necessarily his own or his co-draftmen's views, but resolutions of the several Committees, no time was lost in general debate, but the motion to go into Committee was carried, and Sir

Richard Baker, who had already been appointed Chairman of Committees, took the chair amidst cheers.

The Bill in Committee.—Proceedings in Committee opened with a motion by Sir John Forrest to postpone all clauses up to clause 52 in order that the Money Bill clauses might be taken first. The West Australian delegates, on account of a general election in that colony, would have to leave on 14th April. The burning question of the power of the Senate to deal with Money Bills was practically a battle between New South Wales and Victoria on the one hand, and the three less populous colonies on the other. As the Convention was constituted, the latter were in a majority; in the Constitutional Committee they had gained the day, and they could do so again in Convention. But with the West Australian delegates absent, the tables would probably be turned; hence their desire to settle the question at once. The propriety of taking this course had already been discussed some days before, when it had become clear that a large majority of the Convention would support Sir John Forrest's motion, and it was now carried with but little protest.

Money Bill Clauses.—Then, on 13th April, commenced the last great debate on the Money Bill clauses—a debate which, though it occupied but two days, was certainly the most momentous in the Convention's whole history. It established the recognition by the Convention of the fact that it was a negotiating, and not a legislative, body; that the decision of a majority of representatives within that Chamber went for nothing unless it were a decision which was acceptable to the people of all the colonies. Had that fact and its consequences not been recognized, the present prospects of Federation must have been wrecked, and at the outset there seemed some danger that this might happen. Sir John Forrest, for the small States, announced cheerfully and often that "we have a majority;" and it seemed for a time that the equal representation of the colonies in the Convention—a necessary principle in an assemblage of contracting States—would exercise an undue influence on the form of the Constitution. The recognition of the fact that they must defer to the wishes of majorities outside marked the turning point of the Convention, and the entry of the really federal spirit of compromise—a spirit which thenceforward grew, slowly but steadily, through all the sittings of the Convention, and spread from the Convention to the people.

The real debate began with an amendment by Mr. Reid to insert a prohibition against the Senate amending "laws imposing taxation," and thus revert to the "compromise of 1891." He was prepared to give the Senate—"not as an antiquated power, never to be used, but as a real living power"—the right of rejection; but the power of moulding finance must be with the House of Representatives. Sir George Turner followed, and said emphatically that he had gone a long way in conceding equal representation in the Senate, and that to give the Senate the power of amending taxation Bills was a proposition which he dare not submit to the people of Victoria, and which, if he did submit it, they would never accept. Sir John Downer, on the other side, argued that he was only asking for terms which existed in every legitimate Federation in the world. Mr. Kingston was the first

to stand out from his South Australian colleagues, and adhere to the "compromise of 1891," which had been deliberately arrived at after deep consideration, and any departure from which would imperil the cause of Federation. Mr. McMillan, on the other hand, differed from his New South Wales colleagues, on the ground that a revising Chamber, without the amending power, is ineffectual. With these exceptions the ranks of the opposing colonies seemed unbroken, till Mr. Glynn announced that as a representative, and not a delegate, he deemed it his duty to give way. Mr. Carruthers carried the war into the enemy's camp, proposed to deny the Senate even the power of suggesting amendments, and withdrew his assent to equal representation in the Senate. Later on Mr. Henry, the last speaker of the day, announced his secession from the fast dwindling majority, and thought that he could support Mr. Reid's amendment without emperilling State rights. Nevertheless, had the vote been taken that evening, the amendment would assuredly have been defeated. But Mr. Barton, thanks to a providential catarrh, induced the Committee to report progress, and a night's reflection turned the tide. When the Convention met next morning the battle was practically won, and Mr. Barton clinched the victory by a forcible appeal to the representatives of the small States not to take a step which the people of the two great colonies would regard as an ultimatum, and which would inevitably imperil the chances of union. Mr. Kingston supported him, and scored a palpable hit by pointing out that the Parliament of South Australia, when dealing in Committee with the Bill of 1891, had raised no objection to the "compromise," and that there had never been any indication that the people disapproved of it. Two Tasmanians, Mr. Brown and Mr. Lewis, in the interests of Federation, declared for the amendment; and Mr. McMillan, for the same reason, determined to vote with his colleagues. On division, Mr. Reid's amendment was carried by 25 votes to 23.

The Federal Parliament.—The name "States Assembly" had already been rejected in favour of the more familiar "Senate;" and now Mr. Higgins proposed an amendment providing that each State should be entitled to a number of Senators to be determined by a sliding scale, intermediate between equal and proportional representation. His argument was that "State rights" were protected by the limitation of federal powers in the Constitution, and that in the defined sphere of national legislation State lines ought to be obliterated. To this it was replied that the true justification of equal representation was, not that it was a theoretically ideal principle, but that it was a matter of terms and conditions between equal contracting parties. The amendment was defeated by 32 votes to 5. Soon afterwards Mr. Solomon proposed a similar sliding scale for the House of Representatives, but this was promptly negatived.

The question of the federal franchise raised some discussion. Mr. Holder first proposed an amendment to give every adult man and woman a vote; but this was criticized as being a rash experiment, and an attempt at dictation which would probably be resented in some of the colonies. It was negatived by 23 to 12. He then, by way of compromise, proposed that "no elector now possessing the right to

vote shall be deprived of that right"—the object being to ensure that the Federal Parliament, if it should exercise its powers of fixing a federal franchise, should not disfranchise the women of South Australia. This was strongly opposed, not only as being too wide, but also as preventing the Federal Parliament from framing a uniform franchise except by including women's suffrage. Mr. Holder eventually withdrew this in favour of a provision—drafted, though not approved, by Mr. Barton—which was carried on division by 18 votes to 15, and which now forms sec. 41 of the Constitution. In effect, it guarantees to every State elector a federal vote; so that the Federal Parliament, though it can give the right to vote at federal elections, cannot withhold that right from any elector of a State.

In the legislative powers of the Federal Parliament several changes were made. "Telephonic and other like services" were added to telegraphs; but an amendment by Mr. Holder, to limit the postal and telegraphic power to services "without the boundaries of the Commonwealth"—reserving to the States the control of internal and inter-State services—was defeated by 30 votes to 5. The power as to river fisheries was omitted. An effort by Mr. Higgins to insert a new sub-clause dealing with "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of the State concerned" was negatived by 22 votes to 12.

The River Question.—The chief debate on Legislative powers was in connection with the sub-clause, inserted by the Constitutional Committee, "The control and regulation of navigable streams and their tributaries within the Commonwealth and the use of the waters thereof." Mr. Gordon, who was responsible for the sub-clause, proposed to cast it into a somewhat less sweeping form by restricting it to the Rivers Murray, Darling and Murrumbidgee, and their tributaries.

The debate which followed, and which was only preliminary to a keener and more prolonged debate at the Melbourne sitting, needs for its explanation a short statement of the peculiarities of this great river system, and of the interests of the several colonies in it. The one great river system of Australia extends through four colonies —Queensland, New South Wales, Victoria, and South Australia. Its watershed embraces almost the whole of New South Wales, except the narrow strip east of the dividing range; whilst some of the sources of the Darling are in Queensland, and some of the sources of the Murray are in Victoria. The lower part of the united stream runs for some hundreds of miles through South Australia to the sea. Thus the chief catchment area is in New South Wales, and the outfall in South Australia. The peculiarities of these rivers, and the causes which affect their flow, are as yet very imperfectly understood. The Darling is intermittent; sometimes a broad navigable stream, stretching into immense backwaters and billabongs; sometimes a mere chain of waterholes. It is fed by the irregular tropical rainfalls of Queensland, and by the lighter and still more uncertain rains of New South Wales. The Murray has a more reliable source in the snows of the Great Divide, and is generally navigable as far as Echuca. In a country of vast distances, scanty rainfall, and unlimited thirst, these

rivers are of immense importance both as highways of commerce and as channels for the water necessary for the development and settlement of the land; whilst the problem of their best utilization for either purpose involves vast schemes and undertakings.

Of the colonies represented in the Adelaide debate, Tasmania was a disinterested onlooker, Victoria was concerned to a certain extent, and the real issue was between South Australia as claimant and New South Wales as defendant. South Australia's interest was mainly in the maintenance and improvement of a navigable highway of the utmost importance to her trade with New South Wales and Victoria; whilst New South Wales was impressed with the supreme importance of the waters of the rivers for the development of her territory. Extensive irrigation works in Victoria, and great conservation schemes in New South Wales, had alarmed South Australia; there had been much correspondence between the Governments and a Royal Commission in Adelaide, but South Australia's claim to definite riparian rights had not received much recognition.

Mr. Gordon's contention was that riparian rights between neighbouring States were based on natural justice, and recognized by international law; and that the great river system of Australia, with all its tributaries, could only be dealt with justly by federal control. There were riparian rights between States as well as between individuals, and they ought to be defined by the Federal Parliament. Mr. Carruthers, the New South Wales Minister for Lands, pointed out that the Australian rivers were unique, and English riparian laws utterly inapplicable. New South Wales was responsible for the settlement of territory, and could never be persuaded to give up control of the water. Mr. Gordon protested that he only asked for "a tribunal;" but Mr. Deakin pointed out that there were no settled principles which a tribunal could apply, and urged "the unwisdom of endeavouring to include in the Federal Constitution the settlement of a problem such as this—the acquirement, in point of fact, under this Constitution of a legal right where at present no legal right exists or is enforceable." The New South Wales delegates were prepared to grant federal control, for purposes of navigation, of rivers forming a boundary between States—practically, that is, of the Murray; but they protested against the Federal Government being able to impound waters wholly within a colony—against New South Wales being made, in Mr. Reid's phrase, "a catchment area for South Australia." Sir John Downer and Mr. Symon were prepared to accept this, and Sir John Downer moved an amendment to make the sub-clause apply only to "rivers running through or on the boundaries of two or more States, so far as is necessary to preserve the navigability thereof." Mr. Reid, however, objected to the phrase "preserve the navigability," as being dangerous and ambiguous. To regulate navigation was one thing, to "preserve navigability" another; and in the case of rivers now intermittently navigable might mean anything. Sir John Downer's amendment was negatived by 24 votes to 10, and the sub-clause was then negatived by 25 votes to 10.

Mr. Gordon then proposed a new sub-clause, "The control of the navigation of the river Murray, and the use of the waters thereof."

An amendment by Mr. O'Connor, to omit the words relating to the use of the waters, was negatived, and an amendment by Mr. Carruthers to add "from where it forms the boundary between Victoria and New South Wales to the sea," was carried. In this form the sub-clause was agreed to. The decision of the Adelaide Convention was therefore to give no express federal control of rivers generally, but only of the Murray from where it first forms an inter-State boundary.

Railways.—Doubts had already been expressed whether the sub-clause empowering the Federal Parliament to deal with matters referred to it by the States would extend to the taking over of the railways; and accordingly on re-consideration sub-clauses were added by Mr. McMillan to allow the Commonwealth, with the consent of a State, to take over the railways of the State on terms arranged between them, and also to undertake railway construction and extension with the consent of the States concerned. But an amendment by Mr. Walker, to include the railways among the departments taken over at the outset, was negatived by 18 to 12.

The Finance Clauses.—In the financial clauses some important amendments were made, though the debates were short. This part of the Bill was reached on 19th April; and on the clause dealing with the distribution of the surplus, Mr. McMillan explained the difficulties which the Finance Committee had had to meet. These difficulties arose out of the widely different fiscal policies of the colonies. Three of them were, in different degrees, distinctly protective; Western Australia, being at present chiefly engaged in the mining industry, was in the abnormal position of raising nearly all her revenue through the customs; whilst New South Wales was absolutely freetrade. Until the imposition of the uniform tariff, the distribution of the surplus would be chiefly a matter of book-keeping, and would present no special difficulties. The question was how to introduce the uniform tariff without dislocating the finances of the States. If the debts were taken over, or if an equivalent minimum return of surplus to the States were guaranteed, New South Wales would be placed in a difficult position, because this would practically mean dictating the fiscal policy of the future. In any case, there must be a federal tariff which would considerably increase customs duties for the people of New South Wales; and for the first few years, till trade had time to adjust itself, New South Wales would pay a disproportionate amount through the customs, and would lose heavily by a *per capita* system of distribution. Therefore the Finance Committee had been driven to adopt for five years "this detestable system of book-keeping" —which, though perfectly fair, would be "a great nuisance." He believed that the only way was to leave the problem of distribution to the Federal Parliament as "the great negotiator."

Mr. Holder followed, and developed the question from the point of view of the small States. The small States did not know how, without the customs revenue, they could make both ends meet; and his point was—"while we would like from the point of view of the Federal Treasurer to leave him free, we cannot from the point of view of the States." They could not leave the Commonwealth free to adopt a

purely freetrade tariff which would destroy the customs revenue and ruin the States. With a Senate strong enough to insist on the interests of the small States, he would have trusted the Federal Parliament; as it was, he preferred to tie the hands of the Federal Treasurer rather than risk the solvency of the States. He believed that ultimately the *per capita* system would be fair, and he would like meanwhile to see some plan which would obviate the objectionable book-keeping. As to the "guarantee" question, he objected strongly to the clause limiting expenditure, and made a suggestion—which contained the germ of what was afterwards known as the "Braddon clause"—that the Commonwealth should return to the States a fixed percentage, say 70 per cent., of the customs revenue collected.

Sir George Turner then took up the discussion, and objected to Mr. McMillan's suggestion as simply shelving the difficulty and giving out to all Australia that it was insoluble. To secure support for the Bill, they must propound something definite. There must be a fixed minimum amount to be returned. He would like to see, in place of the guarantee of an aggregate amount, a guarantee to each State of an amount equal to what it received before the uniform tariff. They might fix a percentage to be returned, in order to guard against federal extravagance, and fix a minimum return, in order to guard against an insufficiency of federal taxation. As to the basis of distribution, he too did not like the book-keeping, and would welcome some arrangement to dispense with it.

Mr. Reid came last, and argued that a *per capita* basis would, for some years, mean a heavy loss to New South Wales, whilst industry and commerce were adjusting themselves to the new conditions. At the same time, he was anxious to abolish the book-keeping system as soon as possible, and would agree to a sliding scale, ending in the *per capita* system after five years. He objected to fixing any minimum return, or to loading the Commonwealth with the debts. New South Wales was prepared, with the odds against her, to trust the fiscal question to the Federal Parliament; she was not prepared to give the Commonwealth burdens which would compel a high tariff. Mr. Holder, Sir George Turner, and Mr. Reid having expressed a willingness to confer in order to devise a scheme for dispensing with the book-keeping system, Mr. Barton secured the postponement of the financial clauses in order that the Treasurers might consult together on the subject.

On 21st April, the debate was resumed. First of all Sir Philip Fysh moved an amendment providing that in place of the "guarantee" to the States of an aggregate minimum, there should be a guarantee to each individual State of the amount it received before the uniform tariff. Mr. Reid opposed this stoutly as involving a gigantic system of taxation for the purpose of meeting the possible requirements of one small State. Sir George Turner, who had previously favoured this plan, admitted the force of the New South Wales arguments, and the amendment was negatived on the voices.

Then Mr. Reid brought up the proposal of the Treasurers for shortening the book-keeping period. This was based on a sliding scale, by which the apportionment of revenue, beginning on the book-

keeping or contribution basis, would slide in five years to a *per capita* basis. Accounts were to be kept on the borders for one year only after the imposition of a uniform tariff. That year was to be taken as a test of the inequalities of contribution; and on the assumption that those inequalities would steadily decrease, and would disappear in five years, it was provided that the apportionment of revenue should scale down in five years from the basis shown by the test year to a *per capita* basis.

This plan, which had been chiefly worked out by Mr. Holder, was strongly recommended to the Convention, and was adopted with very little discussion. The result was that the preliminary basis, for the period prior to the uniform tariff, remained unaltered; the final basis, after five years from the uniform tariff, also remained unaltered (see p. 169, *supra*); but for the intermediate period, instead of five years' book-keeping on the borders, there was to be only one year's book-keeping, followed by four years' scaling down from the contribution basis, which ruled before the uniform tariff, to the *per capita* basis which was to rule ultimately.

The only other important financial discussion was in connection with taking over the public debts of the States. The clause as submitted to the Convention provided that the Parliament might, with the consent of any State, take over the whole or any part of the public debt of the State. Sir George Turner, with most of the Victorians, thought it ought to be compulsory to take over all the debts; but in view of Mr. Reid's strong objection to this course, as dictating a high tariff, he did not press this proposition. He still urged, however, that the Parliament ought to take over all or none, and ought not to have the power of favouring some States in preference to others. The arguments against compulsory federalization of debts were two:—(1) That it would amount to a permanent endowment of the States, and would thus dictate a high tariff policy; (2) that it would make a present of the federal credit to the bond-holders, and prevent the Federal Treasurer being able to bargain for a profitable conversion before maturity. On Sir George Turner's motion, the words requiring the consent of the States, and also the words empowering the Parliament to take over "any part" of the debt of a State, were struck out. In order, however, to give a wider discretion to the Parliament and at the same time prevent unequal treatment of the States, it was provided that a "ratable proportion" of the several debts, on a population basis, might be taken over. The application of the clause was also restricted to debts "existing at the establishment of the Commonwealth." The clause as passed, therefore, did not compel the taking over of the debts, but empowered the Federal Parliament, at its own discretion, to take over the debts of all the States as existing at the establishment of the Commonwealth, or a ratable proportion thereof.

Railway Rates.—A somewhat indefinite debate took place on the subject of preferential rates. On the clause prohibiting derogation from freedom of inter-State trade, Mr. Gordon moved an amendment trying to define with some minuteness an unfair preference. The test by which he proposed to determine the fairness of a preferential rate was to enquire whether or not the trade attracted by that particular

rate was or was not profitable; but the proposal was overwhelmed with criticism and was ultimately withdrawn. In the clause dealing with the powers of the Inter-State Commission, the Victorians objected to the prohibition of preferential rates made "for the purpose of drawing traffic from the railway of a neighbouring State," on the ground that it was one-sided, and tied the hands of Victoria in competing for the Riverina trade, whilst it left New South Wales free. The problem was a most difficult one, involving important commercial and political interests. Under the provincial system, each colony had reinforced its barrier of custom-houses by a war of railway rates and railway policies. This was especially the case between New South Wales and Victoria. Each colony had built its railway lines and arranged its rates with a view to concentrating as much trade as possible in its own capital. New South Wales, having an immensely larger area than Victoria, had tried to gather into Sydney all the trade of that area, and had built octopus railways into the south-western or "Riverina" district—taking care not to extend them quite to the Victorian border, lest some of the trade might flow the wrong way. A large area of New South Wales, however, is geographically nearer to Melbourne than to Sydney; and Victoria ran numerous lines to the border in order to tap the trade of these outlying districts of New South Wales. Then began a system of frankly competitive rates; Victoria offering special reductions—in some cases amounting to 66 per cent.—to goods coming from across the border, while New South Wales endeavoured to retain the trade by prohibitive rates for produce travelling towards Melbourne, and by extremely tapering long-distance rates for produce travelling to Sydney. This "cut-throat" competition between the two railway systems was moreover complicated by the competition of both with river steamers trading to South Australia. As regards the "long-haul" rates in New South Wales, there was also the difficulty that tapering rates for long distances are required by the soundest principles of railway management; and it seemed impossible to ascertain the precise point at which it could be said that a differential rate became preferential and unfederal in character, or the precise degree of tapering which was necessary for the development of territory, and in the interests of the producer and the carrier alike. The only obvious test—that of the direct profitableness or unprofitableness of the rate to the carrier—was inapplicable because the carrier, being the Government, had public and political interests which might justify it in running the railways at a loss for the public benefit.

This war of railway rates had resulted in considerable bitterness between the colonies, and considerable loss to the railways and the public; and everyone was agreed that the Constitution ought, if possible, to contain some power of regulating the competition. Sir George Turner and his colleagues, however, feared that the particular provision in the Bill would prevent Victoria from competing to draw trade from beyond her boundary, whilst it would allow New South Wales to compete to retain trade within her boundary. In other words, they feared that it recognized the right of each colony to charge preferential rates with a view to drawing the trade from its

own outlying territory to its own ports; that instead of being mutual, it was anti-federal, inasmuch as it restricted each colony to its own produce; and that it thus favoured the long distance railways of New South Wales at the expense of the short distance railways of Victoria. The answer on behalf of New South Wales was that the clause *was* mutual so far as inter-State traffic was concerned, and that the Constitution ought not to interfere with the purely internal trade of a State. The arguments may be summed up thus: The Victorians—and with them the South Australians—claimed that "trade should flow in its natural channels." The New South Wales representatives did not dispute this as an abstract proposition, but objected to extending the federal control to any trade that was not "inter-State trade," and claimed the right of each State to control its internal trade, subject only to the condition that freedom of trade should not be derogated from. There was no attempt to justify the policy of Victoria in carrying New South Wales goods at cheaper rates than her own, nor the policy of New South Wales in charging prohibitive rates on goods destined for Victoria. The real question as to which opinion was divided was whether a limit ought to be put to the right of New South Wales to taper her long-distance rates. Victoria objected to giving up her admittedly anti-federal weapon unless New South Wales were disarmed also; New South Wales argued that her tapering long-distance rates, though they might indeed be used as an anti-federal weapon, were an essential means to the settlement of her land and the development of her resources. No definite solution of the difficulty was arrived at; but on Sir George Turner's motion the objectionable limitation was struck out, and the powers of the Inter-State Commission were left unhampered by any definite instructions.

Amendment of the Constitution.—In the clause providing for the amendment of the Constitution, an important change was made. In place of the provision requiring (1) that the electors of a majority of the States should approve the proposed law, and (2) that the people of the States so approving should be a majority of the Commonwealth, it was provided that the law should be approved by (1) the electors of a majority of the States, and (2) a majority of all the electors voting. A difficulty, however, arose with regard to the women's suffrage in South Australia, which, if the votes in the different States were added together, would give double influence to that State (assuming that there were as many women voters as men). To meet this, it was provided that the votes of States in which adult suffrage prevailed should be halved before being added to the others.

Deadlocks.—The question of the insertion of a clause for the solution of deadlocks was not ignored. During the sitting, suggestions to this end had been circulated by several members; one by Mr. O'Connor, providing for a joint sitting of the two Houses; one by Mr. Carruthers to a similar effect; one by the Premier and Attorney-General of Victoria providing for a dual referendum; one by Mr. Wise, providing for a consecutive dissolution, first of the House of Representatives, and then of the Senate; and one by Mr. Higgins giving the Governor-General a general power to dissolve both Houses. When the stage was reached for the insertion of new clauses, Mr.

Wise moved his proposal providing that if the House of Representatives should pass a Bill to which the Senate would not agree, and if the Governor-General should on that account dissolve the House of Representatives, and if after the dissolution the House of Representatives should again pass the Bill and the Senate again disagree, the Governor-General might dissolve the Senate. He pointed out that his two objects were (1) to preserve the independence of the Senate in all matters affecting State interests, and (2) to secure the dominance of the popular vote on all party questions which did not place the interests of one group of States against those of another. Mr. Barton argued that deadlocks had in fact nearly always arisen from attempts to "tack" matters of general legislation on to a money Bill, or to lump different kinds of taxation together in one Bill; and that the Constitution, by prohibiting this, had already made adequate provision against deadlocks. Mr. O'Connor had also come round to this opinion, and preferred to leave the Bill as it stood. Mr. Trenwith disagreed with this view, and argued that though the deadlocks due to "tacking" were the most acute and striking, there were frequent "deadlocks" consisting in the refusal of one House to pass matters of progressive legislation. The fact is that in this debate the word deadlock assumed a new and extended meaning, which, in subsequent discussion of the question, it has since retained. A "deadlock" originally meant a disagreement as to a Money Bill or some vital measure, the failure of which would paralyze the machinery of Government; but it now came to be used—for want of a better word—to describe any disagreement between the Houses on any matter of legislation. It was as yet by no means generally recognized that for "deadlocks," in this wider sense, any cure was necessary or desirable; and fears were expressed lest a clause intended to cure deadlocks should in fact have the effect of creating them.

Mr. Higgins objected to Mr. Wise's proposal because it enabled the Senate, without risk to itself, to force the House of Representatives to a "penal dissolution;" and he moved an amendment to enable both Houses to be dissolved together in the first instance. This amendment was strongly opposed, especially by the representatives of the small States, who thought that it would allow undue pressure to be brought to bear on the Senate by the Government of the day. Mr. Higgins' amendment was defeated by 24 votes to 7, and the original proposition was then defeated by 19 to 11.

Mr. Isaacs then moved a series of clauses which had already been circulated by Sir George Turner and himself. They applied equally to both Houses, and provided that in the event of a disagreement about any Bill, the House in which the Bill originated might resolve "that the proposed law is of an urgent nature," and might transmit it with any amendments agreed to by both Houses to the other House for further consideration. If within a certain time it were not passed by the latter House, the originating House might resolve that it be referred to the direct determination of the people. The vote was to be taken in each State separately, and if the Bill was affirmed by "a majority of States containing also a majority of the population of the Commonwealth," it was to be presented for the Royal assent as though

it had passed both Houses. Mr. Isaacs claimed that this scheme gave ample opportunities for reconciling differences, and did not endanger either the independence of the Houses or the responsibility of the Ministry. The real debate had taken place on Mr. Wise's clause, and the new proposal was at once negatived by 18 votes to 13.

All the mechanical devices subsequently discussed—the joint sitting, the consecutive or simultaneous dissolution of both Houses, and the referendum—were thus placed before the Convention at its Adelaide sitting. The refusal to adopt any of them at that stage was not meant as a final decision, but rather as an indication that the Convention was not yet satisfied that any provision was necessary, and at all events was not prepared to commit itself to any of the numerous alternative schemes. The whole question therefore remained open for future consideration.

Adjournment.—The Bill was reported to the Convention on 22nd April, and next day the report was adopted. In the ordinary course of events, the Convention would then have adjourned, for not more than 120 days, in the terms of the Enabling Acts; but here a difficulty had arisen. The Premiers were all about to visit England for the Queen's Diamond Jubilee celebrations, and it was practically impossible to hold the adjourned sitting before September. The device was therefore adopted of moving that the Convention adjourn till 5th May, and that "at its rising on that day it do further adjourn till Thursday, 2nd September, at 12 o'clock noon." Accordingly on 5th May—all the visiting delegates having long since departed—the Acting-President took the chair, and, having solemnly but ineffectually ordered the bells to be rung for a quorum, declared that the Convention stood adjourned till noon on 2nd September, at Parliament House, Sydney.

(11) CONSIDERATION BY THE LEGISLATURES.

The next step under the Enabling Acts was the consideration of the Draft Constitution by the Legislatures of the several colonies, during the statutory adjournment of the Convention.

New South Wales.—The discussion was begun by the Legislative Assembly of New South Wales on 5th May, 1898, Mr. Carruthers, in the Premier's absence, being in charge of the measure. The proceedings began with a protracted general debate, of a somewhat monotonous character, which revealed many critics of the Bill, but few friends. The points most forcibly attacked were the equal representation of States in the Senate, the powers of the Senate with regard to Money Bills, and the financial clauses generally. The financial clauses had already been adversely criticised in a series of articles by Mr. R. L. Nash, financial editor of the Sydney *Daily Telegraph*. The gist of his argument was that Federation under the Bill meant added burdens and no savings; that to meet the new expenditure and the remission of intercolonial duties there would have to be a great increase of duties on oversea imports; that in Victoria, South Australia, and Tasmania there was practically no reserve power

of taxation; and consequently that New South Wales would have to pay the whole cost of Federation, adopt a fiscal policy of which she disapproved, and submit to additional taxation to the amount of £1,500,000—of which possibly £1,000,000 would be returned to her, to be spent extravagantly. His conclusion was that the only solution would be to provide for savings at least equal to the added expenditure, and that this could only be effected by the federation of the debts and railways. These forecasts had been based to some extent on a set of calculations placed before the Convention by the Government Statistician of New South Wales, which took as their basis the imports of the several colonies under their existing and widely-differing tariffs, and deduced the amounts of revenue that would be contributed by each colony, assuming the imports remained the same, by applying to them first a uniform tariff on the lines of the Victorian tariff, then a uniform tariff on the lines of the South Australian tariff, and so on. The basic assumption, that the amount of imports would not be affected by the change in the import duties, had already been attacked in the Convention, and was demolished by Mr. Edward Pulsford in a series of articles in the *Sydney Morning Herald*, which were afterwards laid on the table of the Convention at the session. The supporters of the Bill denied that the estimated contributions of the colonies, thus arrived at, were even approximately correct. They also denied the assumptions that there would be no savings under the Bill, and that the other colonies were already taxed to the uttermost; and maintained that when the necessary corrections were made the groundwork of these gloomy predictions was cut away. The arguments of the critics, however, carried great weight, and formed the backbone of the Parliamentary opposition to the Bill. The general debate dragged on until 24th June, and on 7th July the detailed discussion began.

The chief amendments suggested by the Assembly followed the lines already indicated. An amendment to abolish the Senate altogether received little support; but the principle of equal representation was negatived, at an early hour in the morning, by a decisive vote of 59 to 4. In its place was inserted a provision for proportional representation, with a minimum representation, for any State, of three members. The exclusive originating power of the House of Representatives was extended to all Appropriation Bills, irrespective of their "main object," and the power of the Senate to suggest amendments in Money Bills was struck out. The limitation of federal expenditure, and the guarantee of the return of a minimum aggregate surplus, shared the same fate; and the elaborate provisions for the distribution of the surplus were replaced by a clause leaving the whole question to the Federal Parliament. The clauses providing for an Inter-State Commission, and for taking over the debts, were struck out. A sweeping "deadlock" clause was inserted, providing that either House, in the event of a disagreement, might submit the disputed measure to a "mass referendum," at which a majority of all the electors voting should decide. Amendments of the Constitution, after having been passed by the Parliament, were to be submitted to a similar referendum, without regard to State majorities.

In the Legislative Council, where Mr. Barton had charge of the Bill, the opposition was even more pronounced. By way of a general protest against State powers in the Constitution, and an affirmation of a more complete unification, after the Canadian model, the word "Commonwealth" was replaced by Dominion, and the word "federal" was ruthlessly excised throughout. The Assembly's amendment as to Senate representation was adopted; but the Council, with an eye to the dignity of Upper Houses in general, left intact the power of the Senate to suggest amendments in money Bills. The destructive attitude of the House, however, was plainly shown in connection with the financial parts of the Bill. The taxing powers of the Federal Parliament, through the customs or otherwise, were excised; in Chapter IV. nearly the whole of the financial provisions were omitted, leaving the Bill a blank. At this, Mr. Barton and Mr. O'Connor disclaimed all responsibility for the proceedings, and left the Chamber; but the Council protested the integrity of its intentions, and went on with its work of disapproval. It insisted that Sydney should be the federal capital; but on the subject of deadlocks—true to the traditions of an Upper House—it made no suggestion.

Victoria.—Criticism in the other colonies was much more moderate. In Victoria, both Houses accepted equal representation in the Senate, but suggested single-member electorates in preference to having each State as one constituency. The money bill clauses, even more emphatically than in New South Wales, brought out the particular bias of each Chamber. The Assembly threw out, not only the Senate's power of suggesting amendments, but also the prohibitions against tacking; whilst the Council went so far as to claim for the Senate the full power of amendment. The Assembly struck out the plan for the distribution of the surplus, and objected to giving the Federal Parliament exclusive control of bounties; but otherwise it accepted the financial clauses. The Council contented itself with a general resolution "That, in the opinion of the Legislative Council of Victoria, the finance and trade proposals of the Commonwealth Bill require further enquiry and consideration." The Victorian complaint, however, was precisely the opposite to that of New South Wales; the "guarantee" for the return of revenue was thought insufficient, and there was a strong feeling in favour of an immediate *per capita* distribution of revenue. The Legislative Council—like that of New South Wales—left the matter of deadlocks alone; but the Assembly suggested three distinct schemes:—(*a*) That if the Senate disagreed with a Bill sent up by the other House, and if "on that account" the House of Representatives were dissolved, and if the Bill were again sent up and disagreed with, the Governor-General might dissolve the Senate; (*b*) that if the Senate disagreed with any Bill sent up to it, the Governor-General might dissolve both Houses; (*c*) a modification of the Turner-Isaacs Adelaide proposition for a dual referendum, the two majorities required being (1) a majority of the electoral districts for the House of Representatives, and (2) a majority of all the electors voting. With regard to the amendment of the Constitution, the Assembly suggested that, in case of disagreement, either House without the concurrence of the other might submit an amendment to the electors; and also

suggested that the final paragraph, forbidding certain amendments without the consent of the States concerned, should be omitted.

South Australia.—In South Australia the Assembly carried an amendment for the election of federal representatives on the basis of "one adult one vote." The Assembly asked for the federal control of rivers to be extended to the "tributaries" of the Murray, whilst the Council asked for its extension to the "Darling, Murray, and Murrumbidgee," specifically. Both Houses decided in favour of giving power to the Senate to amend Money Bills, instead of the mere power of suggestion. The Assembly also passed an amendment providing for the election of Federal Ministers by the two Houses of Parliament for a term of three years, subject to dismissal by the vote of a joint sitting. The Council proposed to make the High Court consist of one Supreme Court Judge from each State; and it also adopted Mr. Gordon's attempted definition of a preferential rate. Lastly, the Assembly adopted a deadlock clause, providing that if, after continued disagreement upon any question, either House resolved that the question was one of urgency, the Governor-General might grant or refuse either a dissolution (apparently of both Houses) or a dual referendum.

Tasmania.—In Tasmania the amendments made were somewhat less important. With regard to the origination of Appropriation Bills, the House of Assembly made the suggestion, which was subsequently adopted by the Convention, to leave out the somewhat vague words as to the "main object" of the Bill, and to substitute a proviso that either House might originate appropriations of fines or penalties, or fees for licenses or services. This secured the desired result of giving the Senate power with regard to petty incidental appropriations, without opening debatable questions as the "main object" of the Bill. Both Houses were in favour of giving the Senate power to amend Money Bills. Both Houses also agreed to an elaborate scheme for the immediate taking over of the debts of the States, making the Commonwealth chargeable with the whole interest bill, and giving it an indemnity against each State for interest paid in respect of any excess of its indebtedness, on a *per capita* basis, over that of the State whose indebtedness was least. The Tasmanian Parliament did not wish for the insertion of any deadlock scheme; but the Assembly provisionally suggested a scheme "for use in the event of the Convention deciding to make a provision to evade deadlocks, but not otherwise." It provided that in the event of a disagreement, followed by a dissolution of the House of Representatives, the law in dispute, if again carried by a four-sevenths majority of the House of Representatives, and then by a three-sevenths majority of the Senate, might be deemed to have passed both Houses.

Western Australia.—The West Australian Parliament did not meet until 17th August. Its consideration of the Bill was short, and its amendments were few. Both Houses claimed for the Senate the power to amend taxation bills. In respect of the return of surplus revenue, both Houses asked for a guarantee, not in the aggregate merely, but to each individual State, and struck out the sliding scale of distribution; whilst, for the ultimate basis of distribution, the Assembly rejected the *per capita* system in favour of a return in pro-

portion to contributions. The Assembly also proposed to charge the Commonwealth with a proportion of the debts, on the basis, not of population, but of adult male population. Western Australia at present numbers an abnormally large proportion of adult males—a fact which goes far to account for her abnormally high revenue from Customs; and it was argued that a factor which had so potent an influence on the incidence of taxation should not be ignored on the other side of the ledger.

Survey of the Suggestions.—A comparison of the general trend of the amendments thus suggested in the five colonies is most interesting. The main lines of cleavage on constitutional points were two. There was in the first place a general opposition between the constitutional views of the more populous colonies on the one hand, and the less populous colonies on the other hand; the former inclining towards the absolute supremacy of the majority, independent of State boundaries, and the latter towards some degree of control by a majority of States. There was also, in each colony, a conservative and a liberal view—the former, for the most part, represented by the Legislative Council, and the latter by the Legislative Assembly. The Conservative, or Upper House, sympathy was with a strong Senate; and hence —partly by accident, and partly by a natural association of ideas—the Conservative view and the "particularist" or State right view tended to approximate, though their aims by no means coincided; whilst in the same way the liberal view and the nationalist view tended also to approximate. The result was a certain blurring of the lines of State cleavage. Just as in the Convention it seldom happened that any delegation voted solid, so in the Parliaments it seldom happened that the two Chambers quite agreed on their most important suggestions.

But besides constitutional differences, such as those with regard to money bills and deadlocks, there were also differences of interest or policy, such as those with regard to the river question, the railway question, or the tariff question. On these matters the issues were far more clearly cut between the colonies immediately interested.

On the whole, as to constitutional questions and commercial questions alike, the draft constitution held a pretty fair balance between the conflicting views. The compromises made by the Convention were re-opened in the Parliaments in opposite directions. Thus with regard to Money Bills, the Legislative Assemblies of New South Wales and Victoria wanted to give the Senate less power; the Legislative Councils of those colonies were content with the clauses as they stood; whilst the Legislatures of the other colonies wanted to give the Senate more power. These different amendments represented the divergent views which the Convention had endeavoured, with remarkable success, to reconcile.

In two points, however, there seemed to be considerable dissatisfaction with the Bill; in respect to the financial clauses, and in respect to the absence of a "deadlock" provision. The Adelaide "sliding scale" of distribution had considerable merit as an attempt to bridge the gulf between the system of distribution according to contributions, which was admittedly necessary to begin with, and the system of

distribution *per capita*, which was ultimately desirable. But it did not please New South Wales—to meet whose objections to immediate *per capita* distribution it had been expressly devised—nor was it approved in any other colony except South Australia—whose Treasurer, Mr. Holder, was the real author of the clause. As to deadlocks, the Legislative Assemblies of three colonies—New South Wales, Victoria, and South Australia—agreed that some provision was necessary, though they differed in their ideas of what it should be. The Assemblies of Western Australia and Tasmania did not want any such provision; nor did any of the Legislative Councils.

(12) THE SYDNEY SESSION OF THE CONVENTION, 1897.

On 2nd September the Convention met in Sydney to reconsider the draft Constitution, together with the amendments suggested by the Legislatures. Some hopes had been held out that Queensland would be represented at this sitting, but they were disappointed. In June an Enabling Bill had been introduced in the Legislative Assembly of that colony, providing that representatives elected by the Parliament should attend the Sydney Convention, on condition that the draft Constitution should be reconsidered clause by clause. Mr. Thomas Glassey, leader of the labour party, had thereupon moved a resolution similar to that previously moved by Mr. Curtis, that no Bill would be acceptable which did not provide for the direct election of the representatives; and a vote having been taken which amounted to a defeat of the Government proposal, the Bill was withdrawn on 14th July. On 29th July Mr. John Leahy moved a resolution affirming the desirability of Federation, and of Queensland being represented at the Convention, but this was ultimately discharged from the paper. At last, on 9th September, while the Convention was sitting, Mr. J. V. Chataway moved a resolution, which was duly carried, asking the Convention not to conclude its work till Queensland had an opportunity of being represented. Accordingly the colonies represented at the Sydney sitting were the same as before. There was a change in the West Australian delegation, the Hons. H. Briggs, M.L.C., F. C. Crowder, M.L.C., A. H. Henning, M.L.C., and H. W. Venn, M.L.C., taking the places of Messrs. Piesse, Loton, Sholl, and Taylor, who had resigned on 26th August.

The business of the Convention involved not only the general reconsideration of the whole Bill in the light of recent discussion, but also the consideration of some 286 amendments, in all, suggested by the ten Houses of Parliament. The chairman (Sir R. C. Baker) wisely decided that all these amendments should be put from the chair, and voted upon, as though they had been moved by a representative; so that no Parliament could say that its suggestions were slighted. It soon proved, however, that the work before the Convention was too much to be disposed of in the time at its disposal. A general election in Victoria was impending, which would call the Victorian representatives away; and it became clear that another

adjournment would be necessary. In order, however, to settle some of the most important questions, it was decided once more to depart from the consecutive order of dealing with the clauses. Most of the debate at Sydney was monopolized by four great questions: the financial problem, the basis of representation in the Senate, the power of the Senate with regard to Money Bills, and the insertion of a provision for deadlocks.

The Financial Debate.—With regard to the financial clauses, the first step was to appoint a Finance Committee, consisting of the five Treasurers and one other representative from each delegation, to report upon Chapter IV. of the Constitution. Then followed a general debate, in which the whole financial question was discussed at large. The tenor of the debate was critical rather than constructive; and though no conclusion was arrived at, the difficulties as they presented themselves to the several colonies were reviewed at length. The great central difficulty was to formulate—while the nature of the federal tariff, and its operation, were still unknown quantities—some scheme of distributing the federal surplus which would not only be fair in itself, but would guarantee all the States against any dislocation of their finances. This difficulty arose out of the widely-differing character of the existing tariffs of the colonies, and the differing degrees of their dependence on customs and excise revenue. At one end of the scale stood New South Wales, with a purely freetrade tariff and a large land revenue. The finances of that colony, under almost any system, would be secure; what she feared was, not a deficiency of revenue for provincial purposes, but an unduly large increase of taxation through the customs. At the other end of the scale stood Western Australia, with a large unsettled mining population, and relying almost entirely on customs duties, a great proportion of which were collected on intercolonial produce. It was recognized that her abnormal position required special treatment, and that no system of general application could meet her needs. Between these extremes were the other three colonies—all relying largely on customs and excise, and all unwilling to resort, in any great degree, to direct taxation. The customs and excise revenues surrendered to the Commonwealth would be some four times as much as were needed for federal expenditure; and each colony wanted some guarantee that it would get back, not only its fair share of what it contributed, but an amount sufficient to balance its provincial accounts. The two problems were to guarantee that there would be a large surplus to distribute, and to find a basis of distribution which would meet the needs of all the colonies.

The basis of distribution provided by the Adelaide sliding scale had not found favour. As Mr. Holder said, it was "a child of misfortune—misfortune in that it was laid before the Convention and accepted [in Adelaide] on the faith of those who recommended it; never discussed, never explained—thrown into a cold world, without anybody to be father to it." Mr. Reid admitted its good points, but recognized that it had not inspired public confidence; and, in common with most of his delegation, fell back on the necessity of leaving the whole question to the Federal Parliament. The "unknown quantity"

of the federal tariff, it was contended, made it impossible for the Convention to solve the question; a basis of experience was necessary. The other colonies were willing to "trust the Federal Parliament" to a certain extent; but they wanted some guarantee of their State finances. Methods were suggested for evading the difficulty by saddling the Commonwealth with some of the obligations of the States —for instance, in respect of the debts, or the railways, or both—but all these plans, as Mr. McMillan pointed out, only "covered up" the surplus, and did not get rid of the problem of apportionment. The uncertainty surrounding the whole question was increased by the calculations of the statisticians, which were sometimes treated as reliable forecasts, and sometimes—with more truth—as deductions from unreal and improbable assumptions. The debate threw all the difficulties into high relief, and it was then left to the Finance Committee to find a solution.

Senate Representation.—The Senate debate took place upon the New South Wales suggestion to substitute proportional for equal representation. The opponents of equal representation proved to be only five in number. It must be noted, however, that most of its supporters justified it, not so much on the abstract principle of State equality, but as a concession to the smaller States, necessary to secure their assent to the Constitution, and expedient to secure the fair treatment of local interests. This view of equal representation in the Senate, as based not on abstract logic but on practical compromise, was emphasized by an amendment which made it clear that the guarantee of equal representation was given only to "original States," and was not extended to States which might afterwards enter the union, or be created within it by subdivision or otherwise. It is also noteworthy that many of the delegates who accepted equal representation did so in the expectation, and on the understanding, that some provision would be inserted for securing the due subordination of State interests to national interests. The debate in fact pointed forward to the adoption of a deadlock clause which would place some restriction on the absolute veto of the Senate. The Convention explicitly affirmed the principle that the structure of the Federal Parliament ought to ensure due consideration to State interests; but it explicitly denied the doctrine that all federal legislation must necessarily receive the assent of a majority of the States.

Money Bill Clauses.—In the Money Bill clauses only one substantial amendment was made. The vague and somewhat sweeping power of the Senate to originate appropriation Bills whose "main object" was not the appropriation of revenue was taken away, and in its place was inserted the Tasmanian suggestion, drafted by Mr. Inglis Clark, giving the Senate power to originate Bills involving incidentally the appropriation of fines or fees. This provision was based upon a standing order of the House of Commons, which had already been adopted by the Legislative Assemblies of South Australia and Tasmania. The amendment of the Legislative Council of Western Australia, to give the Senate power to amend taxation Bills, was debated at some length, but was defeated by 28 votes to 19.

Deadlocks.—The longest and most important debate of the Sydney sitting was that upon deadlocks, which lasted from 15th to

21st September. On this question several distinct suggestions had been made by the Legislatures; and the clause first proposed from the Chair was that suggested by the Legislative Assembly of New South Wales, providing for a referendum of the kind spoken of at the Convention as a "mass" or "national" referendum—a referendum, that is to say, at which a simple majority of all the electors voting should decide. The discussion began by a general debate on the whole question. (Conv. Deb., Syd., pp. 541-79.) Some of the members had thought from the outset that some provision would be necessary to prevent serious conflicts between the Houses. Others, who thought conflicts would be infrequent, nevertheless agreed that some provision in the nature of a "safety-valve" would be desirable; and some who had previously opposed any such provision were now, upon more mature consideration, converts to this view. The devices which were chiefly discussed at the outset were the dissolution of both Houses, either consecutively or simultaneously, and the referendum, either national or dual. Of these, all except the national referendum preserved the veto power of a majority of States, and therefore failed to provide effectually against the conflict which was feared from the double basis of representation. They safeguarded State interests, but did not ensure finality. They would only be effectual in cases where the Senate's constituents either differed from their representatives, or were overborne by the moral weight of the national majority. This, of course, from the point of view of the small colonies, was a strong recommendation; but from the point of view of the large colonies it meant that these schemes failed in their chief function; that, whenever State interests and national interests clashed, the deadlock, so far from being cured, would be intensified by being transferred from the Parliaments to the people. On the other hand the national referendum, though absolutely final, ignored the individual States altogether, and was objected to by the small States as practically destroying the power of the Senate to protect their interests.

Some compromise was needed which would partially, but not fully, recognize State individualities; and to effect this, Mr. Kingston and Mr. Reid suggested that the subjects of legislation which affected State interests might be defined, and the dual referendum applied to them, whilst the national referendum should be applied in all other cases. It was soon seen, however, that no definition of this kind could possibly be framed, as almost every conceivable subject of legislation could be dealt with in a way which might seriously prejudice State interests. Some other principle of compromise had to be looked for.

The Tasmanian suggestion—which, in case of continued deadlock, enabled a four-sevenths majority of the House of Representatives to override a four-sevenths majority of the Senate—was not much discussed; but the somewhat similar device of a joint sitting of both Houses, which had previously been suggested in a tentative way by Mr. O'Connor, Mr. Reid and others, was now revived as a possible solution of the difficulty. It was not favourably received by Sir George Turner and Mr. Isaacs, who had an affection for the referendum—even the dual referendum, if no other were attainable. In fact—as is the way with compromises—it aroused no enthusiastic

support anywhere; but both sides looked upon it as a possible last resort if they could get no better terms. The dissolution and the referendum continued to occupy the most prominent place in the debate; which turned a good deal on the restrictions and safeguards which ought to be placed on both these devices to prevent their abuse. The objections raised to the consecutive dissolution, first of the House of Representatives and then of the Senate, were: first, that it would enable the Senate, without immediate risk to itself, to penalize the other House; next, that it would mean that the two sides of the question would be put to the people at different times. The objection raised to the simultaneous dissolution of both Houses in the first instance was that it would enable the Ministry constantly and systematically to bring threats and pressure to bear on the Senate. And the objection raised to any dissolution of the Senate at all was that it would destroy the continuity which was effected by the principle of rotation—an objection largely met by the reply that deadlocks would undoubtedly be rare, and that resort to the deadlock clause would be "the medicine, not the daily food," of the Constitution. The argument against the referendum was that it would weaken Ministerial and Parliamentary responsibility; and accordingly many of those who objected strongly to its use as a first step were inclined to view it with less disfavour if it were preceded by the responsible step of a dissolution. The general discussion ended with a test vote on the first word of the proposed clause, which resulted in a decision, by 30 votes to 15, in favour of a deadlock clause of some kind. Then came the question of the choice of methods.

The first amendment, moved by Mr. Symon, was to the effect that if the Senate should disagree with any Bill passed by the House of Representatives, and if "on that account" the House of Representatives were dissolved, and if the deadlock still continued, the Governor-General might dissolve both Houses. It was at once complained that this not only required the House of Representatives to be penalized first, but also involved its being dissolved twice to the Senate's once, and Mr. Symon accordingly consented to deprive the first dissolution of the House of Representatives of its penal character by omitting the words "on that account," and to allow the Senate alone to be dissolved in the second instance. This proposition for a consecutive dissolution was strongly opposed by the representatives of New South Wales and Victoria, but was carried, after discussion, by 27 votes to 22—the division practically representing the three small colonies against the two large ones. To most of the representatives of the latter the vote was very unpalatable; but it had to be accepted for the time being.

Mr. Lyne then moved to add to Mr. Symon's amendment a provision that if, after the consecutive dissolution, the deadlock still continued, the measure in question should be referred to a national referendum. But Sir George Turner, though he had been prepared to allow the referendum to follow a simultaneous dissolution, would not postpone it till after the consecutive dissolution; and he accordingly moved an amendment on Mr. Lyne's proposition, so as to provide that instead of a dissolution, there might be a referendum (either

dual or national) in the first instance. Mr. Wise, in turn, objected to a referendum without a previous dissolution, and accordingly moved to amend Sir George Turner's amendment by inserting a simultaneous dissolution before the referendum. The proceedings were getting rather tangled, and to simplify matters the discussion was postponed, with leave to the Committee to reconsider and rescind the unsatisfactory vote already taken, and to begin afresh.

The Committee, however, did not take advantage of this leave, but proceeded to discuss the series of amendments thus proposed. A whole day's debate followed before any decision was come to. A vote then taken, without division, on the first word of Mr. Lyne's amendment, decided that whatever new machinery was added should be made alternative to, and not consequent upon, Mr. Symon's consecutive dissolution. The result was that Mr. Symon's provision led up to nothing further, but stood by itself as one mode of securing agreement; whilst the Convention, not satisfied with that mode, proceeded to work out an alternative one.

Mr. Lyne's amendment was now out of the way, and the questions before the Convention were Sir George Turner's proposition for a referendum, and Mr. Wise's amendment for preceding this with a simultaneous dissolution. Mr. Wise's amendment was carried by 25 votes to 22—a decision that, if there were to be a referendum at all, it should only be after a double dissolution. It soon became evident, moreover, that though the friends of some kind of referendum were in a majority, they were hopelessly split when the choice had to be made between the national and the dual referendum. As a result, the national referendum was defeated by 36 votes to 18—the smaller colonies voting almost solid with the majority—and the dual referendum was next defeated by 27 votes to 18.

Mr. Carruthers then came to the rescue with a proposition that Mr. Wise's double dissolution should be followed up by a joint sitting of both Houses, at which a three-fifths majority should be able to carry the measure. Though no one waxed enthusiastic over the joint sitting for its own sake, it was supported as being on the whole the best compromise that the Convention would agree to. It was, however, strongly opposed by Sir George Turner and Mr. Isaacs on the one hand, and some of the friends of a strong Senate on the other. Mr. Kingston moved an amendment to substitute, in place of the joint sitting, a national referendum "in the case of national questions," and a dual referendum "when State interests are involved;" but the impossibility of defining State interests was apparent, and the amendment was negatived by 30 to 11. The "three-fifths" majority at the joint sitting caused some debate. Mr. Howe, of South Australia, wanted to increase it to "two-thirds;" Mr. Higgins, of Victoria, to diminish it to a bare majority. A proposition to omit the words "three-fifths" was defeated by 28 votes to 13—Mr. Reid and others, who preferred a bare majority, not caring to risk the loss of everything by insisting. Mr. Carruthers' amendment was then carried by 29 votes to 12.

The result of these votes was that Sir George Turner's original proposition for a referendum was overlaid by the Wise-Carruthers

amendment, providing for a simultaneous dissolution of both Houses, followed, if necessary, by a joint sitting. The question that this composite proposition stand part of the clause was carried in the affirmative by 23 votes to 13. A further amendment by Mr. Carruthers, to allow a bare majority at the joint sitting, if defeated, to appeal to a national referendum, was rejected; and the clause was then agreed to. The Sydney session thus resulted in two deadlock schemes: Mr. Symon's consecutive dissolution, standing by itself and leading to nothing further; and the Wise-Carruthers scheme of a double dissolution followed by a joint sitting. The latter scheme represented the real decision of the Convention, and it was tacitly understood that Mr. Symon's consecutive dissolution was superseded, and would be subsequently rescinded.

The necessity for the departure of the Victorian delegates brought the proceedings of the Sydney session to a close before more than half of the clauses of the Constitution had been considered; and on 24th September the Convention adjourned, to meet for its final session at Melbourne on 20th January, 1898.

Queensland and New South Wales.—It was hoped that this adjournment might enable Queensland, even at the eleventh hour, to take part in the proceedings of the Convention; but the hope was again disappointed. A third Enabling Bill was indeed introduced in that colony in November, for the direct election—at last—of Queensland representatives by the whole colony as one constituency. This Bill was again wrecked by the provincial differences of the three great divisions of the colony. Mr. Curtis moved the withdrawal of the Bill with a view to having the colony divided into three constituencies. He succeeded in his object so far as the withdrawal of the Bill was concerned; but no further Bill was introduced. Federalists were still too divided by provincial differences to make headway against opposition.

In New South Wales, the interval between the Sydney and Melbourne sessions was marked by a determined effort by the opponents of the Convention scheme to prevent its ultimate adoption by the people. The Parliament of New South Wales contained many members who, if not exactly anti-federal, were at least strongly opposed to Federation on the lines which commended themselves not only to the Convention, but to most of the zealous advocates of Federation. They had allowed the Enabling Bill to pass without much protest, little dreaming of the strength of public sentiment by which the movement so started would be supported and carried to a conclusion; and they now rallied for a last Parliamentary stand. In June, a Bill had been introduced in the Assembly by Mr. R. H. Levien, a private member, to amend the Enabling Act by requiring an affirmative vote, at the federal referendum, of an absolute majority of all the electors on the roll. As the roll at that time numbered about 278,000 electors, this meant an affirmative vote of some 139,000—an impossible number to expect. The Bill reached its second reading on 12th October, when it was found that though few members were willing to go so far as to require an absolute majority, many would vote for a substantial increase in the minimum of 50,000 imposed by the

Enabling Act. Any amendment of the Enabling Act at this stage was denounced by the most prominent federalists in the House as a breach of faith with the other colonies; but the second reading was carried by 47 votes to 27, and in Committee an amendment was carried requiring a minimum affirmative vote of 80,000. In that form the Bill was passed and sent to the Council, where it was introduced by Sir Julian Salomons. It met with determined opposition from Mr. Barton, Mr. O'Connor, and other prominent federalists, who however found themselves in a minority. The second reading was carried by 21 to 17, and in the course of an all-night sitting, notwithstanding gallant resistance, it was forced through Committee with the help of a plentiful—and in that Chamber, unprecedented—use of the closure. It became law on 12th December.

(13) THE MELBOURNE SESSION OF THE CONVENTION, 1898.

The Melbourne session, extending from 20th January to 17th March, 1898, was the longest and most important of all; and the necessity of coming to a final decision on all points invested its deliberations with special weight. The whole Bill received thorough reconsideration by the Convention, and thorough revision by the Drafting Committee. The passage through Committee of the Whole, interrupted in Sydney, was completed—ending with the finance and trade clauses, on which the Finance Committee had meanwhile reported. This process occupied the Convention until 3rd March, after which the Bill was four times recommitted for the consideration of certain clauses, and for the insertion of drafting amendments, before it was finally adopted by the Convention. The debates which stand out from the others as being of pre-eminent importance were those relating to rivers, finance, and railway rates.

Rivers.—The river question raised the first long debate, which occupied nearly a fortnight of the time of the Convention. (Conv. Deb., Melb., pp. 31-150, 376-642, 1947-90.) It began upon the suggestion of the Legislative Council of South Australia, to extend to the "Darling, Murrumbidgee, and Lachlan" the sub-clause empowering the Federal Parliament to regulate "the navigation of the river Murray and the use of the waters thereof." The South Australian claim, at first, involved federal control not only of navigation, but of irrigation and water conservation as well. It was argued that the great rivers belonged, not to one colony, but to all; that they were essentially national in character, and that the use of their waters, for all purposes, could only be effectually dealt with by the federal authority. As regards navigation, South Australia undoubtedly had the best of the argument, and no serious attempt was made in Melbourne to confine federal control of navigation to boundary rivers. It was also admitted that the navigation power ought not to be confined to the rivers which were "navigable" in the sense laid down by English decisions, as being subject to the ebb and flow of the tide, but ought to extend, as defined by cases in the United States, to rivers

which were in fact, permanently or intermittently, navigable for purposes of trade and commerce. But it was pointed out that irrigation and conservation were not subjects handed over to the Commonwealth, and therefore that the "use of the waters" for these purposes was a matter in which the States, which were responsible for the settlement and cultivation of their lands, were primarily interested. This the South Australian representatives were soon obliged to concede, though they maintained that there were, or ought to be, riparian rights between States as between individuals, and that these rights ought to be defined by federal law. The debate proceeded mainly, however, on the recognized assumption that navigation—at least inter-State navigation—was a federal power, incident to the control of trade and commerce, whilst irrigation and conservation were State powers incident to the control and management of the land. The difficulty remained, that the two powers might possibly conflict. Irrigation and conservation works in the States, if uncontrolled by the Commonwealth, might destroy the navigability of the rivers; whilst navigation regulations of the Commonwealth, and more especially works for maintaining or improving the navigability of the rivers, might seriously interfere with irrigation and conservation. South Australia adjured New South Wales to "trust the Federal Parliament;" New South Wales replied that she was prepared to trust the Federal Parliament in federal matters, but that provincial rights ought to be beyond the reach of the Federal Parliament. It was argued very strongly that both sides were fighting a shadow, and that the danger of conflict was imaginary; that the two powers, so far from being antagonistic, would probably mutually benefit each other. Neither party, however, could be wholly satisfied as to this; and the question was how far either power, in case of conflict, ought to be paramount. Amendments innumerable were suggested, with a view to giving the Federal Parliament power to deal with the "maintenance of the navigability," or "the maintenance and improvement of the navigability" of the rivers; whilst the New South Wales representatives contended that the clause ought to be restricted to the "control of navigation." "Navigability," they objected, was such an uncertain and intermittent condition in the Darling that it was impossible to define what its "maintenance" meant; and it would be equally impossible to decide whether a particular irrigation work interfered with "navigability" or not. Moreover, power to maintain—and still more to improve—navigability, must, in order to be effective, deal with tributaries, and control the use of the water. Irrigation and conservation, they contended, were needed for production, and were infinitely more important than navigation, which was only needed for carriage. Accordingly, they objected to any provision which made navigation paramount, and cultivation subservient. To meet these objections, various limitations were suggested by way of preventing interference with a "reasonable use" of the waters for irrigation, or of requiring "a just regard to the necessities of water conservation and irrigation." None of these suggestions, however, satisfied the New South Wales representatives, who complained that they were being asked, in the

name of Federation, to give up their undoubted rights with regard to provincial matters. No solution seemed ready, and Mr. Barton secured the postponement of the clause in order that the delegations most directly concerned might thresh the matter out in friendly conference.

The friendly conference, however, was unsuccessful, and the debate re-commenced. In the interval Mr. Carruthers, the New South Wales Minister for Lands, had procured and hung in the vestibule a large map showing the watershed of the Murray system; and this helped the representatives of Tasmania and Western Australia, who were in the position of disinterested umpires, to see that the objections of New South Wales were not unfounded. The Convention began to hark back to the position that, after all, the "trade and commerce" power, together with the power to regulate "navigation and shipping," gave all the control of navigation that was necessary, and that the best solution would be to follow the American example and attempt no detailed definition. A number of amendments, on the lines previously foreshadowed, were proposed and negatived, and eventually the whole sub-clause was struck out. Attempts were made to substitute various other provisions in its place; but these were all rejected in turn, and the "navigation" power was left undefined and unfettered, without any reference to rivers.

New South Wales, however, was not yet satisfied. The federal control of rivers was now limited to navigation; but the navigation power, being a federal power, would be absolutely paramount, in case of conflict, over the rights of the States to use the water for any other purpose. Mr. Reid and Mr. Carruthers wanted to secure the rights of irrigation and conservation, which they regarded as of paramount importance, against any possible interference by the Federal Parliament. Accordingly, after the second re-committal of the Bill, Mr. Carruthers moved to add to the "navigation and shipping" sub-clause a proviso that the use of the rivers for navigation should be subordinate to the conservation of waters within any State to meet the requirements of its people. He argued that without some such safeguard no one could safely invest money in conservation works without the express sanction of the Federal Parliament. The South Australians, having failed to secure their own amendments, fought for the Bill as it stood, and claimed that irrigation must not be made paramount unless some just basis of distribution between riparian States were recognized. Finally Mr. Carruthers withdrew his amendment in favour of one by Mr. Reid, to the effect that the navigation power "shall not abridge the rights of a State or its citizens to the use of the waters of rivers for conservation and irrigation." This, it was claimed, merely protected the existing rights of New South Wales, leaving it to the Court to say what those rights were. The South Australian argument, however, was that, whatever the present legal rights of a colony might be, they should not be paramount when they conflicted with the reasonable use of the powers of the Commonwealth. Several previous amendments had offered to concede to the States the "reasonable use" of the waters, and now Sir John Downer proposed to insert "reasonable" before "use" in

Mr. Reid's amendment. Mr. Reid feared that the indefinite word "reasonable" would destroy the effect of the provision for the preservation of rights; but the Convention was against him, and the sub-clause was carried with Sir John Downer's amendment. Later, it was re-modelled by the Drafting Committee into a separate clause explanatory of the "trade and commerce" power.

The Financial Clauses.—The Finance Committee appointed in Sydney had not, during the Sydney session, found much time for deliberation; but during the early part of the Melbourne session they got to work, and framed a series of resolutions which, with the help of the Drafting Committee, were shaped into clauses. On 10th February, when the first consideration of the whole Bill, except Chap. IV., had been completed, the Finance Committee brought up their report. They proposed a complete reconstruction of the financial scheme of the Bill. They recommended that the Adelaide "guarantees" of a limited expenditure and of a minimum aggregate return of surplus should be omitted. They submitted a new clause to provide against a loss of revenue which it was feared might result during the first year of the tariff if merchants "loaded up" dutiable goods in New South Wales in anticipation of the tariff, in the hope of making them free of the Commonwealth without paying duty. The new clause provided that such goods, on transportation into another State within a certain time after the uniform tariff, should pay the difference between the duty chargeable on importation under the uniform tariff and the duty they had already paid.

As regards the period before the uniform tariff, no substantial change was made; but after the uniform tariff it was proposed to abolish the Adelaide sliding-scale, and revert to the despised system of book-keeping "for five years, and thereafter until the Parliament otherwise provides." In other words, they harked back, practically, to the plan of 1891, ensuring each State a return on the basis of its contributions for five years, and leaving the ultimate mode of distribution to be determined by the Parliament, after five years' experience of federal conditions.

To meet the abnormal position of Western Australia, a clause was suggested to provide that in the event of a falling off in the proportional amount collected in that colony, as compared with the rest of the Commonwealth, the deficiency should be made good by the Commonwealth.

On this report there was a general debate of two days' duration. (Conv. Deb., Melb., pp. 774-895). On the whole, the scheme was received with general, though cautious, approval, as the best that could be done with a difficult problem. The abolition of "guarantees," however, was strongly objected to by Sir George Turner and Mr. Isaacs for Victoria, and by Sir Edward Braddon and others for Tasmania. Mr. Holder, on the other hand, argued that an express guarantee was unnecessary, because "the necessities of four out of five States" were a sufficient guarantee that the Parliament would raise its revenue and limit its expenditure to meet those necessities. Some of the Tasmanians also thought that their colony ought to receive special terms like those given to Western Australia.

The clauses were then dealt with in detail, and the recommendations of the Finance Committee were substantially accepted, except in respect to the West Australian clause. It was pointed out that any loss of revenue which that colony might suffer would be a purely Treasury loss, owing to a remission of taxation to the West Australian tax-payers; and it was argued that this loss ought to be made up by the tax-payers of Western Australia, not by the tax-payers of the other colonies. Western Australia, however, was not yet in a position to raise much revenue otherwise than through the customs; so it was finally agreed to allow her, for five years, to impose gradually diminishing duties on intercolonial imports. This would, of course, postpone for a while the full benefits of intercolonial freetrade, and was not very welcome to South Australia, the next-door neighbour of Western Australia; but the point was conceded in consideration of the abnormal conditions temporarily existing in the latter colony.

The Adelaide "guarantees" having been struck out, several alternative kinds of guarantee were submitted, but without success; and when the Bill was reported a first time to the Convention it contained no express guarantee whatever as to the return of surplus. This position, which was due to the strenuous objections of the New South Wales delegates, was not accepted as final by the other colonies; and after the third recommittal Sir Edward Braddon, after consultation with others of the same mind, brought up the first draft of the famous Braddon clause, providing that out of the net customs and excise revenue not more than one-twentieth should be spent by the Commonwealth in the exercise of its original powers, not more than four-twentieths should be spent upon transferred services, and the remaining three-fourths should be distributed among the States. The proposal was made in the small hours of the morning, towards the close of the sittings; it had been in print for some days, the Convention had already discussed the whole question fully, and it was carried, with hardly any debate, by 21 votes to 18—the Victorians and Tasmanians voting solid with the "Ayes," and all the representatives of New South Wales, except Mr. Lyne, with the "Noes."

Next day it was reconsidered. Mr. Barton made an effort to limit it to five years, in which he was backed up by Mr. Reid, who reiterated his objections to any guarantee at all, but admitted that, if there must be a guarantee, this was the least objectionable form of it that he had seen. Mr. Holder put the argument for the clause very clearly. The Federal Treasurer would only need, for federal purposes, a revenue of £1,500,000; but to meet the needs of the States, he ought to raise at least £6,000,000. He still thought that the best guarantee was the necessities of the States; that this clause only imposed a statutory obligation to do what in any case the Parliament would be under a political obligation to do. Still, he pointed out the difficulty of satisfying the electors—upon whose acceptance the Constitution depended—without plain words on the face of the Constitution; and he supported the clause without limitation. Mr. Barton's amendment was negatived; and the clause passed with an amendment providing that, when any part of the public debts was taken over, revenue returnable to the States might be devoted to the payment of

interest. The clause was discussed yet once again, when Sir Edward Braddon consented to simplify it by omitting the distinction between different kinds of expenditure, and allowing the Commonwealth to spend one-fourth of the net receipts.

The financial clauses, as finally passed, substantially differed from those of 1891 in one respect only—the addition of the "guarantee" contained in the Braddon clause. The question of guarantees to the States against the dislocation of their finances had troubled the Convention from the very first; the problem being to satisfy Victoria, South Australia, Western Australia, and Tasmania on this point without arousing the fears of New South Wales that a high tariff would be required. In the latter part of their task—as subsequent events in New South Wales proved—the Convention did not altogether succeed; for it was upon the Braddon clause that the opponents of the Bill in New South Wales made the fiercest and most effective attack.

Railway Rates.—The question of regulating the war of railway tariffs caused a series of long and critical debates, owing to the difficulty, in the first place, of finding any satisfactory definition of fair or unfair competition, and the difficulty, in the second place, of securing harmony between the apparently conflicting interests of the rival trade centres, Sydney and Melbourne.

To begin with, Mr. Barton proposed to substitute, for the preference clause agreed to in Adelaide, a clause forbidding both the Commonwealth and the States to make any law or regulation of commerce or revenue which should give any preference to one State over another. This was at once objected to as going too far. That *the Commonwealth* should give no preferences was admitted; that a State should not be permitted to "derogate from free-trade" by trade barriers of any kind was also admitted; but that a State should be forbidden to *attract* trade to itself—to compete for trade by increasing the facilities for it—was too sweeping. It was strongly urged that the aim of Federation was to remove obstructions to trade, not to paralyze competition. Mr. Higgins denied this, and argued that differential rates which attracted trade, though they did not interfere with *freedom* of trade, interfered with *equality* of trade, and were therefore unfederal. He proposed to add to the existing clause a prohibition against rates made "with a view of attracting trade to ports of one State against ports of another State." Mr. Reid, however, replied that low rates were used for purposes of developing territory, as well as for attracting trade, and it would be impossible to frame words which would allow the one, and forbid the other. It would be disastrous to federalize the control of railway rates unless the financial responsibility of management were also federalized; and whilst he was prepared to forbid unduly high rates, he favoured an express provision that no rates should be invalid by reason of being unduly low. Such rates cut no throats; they benefited the producers; at the cost of the State, no doubt—but that was the State's concern. These widely differing views were developed by several speakers, but without any satisfactory compromise being suggested; and the opinion seemed to be gaining ground that there was really no middle course between the complete federation of the railways on the one hand, or unrestricted competition on the other.

Mr. Higgins' amendment was negatived by 24 to 18; the clause in the Bill was struck out without division; and then Mr. Barton proposed his new clause in a modified form, limited to the prohibition of preferences by the Commonwealth. This would have left the States free to charge any rates which did not come within the category of "derogating from freedom of trade." An amendment by Sir John Downer, to extend the prohibition to preferences by the States, was negatived; and then Mr. Higgins moved his amendment against rates made to "attract trade"—which this time was carried by 18 votes to 15.

This decision somewhat alarmed New South Wales, and a wrangle followed as to what its precise effect would be. It seemed to aim at fixing points of equidistance between Sydney and Melbourne as the "watershed" of traffic, and preventing "long-haul" rates between Sydney and Riverina. The New South Wales contention was that this would make waste iron of the New South Wales lines in that direction, and Mr. Reid promptly moved a proviso to prevent any interference with the power of a State to fix its railway rates so as to "secure payment of working expenses and interest upon the cost of construction." The Convention was now in something of a tangle. Mr. Reid's amendment was negatived by 22 to 20; but it was decided to postpone the clause until after the consideration of an alternative suggestion by Sir George Turner.

Sir George Turner's proposition was that Parliament might make laws to carry out the trade and commerce power upon railways, "and particularly to forbid such preferences or discriminations as *it may deem* to be undue and unreasonable, or to be unjust to any State." (Conv. Deb., Melb., p. 1372.) The first part of this—the purport of which is now embodied in sec. 98 of the Constitution—was merely declaratory of the application of the trade and commerce power to State railways; the second part was a particular interpretation of the nature of the power, and was meant to enable the Parliament to deal with all unfair rates, whether too high or too low. Its phraseology was based on the English Railway and Canal Traffic Acts and the American Inter-State Commerce Act. The objections raised on the part of New South Wales were: first, that it purported to control internal commerce, as well as inter-State commerce; next, that it assigned to the Parliament a power that was properly judicial. On the latter point there was an animated debate. Sir George Turner and Mr. Isaacs argued that the question was political rather than judicial, and was properly entrusted to the Parliament; whilst Mr. Reid insisted that the Parliament would be an interested tribunal and therefore a "tainted tribunal." However, the clause—with the omission of the word "particularly"—was carried by 25 votes to 16.

Mr. Barton's postponed clause was now re-considered, and Mr. Higgins' amendment, being superseded by Sir George Turner's clause, was struck out. The Turner clause was taken very seriously by Mr. Barton, Mr. Reid, Mr. O'Connor, and most of the New South Wales representatives, who complained that it meant that the railway rates of New South Wales in the competitive area were to be fixed to suit the interests of the other colonies. To counteract it Mr. O'Connor

moved an amendment providing that no rate should be deemed unlawful on the ground that it was unduly low. Afterwards, to make his purpose clear, he added the words "if such rate is imposed for the development of traffic between places within the limits of the State." The debate became very heated; Victoria was charged with "aggression" and "spoliation," whilst New South Wales was accused of wanting low rates, not for the sake of developing her territory or benefiting her producers, but in order to secure a monopoly for her own railways. The Turner clause had been inserted because it was feared that the trade and commerce clause tied Victoria's hands, and left New South Wales free. Mr. O'Connor's amendment was moved because it was feared that the Turner clause left New South Wales defenceless; and Sir George Turner complained that the amendment undid the whole effect of his clause, and tied Victoria's hands again. At this stage Mr. Grant came to the rescue with an amendment—now practically embodied in sec. 104 of the Constitution—to the effect that there should be no interference with "the imposition of such railway rates by any State as may be necessary for the development of its territory, if such rates apply equally to goods from other States." This would empower the Parliament to prevent rates which discriminated between the goods of different States, unduly high rates which blocked inter-State traffic, and unduly low rates whose purpose was not development, but competition. This suggestion was favourably received by New South Wales; but Sir George Turner and Mr. Isaacs objected that it would throw an impossible task upon the High Court. They contended that the proper tribunal to determine whether a rate was "necessary for development" was the Parliament; and the Victorian Premier moved the insertion of the words "in the opinion of the Parliament." It seemed that the whole dispute was to be re-opened; but at last something approaching harmony was restored by the suggestion to leave the decision to the Inter-State Commission—a body which would be judicial in attitude, and at the same time better able than the High Court to investigate and determine the questions which would arise.

The whole subject was now—after three days' debate—ripe for settlement; and to simplify the process the various amendments were withdrawn, to be proposed again in the form of new clauses. Mr. Barton's clause, forbidding the Commonwealth to make preferences, was at once carried. Mr. Grant then proposed his clause safeguarding rates which were "necessary for development." Sir George Turner announced himself as unable to accept this unless Parliament were made the judge of the necessity, and he moved an amendment to that effect; but this was rejected in favour of an amendment by Mr. Holder to make the Inter-State Commission the judge of this question. In that form the clause was carried by 22 votes to 21—all the Victorian representatives, except Mr. Higgins, voting against it, and all the New South Wales representatives voting for it. This division was taken to involve, consequentially, the substitution of the Inter-State Commission for the Parliament in the Turner clause.

Mr. Reid then proposed a clause (now substantially embodied in section 102 of the Constitution) requiring that "due consideration

shall be given to the financial responsibility incurred in connection with the construction and working expenses of State railways." This also was agreed to, and the settlement was complete.

The clauses were afterwards recast by the Drafting Committee, and on the second recommittal of the Bill Sir George Turner and Mr. Isaacs again took a division on the proposal that the Parliament, instead of the Inter-State Commission, should be the judge of the fairness of a rate; but the Convention was against them by 22 votes to 15.

These provisions gave important and responsible duties to the Inter-State Commission, and led to some changes in its constitution. Instead of merely empowering the Parliament to constitute an Inter-State Commission, the Convention decided to provide that "there shall be an Inter-State Commission," and to restore the clauses giving the members of the Commission a seven years' tenure, subject only to removal by both Houses of Parliament in the way prescribed for Justices of the Federal Courts. The functions of the Commission were defined as being "the execution and maintenance within the Commonwealth of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder." For this purpose, however, it was only to have "such powers of adjudication and administration as the Parliament deems necessary." As it was thus contemplated that the Commission should have judicial functions, it was deemed necessary—in order to preserve the unity of the judicial system—to allow an appeal from its decisions to the High Court, but "on questions of law only."

The whole intention of the "railway rate" clauses was to secure the fullest measure of trade equality that was consistent with the management of the railways by the States, and with the responsibilities of the States in connection therewith. This was secured by means of a triple control by the Federal Parliament, the Inter-State Commission, and the High Court. Preferences and discriminations by a State—unlike preferences by the Commonwealth—are not directly prohibited by the Constitution; but the Parliament is enabled, under its trade and commerce power, to make laws prohibiting, not all preferences and discriminations, but preferences and discriminations which are undue and unreasonable, or unjust to any State. This power, however, is hedged about by restrictions intended to prevent its abuse for political purposes; notwithstanding any Parliamentary prohibition, no rate can be prevented without the independent judgment of the Inter-State Commission that it is unfair; nor even then can it be prevented —unless it applies unequally to the goods of different States—if the Commission deem it necessary for development. Any prohibition of preferential rates must, therefore, first be declared by the Parliament, and cases arising under any such prohibition must be independently adjudicated on by the Inter-State Commission; whilst over both Parliament and Commission stands the Constitution, and—as the final arbiter and interpreter of the Constitution—the High Court.

Deadlocks.—There was another two days' debate on the deadlock clause, and a number of amendments were moved which re-opened the whole question. The first paragraph of the clause, providing for

a consecutive dissolution, was dealt with first. Sir John Forrest, fearing that the provision for dissolving the Senate would place that House at the mercy of the Executive, proposed to substitute, in place of the dissolution of the Senate, a joint sitting in the first instance. This was negatived by 28 to 15. Mr. Barton proposed to omit the first paragraph altogether, according to the understanding at Sydney; but the friends of the "consecutive dissolution" were determined to make another effort to carry their point, and the paragraph—for the present—was retained by a vote of 28 to 17, the minority being almost wholly composed of representatives of New South Wales and Victoria.

The fight between the consecutive dissolution and the simultaneous dissolution was brought to an issue by Mr. Symon's amendment to strike out the first part of the second paragraph (providing for a simultaneous dissolution) and so attach the joint sitting to the consecutive dissolution. For a time the situation looked serious. The last division indicated that the smaller States preferred the consecutive to the simultaneous dissolution, and there was a prospect that they would follow up their victory by carrying the amendment. Sir George Turner protested that if this were done the chances of carrying the Bill in Victoria would be ruined; and Mr. Reid followed with a speech which, under a running fire of interjections, developed considerable warmth. At this stage Mr. Barton secured an adjournment for dinner and calm reflection; and on resuming the debate, it turned out that the danger was imaginary—the amendment being negatived by 28 votes to 12.

The longest debate was on a proposal by Mr. Isaacs to substitute a referendum for the joint sitting. The national referendum was, of course, his ideal; but he preferred the dual referendum to none at all, as it would secure the voice of the people—and the experience of Switzerland supported the view that the voice of the people was never likely to be contradicted by the voice of the States. A referendum, he contended, was the only satisfactory solution. Dissolution of the Houses was admittedly insufficient; and the joint sitting was objectionable because it allowed the principle of equal representation to invade the House of Representatives, introduced a unicameral body as final arbiter, and would, in practice, give the Senate a decisive veto. Mr. Wise replied with a powerful attack on the proposed application of the referendum, as being unsuited to the British Parliamentary system, and destructive of Responsible Government. Mr. Reid and Mr. Isaacs contended that these arguments only applied to a referendum, such as that in Switzerland, by way of a veto on the Parliament; the question here was how to meet the case in which Parliamentary institutions broke down. Most of the Victorians, half of the South Australians, and Mr. Reid and Mr. Carruthers from New South Wales, supported the amendment; but the Convention was not to be convinced, and it was defeated by 30 votes to 15.

An amendment by Mr. Higgins, to substitute a bare majority for three-fifths, was defeated by 27 to 10. The clause was elaborated in several respects—especially with a view to enabling the joint sitting

to consider amendments actually *made* by either House, whilst making it clear that amendments *suggested* by the Senate could not be so considered, and that therefore the joint sitting gave the Senate no power of indirectly amending money bills. Finally, Mr. Symon agreed that the isolated provision for a consecutive dissolution was an excrescence, and ought to be struck out; and this was done. Substantially, therefore, the Sydney settlement of the deadlock question was adhered to.

Other Changes.—During the Melbourne session numerous amendments of considerable constitutional importance were made. The legislative authority of the Commonwealth was—after several unsuccessful attempts—at last extended, on Mr. Howe's motion, to "invalid and old-age pensions;" and power was also given to make laws for the acquisition of property for the public purposes of the Commonwealth. The provisions as to Privy Council appeals were considerably altered. To meet the wishes of an influential section of the mercantile community, who petitioned in favour of preserving the right of appeal, it was decided not to interfere with the existing right of appeal direct from the Supreme Courts of the States to the Privy Council, but to allow an alternative right of appeal to the High Court. Where, however, the appeal was made to the High Court, its decision was to be final, in the sense that there was no further appeal *as a matter of right*; and in matters involving the interpretation of the Federal Constitution, or of a State Constitution, no appeal was allowed, even *as a matter of grace*, unless the public interests of some other part of the Queen's dominions were concerned. With this exception, there might be an appeal from the High Court to the Privy Council by special leave of the Queen in Council; but the Federal Parliament might limit the matters in which such leave could be asked.

The suggestion of the Legislative Council of New South Wales, that the federal capital should be at Sydney, was met with a counter-suggestion by Sir Edward Braddon in favour of "some suitable place in Tasmania," whilst Sir George Turner and Mr. Symon kept up the joke by suggesting "St. Kilda" and "Mt. Gambier" respectively. It was felt that the site of the capital ought to be left for the Australian Parliament to choose. The amendment was negatived without division, and an amendment by Mr. Lyne, to provide that the seat of Government should be in New South Wales, was withdrawn at the suggestion of his colleagues. On the first re-committal of the Bill, however, Mr. Lyne pressed his amendment to a division, in which he was defeated by 33 votes to 5; whereupon Mr. Peacock—to show that the vote was not an expression of opinion that the capital ought to be in Victoria—divided the Convention on the question that the capital should be in Victoria—which was defeated by 36 votes to 3. A proposition by Sir George Turner, that the capital should be "within federal territory," was then carried by 32 votes to 12.

There was a widespread feeling that the Constitution ought to contain some recognition of the Deity. At Adelaide numerous petitions to this effect had been received from various religious bodies, and Mr. Glynn had proposed to insert in the preamble a declaration

that the people "invoking Divine Providence" had agreed to form a Federal Commonwealth. A majority of the members thought, however, that the insertion of such words might offend some sections of the people, and that the Convention ought to abstain from expressing, by any formula, the religious sentiments of the people. In deference to this feeling, Mr. Glynn had wished to withdraw the amendment; but this was objected to, and it was negatived by 17 votes to 11. Subsequently nine out of the ten Houses of Legislature had suggested the insertion of some words of recognition, and in Melbourne Mr. Glynn proposed to insert the words "humbly relying upon the blessing of Almighty God," which was carried without division. To prevent any implication arising from these words that the Commonwealth had any power to impose religious observances, or require religious tests, Mr. Higgins afterwards proposed the clause which now stands as sec. 116 of the Constitution.

On Saturday, 12th March, after the Bill had been for the fourth time reported with amendments, the Convention adjourned to enable the Drafting Committee to revise the Bill. The Committee worked assiduously, thoroughly revising every clause; and on Wednesday, 16th March, the Bill was recommitted a last time, and finally adopted by the Convention.

Next day the Convention held its last sitting. A motion by Mr. Barton, inviting the Premiers of all the colonies to supply copies of the Draft Constitution to the electors, afforded an opportunity for those members who were present to express their opinions of their work. Mr. Barton and Mr. McMillan for New South Wales, Mr. Deakin and Mr. Trenwith for Victoria, Sir Richard Baker, Mr. Holder and Mr. Glynn for South Australia, Sir Edward Braddon for Tasmania, all expressed themselves, with varying degrees of enthusiasm, as satisfied with the Constitution as a whole, and pledged themselves to its support. Mr. Reid had already left for home; so had the West Australian representatives. Sir George Turner was ill; but his colleague, Mr. Isaacs, spoke for both, and announced that though they were not wholly satisfied, they hoped that after thorough consideration they would be able to recommend the Bill to Victoria. And in putting the motion, Mr. Kingston, from the Chair, declared his faith in memorable words:—

"It seems to me that this is not the time when one should stand trembling on the brink of a distinct declaration as to future policy in connection with this great movement. I can but speak for myself alone; but in regard to this Constitution, I say unhesitatingly that I accept it gladly. More, I welcome it as the most magnificent Constitution into which the chosen representatives of a free and enlightened people have ever breathed the life of popular sentiment and national hope. Mine will be no Laodicean advocacy; but with such ability as I may possess, and with the fullest enthusiasm and warmth of which my nature may be capable—with my whole heart and strength—I pledge myself to recommend the adoption of this Constitution, daring any danger and delighting in any sacrifice which may be necessitated by unswerving devotion to the interests of the Commonwealth of Australia."

After some complimentary resolutions, the proceedings terminated with cheers for the Queen and for Australia, and the Australasian National Convention of 1897-8 came to a close.

(14) THE REFERENDUM OF 1898.

In accordance with the requirements of the Enabling Acts, the Draft Constitution was forwarded to the Governors of the several colonies by the President of the Convention and by the representatives. From the rising of the Convention an interval of eleven weeks elapsed before the popular vote was taken in four colonies—an event which in New South Wales, Victoria and Tasmania, was fixed for Friday, 3rd June, and in South Australia for 4th June. Western Australia alone took no action, but awaited the result of the vote in the other colonies. In the colonies in which the vote was to be taken, copies of the Draft Constitution were freely distributed to the electors. In New South Wales and Tasmania, the Constitution was accompanied by an official explanation prepared by Mr. R. R. Garran; in Victoria the Melbourne *Argus* published an unofficial explanation by Dr. Quick; and in South Australia a summary of its provisions was circulated by the Government. The campaign for and against the Constitution began promptly, and was vigorously conducted by the newspaper press, the federal representatives of each colony, and prominent politicians of all parties.

New South Wales.—In New South Wales alone was the opposition really formidable. During the last days of the Convention, whilst the leading champions of the Bill were still at their task in Melbourne, a wave of opposition had swept through Sydney. The first opponent in the field was the Sydney *Daily Telegraph*, which cast its whole influence against the Bill. Mr. J. H. Want resigned his position in the Ministry to fight the Bill with a free hand; whilst many members of Parliament, including the whole of the labour party, threw their influence on the same side, and a strong "Anti-Convention Bill League" was formed with head quarters in Sydney. The objections which were made to the Bill may be classed under three heads—political, financial, and provincial. Criticism of the political aspects of the Constitution was concentrated chiefly on the principle of equal representation in the Senate, and the powers wielded by the Senate—provisions which, it was argued, would stifle the will of the majority, and enable the small States to rule the large. In a less degree, the provision for amending the Constitution was attacked, as making amendment practically impossible, and imposing a "cast-iron" Constitution for all time. A further objection, which consolidated the greater part of the Parliamentary labour party against the Bill, was the rejection of the Referendum—their favourite political institution—as a means for settling deadlocks. The financial objections were that the Bill necessitated the raising of an enormous customs revenue, and consequently an immense increase of taxation in New South Wales; that under the federal tariff New South Wales would contribute an undue proportion of the revenue, and that after

the expiration of the book-keeping period there was every probability that her share of the surplus would be "scrambled for" by the other colonies, to meet their pressing needs. The Braddon clause, under the alliterative nickname of the "Braddon Blot," was especially denounced; and apart from the strong case that could be made out against it on its merits, it was made the subject of ingenious misinterpretation—such, for instance, as the constantly reiterated assertion that it required the raising of "four times as much taxation as is necessary."

These arguments, moreover, were reinforced by others which were purely provincial and anti-federal—though seldom avowedly so. Distrust of Victoria, and the other colonies—an alleged "conspiracy" to make Melbourne the federal capital, to annex the trade of Riverina, and to steal the rivers of New South Wales—formed the stock-in-trade of that section of the Anti-Bill party which was really anti-federal, and which appealed rather to prejudice than to reason. The stronghold of this section was in Sydney. What may be called the "old Sydney" party had never been enthusiastic for Federation. The intercolonial jealousies and rivalries of a generation ago had left their mark, and the motives of the other colonies were objects of suspicion. It was thought that the claims of New South Wales as the mother-colony, and of Sydney as the metropolis of Australia, had not been duly recognized, and in fact New South Wales was looked upon as the destined victim of scheming neighbours. These fears, partly a survival of empty prejudices, were in part also due to a short-sighted view of the trade necessities of New South Wales. Historical circumstances which it is unnecessary to recapitulate had left New South Wales with outlying territories southwards, westwards, and northwards, which were geographically nearer to Melbourne, to Adelaide and to Brisbane than to Sydney; and many people earnestly believed that it was necessary in the interests of Sydney—and tried hard to believe that it was necessary in the interests of the whole of New South Wales—to keep an octopus grip on the whole trade of this territory, no matter at what inconvenience to the producers and cost to the public. The doctrine not unreasonably preached by Victoria and South Australia, that "trade should flow in its natural channels," was held to be rank heresy; and no doubts were entertained that the merits in the great battle of railway rates were wholly with New South Wales. Viewed from this standpoint, the carefully contrived compromises as to railways and rivers seemed to be a traitorous surrender of the rights and privileges of New South Wales, and were denounced accordingly in no measured terms.

The "Anti-Billites" were first in the field, but the champions of the Constitution were not long in following. Mr. Barton, and six of his fellow-representatives at the Convention, were untiring in advocacy: federalists from the freetrade and protectionist parties alike rallied energetically; the Federation Leagues throughout the colony helped so far as their non-party organization enabled them to do so; and a strong campaigning body, called the New South Wales Federal Association, was organized. Of the Sydney daily press, the

Morning Herald and the *Evening News* supported the Bill, and the great majority of the provincial press followed suit.

The friends of the Bill had the advantage in debating strength, and had all the weight of national sentiment on their side; its enemies had provincial prejudices and vested interests to help them, and had also the advantage, which the critics of a definite and detailed piece of legislation always have, of being able to choose innumerable points of attack, and challenge the federalists to justify the Bill clause by clause, and line by line. The issue was doubtful, and the great question was—on which side would Mr. Reid throw his great influence and his unrivalled powers as a platform speaker? As Premier of the leading colony, and the man at whose invitation the process of framing the Constitution had been entered upon, he had a heavy responsibility; and it was no secret that he was not wholly satisfied with the Bill.

Mr. Reid kept his own counsel until 28th March, when he addressed a vast meeting at the Sydney Town Hall. He analyzed the Bill from beginning to end, criticized unsparingly what he thought to be its defects, touched more lightly on its merits, and ended with a dramatic declaration that, in spite of all his criticisms and objections, he personally could not be "a deserter to the cause;" that he would vote for the Bill himself—words which were greeted with an outburst of enthusiasm—but would abstain from any recommendation to the electors, one way or the other. Of course, he was claimed by both sides—the "Billites" pointing to his vote, and the "Anti-Billites" to his arguments. During the campaign he only made three other speeches—at Goulburn, Bathurst and Newcastle; and though he still declined to offer advice, his influence undoubtedly was cast against the Bill. Subsequently Mr. Lyne and Mr. Brunker declared against the Bill.

As time went on, the points of attack were multiplied; a word here, and a phrase there, were culled out to show the iniquity of the measure. But the main line of criticism remained the same. Equal representation would be "the death-knell of majority rule;" the "dead-lock fraud" would be utterly ineffective; the Inter-State Commission would hand over the railways of New South Wales to the other colonies; the federal capital would be in Victoria. The real strength of the attack, however, was directed against the financial clauses. It was here that Mr. Reid's criticisms had been most telling; and rival experts—Mr. Edward Pulsford and Mr. Bruce Smith for the Bill, Mr. R. L. Nash and Mr. Coghlan against it—engaged in a duel of figures which made the bewildered electors ask "What is truth?" The Anti-Bill statisticians maintained their forecast of an impossibly high tariff, and heaped ridicule upon the unfortunate "Braddon blot;" their opponents challenged their assumptions, condemned their Forecasts as unreliable guesswork, and maintained that the Bill did not require excessive taxation. The undeniable fact, which the freetraders had to face, was that the federal tariff would be framed to produce more revenue than the existing tariff of New South Wales—not because the Constitution required it, but because the people of Australia would require it; and this, from the freetrade aspect, was a point scored against Federation. At last the Government appointed

a Commission, consisting of Mr. J. Russell French (a banker whose federal views were unknown), Dr. MacLaurin (a strong critic of the Bill), and Mr. Bruce Smith. Witnesses were examined, and on 17th May a report was presented which—like Mr. Reid's speeches—was claimed by both sides as a "triumph." In reality it told against the Bill; for, though it did not bear out the figures of the extreme alarmists, it adopted some of their methods, to which it gave a semi-official authority.

The two sides were thus left as hopelessly at issue as before. On one point only was there no substantial dispute—that the new expenditure for federal establishments would be an inconsiderable item, which might be set down—after allowing a liberal margin—at £300,000 a year for all the colonies. But the opponents of the Bill proceeded to forecast the necessity of ruinous taxation by the following argument. They first calculated the "net deficiency" which each State would have after Federation, supposing no customs or excise revenue whatever were returned by the Federal Government. This they arrived at by simply subtracting the expenditure of which the State would be relieved from the revenue of which it would be deprived. They then assumed that this "net deficiency" of each State was an absolute "requirement" of the State, which must be made up to it by the Commonwealth out of customs and excise revenue. This involved the assumption that the federal tariff must be screwed up to meet the requirements of the weakest State; because, under the distribution clauses, each State could only get back the amount of its own contribution—or rather, the balance of its contribution after deducting its share of the federal expenditure. They then "calculated" the relative percentages which each State would contribute to a common tariff. The first of these calculations—made for the Adelaide Convention—was based frankly on the existing import figures of the various colonies under their widely differing tariffs; and of course the result of applying, say, the Victorian protectionist tariff to the actual imports of New South Wales under a freetrade system gave a startlingly high forecast of the contributions for the latter colony. The absurdity of the assumption led to considerable modifications of these estimates; but it was still contended that New South Wales would contribute an abnormally high percentage of revenue, at least for many years. The conclusion of this elaborate argument was that a tariff high enough to squeeze out of (say) Tasmania enough revenue for her wants would inflict a huge burden of utterly unnecessary taxation upon New South Wales; and though the bulk of this would find its way back to the Treasurer of New South Wales, it would leave him with the demoralizing temptations of an unmanageable surplus. In this argument—which was waged at immense length in the newspapers—the "Braddon Blot" had no place whatever; that was reserved for another line of attack.

The friends of the Bill replied that the whole argument rested on a series of false assumptions. The fixed "deficiencies" were imaginary, and involved the impossible task of foretelling the revenue and expenditure of each State four or five years in advance. There

was no justification for assuming that the States could not diminish their "requirements" by savings in expenditure; or that any State which, under a reasonable federal tariff, had a provincial deficiency, could not meet it by provincial taxation. The estimates of the percentage of New South Wales contributions were excessive, and the figures were unduly swollen by refusing to take into account the probable savings due to Federation, whilst loading the expenditure with the most liberal margins for contingencies. In short, it was argued that the Commonwealth would have a perfectly free hand in framing a tariff; and that under a very moderate revenue tariff each State would be left in a perfectly solvent position. It was not denied that New South Wales would be submitted to some additional taxation through the customs; but that was the necessary result of a uniform tariff, and was not due to the financial scheme of the Bill. Moreover, the favourable position of New South Wales as regards taxation was not due to superior wealth, but to the fact that she was living on capital in the shape of the revenue from the alienation of land; she was not at present taxed up to her real requirements, and an increase of taxation revenue would render a sounder system of finance possible.

Mr. Nash frankly admitted that the faults of which he complained were inseparable from the scheme of Federation proposed, and he advocated, as the only solution, a system which would include the immediate federation of railways and debts. These views, however, were not popular in New South Wales, and most of the critics, while having no suggestions of their own to offer, tacitly assumed that a better way was available. They were convinced that a better Bill could be "fixed up in half an hour"—but they had not half an hour to spare.

The progress of the fight showed that the objectors and doubters were in great force, especially in and near the metropolis. Along the borders, and especially in the Riverina district, the disadvantages of disunion were so apparent that criticism had less weight, and there was a general disposition to accept with enthusiasm the work of the Convention.

Victoria.—In Victoria, the fight was a one-sided affair from the outset. This fact—which anti-federalists in the mother-colony ascribed to an eagerness to "loot New South Wales"—was really due to quite different causes. In the first place, the sentiment of nationality was far more developed and better organized in the southern colony. The credit of this was chiefly due to the Australian Natives' Association—an institution which had received its chief development in Victoria, and which, on the basis of a mixed friendly society, mutual improvement society, and national association, extended to every corner of the colony, and had immense power by reason of its organization and its enthusiasm. Founded in 1871, it was already a great power in politics, and a recognized ladder to a Parliamentary and Ministerial career. Federation had long been its watchword; it had urged Governments to action, suggested schemes of its own, and lent encouragement to the schemes of others. It had produced the Bendigo scheme, the germ of the Federal Enabling Acts under which

the Constitution had been framed; it had contributed three representatives to the Convention—Mr. Deakin, Mr. Peacock, and Dr. Quick. And finally, at a critical juncture, on the eve of the adoption of the Constitution by the Melbourne Convention, when the *Age* advocated the Fabian policy of caution and delay, and when the Turner Ministry, or at least some members of it, seemed to hesitate, the Association at its annual conference held at Bendigo, stimulated by the inspiring eloquence of Mr. A. Deakin and Mr. J. L. Purves, announced its support of the Bill with a declaration of triumphant enthusiasm that left no doubt as to the result.

Another reason for the comparative weakness of the opposition in Victoria was that the financial obstacles were less than in New South Wales. New South Wales, in the matter of customs taxation, occupied a position at the extreme end of the group; Victoria was near the middle. It was apparent that a tariff of approximately the productiveness of the Victorian tariff would fairly meet the needs of the Commonwealth; and though that productiveness might be attained by a moderate revenue tariff as well as by the existing protective tariff of Victoria, the fears of producers that their protection might be reduced affected few pockets as compared with the fears of tax-payers in New South Wales that their taxation would be increased.

There was, nevertheless, a substantial Anti-Bill party in Victoria, led by Mr. Higgins—the only one of the ten Victorian representatives who did not support the Bill. His objections were almost wholly from a constitutional standpoint, and were directed against equal representation in the Senate, and against the restrictions upon the amendment of the Constitution. He was supported by a section of the labour party, which was however hopelessly divided—seeing that Mr. Trenwith, the ablest and most influential of the party's leaders, was warmly advocating the Bill. These were the most effective criticisms used against the Bill in the metropolitan centres; but in the country districts the chief concern was over the abolition of the stock tax, which would have to go when intercolonial freetrade began. The farmers had an unbounded belief in the extra value added to their land and stock by this tax; and Mr. Allan McLean, its chief apostle, conducted a vigorous campaign against the Bill.

There was some dissatisfaction in Victoria with the "railway rate" clauses, which the Premier and Attorney-General of Victoria—in spite of the precisely opposite fears expressed in New South Wales—feared would unfairly hamper Victorian competition for the Riverina trade, whilst leaving New South Wales free to do as she liked, under the pretext of developing her territory and making her railways pay. However, after a report from Mr. Mathieson, the Commissioner for Railways, which went to show that the revenue loss, on the most unfavourable interpretation of the Bill, would not be considerable, the Victorian Ministry announced their unanimous support of the Bill.

A few vested interests felt some mild alarm about bounties and protective duties. The clause prohibiting the granting of bounties by the States, except with the consent of the Federal Parliament,

had in New South Wales been thought to hide a cunning conspiracy to enable its provisions to be evaded, and Victorian bounties to be perpetuated; in Victoria it was complained of as a death-blow to the few bounty-assisted industries in existence. Nor did the Victorian Anti-Billites share the confidence of their brethren across the Murray that the federal tariff must inevitably be protective; and they would fain have seen some guarantee against the predominance of freetrade views in the Commonwealth.

All these arguments were overwhelmingly answered by the federalists, who, strong in numbers, in debating ability, and in enthusiasm, swept the country with an unbroken series of campaigning triumphs. Victoria as a whole had confidence in the Convention, and confidence also in the ability of the Australian people to work out their own destiny under a free Constitution. The federal compromises were accepted as necessary conditions of union, and the fears of the Anti-Billites were outweighed by the obvious commercial advantages of Federation, and by the strong sentiment in favour of national institutions. The Victorian newspapers almost unanimously supported the Bill. The *Argus*, the *Australasian*, and the *Evening Herald* in the metropolis, and the *Bendigo Advertiser*, the *Bendigo Independent*, the *Bendigo Evening Mail*, the *Ballarat Courier*, the *Ballarat Star*, the *Geelong Advertiser*, the *Geelong Times*, the *Gippsland Times*, and other country journals gave the Bill powerful advocacy. The *Age* and the *Leader* were not opposed to federation, but anxious to promote the improvement of the Bill. Although doubtful and critical at first, the *Age* eventually, in consideration of the many democratic features of the Constitution rendering it more liberal even than the Constitution of Victoria, recommended its acceptance with the hope of securing its reform at a later stage.

South Australia.—In South Australia all the federal representatives united in an appeal to the electors to vote for the Bill. The chief difficulties that had to be met were the fears that the cost would be excessive, and that the rights and interests of the less populous States would be unduly subordinated to the mass vote of the majority. But the argument of the advantages of union, and especially the benefits arising from intercolonial freetrade, prevailed; and the issue was never really in doubt.

Tasmania.—In Tasmania there was widespread dissatisfaction, at the outset, with the provisions limiting the powers of the Senate, which were thought to endanger the interests of the smaller States; and it was also feared that, notwithstanding the Braddon clause, there were not sufficient "guarantees" that the surplus returned to Tasmania would enable her to meet her provincial obligations. However, the federal representatives threw themselves courageously into the fight, and their efforts were rewarded with complete success.

The Vote of the People.—The result of the voting in the four colonies for and against the draft Constitution was as follows:—

	N.S.W.	Victoria.	S. Australia.	Tasmania.	Total.
For	71,595	100,520	35,800	11,797	219,712
Against... ...	66,228	22,099	17,320	2,716	108,363
Majority for the Constitution ...	5,367	78,421	18,480	9,081	111,349

There was thus a majority for the Bill in each of the four colonies. In Victoria, South Australia, and Tasmania, the majorities were decisive; but in New South Wales not only was the majority a slender one, but the total affirmative vote fell short by 8,405 of the 10,000 minimum required by the Federation Enabling Act Amendment Act of 1897. In New South Wales, therefore, under the provisions of the Act, the barely victorious Bill was "deemed to be rejected"—the prescribed effect of which was to be that in New South Wales "no further action shall be taken pursuant to this Act." In other words, the whole statutory process, so far as New South Wales was concerned, was at an end.

(15) EVENTS IN NEW SOUTH WALES.

The Task Resumed.—Had the federalists in New South Wales been in an actual minority, the discouragement would have been serious; but their majority, slender as it was, spurred them to fresh exertions. On the evening of 3rd June, an accidental duplication of some of the telegraphic returns had caused the coveted 80,000 to be posted at the *Sydney Morning Herald* office, and for a few minutes federalists were congratulating themselves on having won the battle. In the first disappointment of the awakening, some brave words were said about repealing the Act requiring an 80,000 minimum; but calmer judgment showed the unwisdom of "cramming the Bill down the throats" of a minority, many of whom were rather fearful than hostile. It was clear that some effort must be made to secure amendments which would dispel the fears of opponents, and diminish the opposition; but Mr. Barton and his following wisely held their hands until Mr. Reid, as Premier of the colony, should open negotiations.

This Mr. Reid promptly did. The day after the referendum he telegraphed to the other Premiers inviting them to a Conference with a view of amending the Bill to meet the wishes of New South Wales, and suggesting that the amendments, when agreed upon, should be transmitted with the draft Constitution to the Imperial Government. The Premiers did not receive this suggestion with favour. Their own colonies had given overwhelming majorities for the Bill, and they resented the idea that, at the instance of a minority in New South Wales, they should be asked to reopen the question—especially as New South Wales was on the eve of a general

election, and it remained to be seen whether that colony could not yet be brought into line. The Premiers of South Australia, Western Australia, and Tasmania, refused point blank to confer; whilst Sir George Turner, in Victoria, replied diplomatically that it would be well for Mr. Reid to intimate what amendments he desired. Mr. T. J. Byrnes, the Premier of Queensland, whom Mr. Reid had also consulted, expressed his willingness to confer; but the attitude of the other Premiers made it clear that nothing could be done till after the New South Wales elections.

The expiring Parliament met on 21st June, and the Governor's speech disclosed Mr. Reid's federal programme. After reciting the result of the Referendum, and the *de jure* rejection of the draft Constitution, the speech proceeded :—

"The Government are not prepared, however, to abandon their efforts to arrive at a satisfactory removal of those features of the Bill which have prevented the people of this country from voting more largely in its favour, and which have caused so many thousands of the electors to vote against it.

"My advisers are, therefore, anxiously engaged upon the preparation of proposals to modify the Convention Bill in certain respects. These will shortly be submitted in clear and definite terms to the electors of New South Wales.

" They will include :—

1. An objection to the principle of equal representation in the Senate, which, if not altered, must be accompanied by the removal of the stipulation requiring that a majority vote at a joint sitting of both Houses, to be effective, shall consist of three-fifths of the members present; or, failing that, the principle should be qualified by a provision for a national referendum instead of a joint sitting.
2. Some of the financial provisions to be recast, and the Braddon clause omitted altogether.
3. Money bills not to be amended by the Senate.
4. The same protection for the territorial rights of each State, as there is for the representation of each State in the federal Parliament, and this should include more definite provisions with regard to inland rivers.
5. Seat of Government—instead of the proposal in the Bill, adoption, in a slightly modified form, of the plan followed in the Canadian Constitution.
6. It is also considered that the appellate jurisdiction should be remodelled."

The bulk of the session, which only lasted three weeks, was taken up, in both Houses, with the Address-in-Reply. The main attack upon the Government programme came from Mr. Barton and Mr. O'Connor in the Legislative Council. They objected strongly to the demands of New South Wales being stated in the form of an ultimatum before conference, and maintained that the Government ought to go untrammelled into conference, and negotiate for the best terms possible. Moreover, they challenged Mr. Reid's good faith in the matter, and especially pointed to the fact that Mr. Want—who

had left the Ministry to lead the opposition to the Bill, and whose criticisms had a decidedly anti-federal complexion—had since the Referendum been readmitted to the Ministry. As regards amendment in the draft Constitution, they took this position. They believed that the Bill was a good and a fair one, and had heartily recommended it for acceptance. With some of the provisions they had never been fully in accord, but they had loyally accepted the whole as the best compromise available. It now appeared that a large minority of the people were dissatisfied; and they recognized not only that an effort must be made to secure amendments which would meet the chief objections made, but also that the result of the vote—showing as it did that unless some amendments were made it would be difficult to secure the adherence of New South Wales—made concessions possible which previously would have been impossible. Mr. Barton therefore approved of asking for reconsideration of the Bill with a view to three amendments—the removal of the three-fifths majority at the joint sitting, the omission of the Braddon clause, and the location of the capital in New South Wales.

The General Election.—Parliament was dissolved on 8th July, and the campaign began at once. Mr. Reid and the Ministerialists took the field as the "Liberal Federal Party," whilst Mr. Barton led the Opposition on behalf of the "National Federal Party." Federation thus became, for the first time, a question of party politics; and curiously enough, both parties seemed to be fighting for substantially the same thing—the draft Constitution, with a few amendments. The amendments foreshadowed by Mr. Barton were indeed only three, as against Mr. Reid's seven; but that was not the real distinction between the parties. The real difference was of a twofold kind, involving a question of federal attitude, and a question of leadership. In the first place, Mr. Reid and his following were definitely hostile to the Bill as it stood, and demanded substantial amendments as a condition of its acceptance. Mr. Barton and his following had been, and still were, ready to accept the Bill as it stood; but urged amendments with the double view of making it a still better Bill and of conciliating opposition. Consequent upon this difference of attitude, the Reid party urged that Mr. Reid stood for the interests of New South Wales, and Mr. Barton for those of the other colonies—that Mr. Reid's demands would meet acceptance, whilst Mr. Barton's "negotiations" meant surrender. The Barton party replied that no agreement could be reached by a policy of dictating terms; that Mr. Barton, as a *persona grata* to the other colonies and the trusted leader of the federalists, would be able to make better terms than Mr. Reid; and that the interests of New South Wales, as well as those of Australia, would be safe in his hands.

The main issue, however, was mixed up in every electorate, not only with the personal claims of the candidates, but with the old lines of party cleavage. The "fiscal issue" was indeed supposed to be sunk; but the fact that in the Ministerial party freetraders preponderated, and in the Opposition party protectionists, showed that the allegiance of many candidates was influenced by the old party ties. The same thing undoubtedly held true of the electors, and stood in the way of a "straight out" issue on the federal programme.

The result of the general election, which took place on 27th July, was very evenly balanced. Mr. Reid himself defeated Mr. Barton in the King Division of Sydney; but his previous large Parliamentary majority was reduced to a narrow majority of about four—including the labour party—whilst three Ministers lost their seats. But though neither party could claim a triumph, Federation had undoubtedly won all along the line. The preceding Legislative Assembly, though not avowedly anti-federal, was so trenchantly critical of the whole Commonwealth scheme as to be, in effect, hostile to Federation. In the new Assembly, every member stood pledged to the main principles of the draft Constitution, and the debatable points were narrowed down to a small schedule of amendments. The unanimity was perhaps more apparent than real. Both parties numbered adherents whose federal sentiment was little more than a polite concession to the necessities of party unity. Still, the fact that there were two federal parties and no anti-federal party—nor even an avowedly anti-federal candidate for election—showed the immense development of popular feeling in New South Wales. Federation may be said to have been assured from the date of the election.

The Federal Resolutions.—Parliament met on 16th August, and after the adoption of the Address-in-Reply, Mr. Reid introduced his federal resolutions. The first resolution affirmed the desire of the House that "steps should be taken without delay, in conjunction with the other colonies, to bring about the completion of federal union." The second resolution affirmed the desire of the House "that the other colonies should agree to reconsider those provisions of the Bill most generally objected to in New South Wales," and proceeded to "submit for the consideration of the other colonies" the following propositions:—

(*a*) *Representation in the Senate.*—That if equal representation be insisted upon, the provision for a three-fifths majority at a joint sitting of both Houses should be removed, and that a simple majority should decide; or that the provision for a joint sitting be replaced by a provision for a national referendum.

(*b*) *The 87th clause, known as the Braddon clause.*—That this clause should be removed from the Bill.

(*c*) *The capital of the Commonwealth.*—That clause 124 should be amended, and provision made in the Bill for the establishment of the federal capital in such place within the boundaries of New South Wales as the Federal Parliament may determine.

(*d*) *The boundaries of States.*—That better provision should be made against the alteration of the boundaries of a State without its own consent—namely, by the protection afforded by clause 127, as to the representation of States.

(*e*) *Inland rivers.*—That the use of inland rivers for purposes of water conservation and irrigation should be more clearly safeguarded.

(*f*) *Money Bills.*—That there should be a uniform practice in respect to such Bills, namely, that provided in the case of taxation Bills and Bills for the ordinary annual services of the Commonwealth.

(*g*) *Judicial appeals from States.*—That the mode of appeal from the Supreme Courts of the States should be made uniform, namely, the appeal should either be to the Privy Council or to the High Court, but not as at present, indiscriminately to either.

The third resolution dealt with the financial system of the Bill, and supplemented the suggestion for the removal of the Braddon clause as follows:—

(3) Although prepared, for the sake of union—if it be placed in other respects upon a fair and just footing—to accept the financial system embodied in the Bill, with the one exception mentioned, this House earnestly invites further inquiry into, and a more thorough consideration of, the financial clauses, regarding as evils to be avoided if possible excessive burdens of taxation, a prolonged system of bookkeeping, uncertainty as to the amount of surplus to be divided, and uncertainty as to the method of distributing it among the States.

It was recognized on all hands that these resolutions were studiously moderate in tone, and that the language of demand had been renounced in favour of the language of request. Nevertheless, Mr. Barton still feared that the difference might be merely one of form, and that under the velvet paw of "negotiation" might lurk the claw of dictation. He still objected to the requests of the House being embodied in a "placard," and thought that the Government ought merely to have defined its policy and then asked the House for authority to confer. However, the resolutions were debated in the House and in Committee, and were passed, with the addition of requests for the consideration of the two following propositions (the first moved by Mr. J. S. T. McGowen, leader of the Labour Party, and the second by Mr. Henry Copeland):—

(*h*) *The alteration of the Constitution.*—That clause 127 should be altered to provide:—

1. That any proposed alteration of the Constitution, approved by both Houses and a national referendum, should be submitted to the Governor-General for the Queen's assent.

2. That, where a proposed alteration has been affirmed in two succeeding sessions by an absolute majority in one House, but rejected by the other, such proposed alteration should be submitted to the national referendum.

3. That, respecting proposed alterations transferring to the Commonwealth any of the powers retained by the several States at the date of their acceptance of the Constitution, such alteration should not take effect in any State unless approved by a majority of electors in such State voting.

(*i*) *Number of Senators.*—That the number of Senators from each State should be increased from six to not less than eight. Twenty Senators, including the President or Chairman of Committees, to constitute a quorum.

In the Legislative Council the same resolutions, with Mr. McGowen's and Mr. Copeland's propositions attached, were moved by Mr. J. H. Want, the Attorney-General. After debate, they were passed with the following substantial modifications:—(1) The suggestion of a national referendum as an alternative to a joint sitting was struck out. (2) The proposition that the federal capital should be in New South Wales was—by a majority of one—amended so as to require that the capital should be in Sydney. (3) As to rivers, the Council asked that their use for irrigation and conservation, instead of being merely "more clearly safeguarded," should be "preserved for their respective colonies." In Resolution 3, the declaration that the House was "prepared for the sake of union to accept the financial system embodied in the Bill" was struck out. Mr. McGowen's proposal for the alteration of the Constitution was also struck out, and replaced by a resolution objecting to the plan of submitting alterations of the Constitution to a Referendum, but asking that any alteration transferring State powers to the Commonwealth should not take effect in any State without the consent of both Houses of Parliament of that State.

(16) THE PREMIERS' CONFERENCE, 1899.

No attempt was made to harmonize the resolutions of the two Houses; and on 29th January, 1899, the Premiers of all the six colonies met at Melbourne, at Mr. Reid's request, to consider the suggestions made by New South Wales. A noteworthy feature of this meeting was that Queensland, which since the Hobart Conference of 1895 had stood aloof from the movement, was represented by its new Premier, Mr. J. R. Dickson. The conference was held behind closed doors, and lasted till 2nd February, when a unanimous agreement was arrived at which all the Premiers agreed to submit to their respective Parliaments for reference to the electors.

The Joint Sitting.—The first request of New South Wales was almost wholly complied with. The requirement of a three-fifths majority at a joint sitting was done away with; and replaced, not indeed by a simple majority, but by "an absolute majority of the total number of the members of both Houses."

THE FINANCIAL CLAUSES.—The financial question proved the hardest of all to solve, and nearly caused a break-up of the Conference. Several brand-new financial schemes were offered, but none of them met with general acceptance, and the Conference, like the Convention, was obliged to fall back on the scheme in the Bill. As to the Braddon clause, every one was willing to let it go, if any substitute could be found; but every cure seemed worse than the disease. The Conference reported as follows:—

"The Premiers have given full consideration to the objections which have been urged against this clause, and have also considered other proposals which have been suggested for the purpose of giving some security to the States that a reasonable amount of the revenue collected in the States shall be returned to them, while, if possible, avoiding excessive burdens of taxation, a prolonged system of book-keeping, uncertainty as to the amount of the surplus to be divided, and uncertainty as to the method of distributing the surplus amongst the States.

"The Premiers consider that all the other proposals are open to more serious objections than those which have been raised against the clause as it appears in the Bill; but with a view of meeting the objections as far as possible, consistently with the safety of the States, the Premiers are of opinion that the operation of the clause should not continue after a period of ten years if the Parliament then desires to repeal or alter it; and that, in addition, power should be granted to the Parliament to deal with any exceptional circumstances which may from time to time arise in the financial position of any of the States."

To give effect to these opinions, they limited the Braddon clause to "a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament otherwise provides;" and added a new clause (sec. 96) empowering the Parliament, during the same period, to grant financial assistance to any State.

THE FEDERAL CAPITAL.—With regard to the Federal Capital, the Conference reported thus:—

"It is considered that the fixing of the site of the capital is a question which might well be left to the Parliament to decide; but in view of the strong expression of opinion in relation to this matter in New South Wales, the Premiers have modified the clause, so that while the capital cannot be fixed at Sydney, or in its neighbourhood, provision is made in the Constitution for its establishment in New South Wales at a reasonable distance from that city."

Accordingly the request of New South Wales, that the capital should be in that colony, was granted; but with two conditions which Victoria insisted upon: (1) that it should not be within 100 miles of Sydney; (2) that the Parliament should sit at Melbourne until it met at the seat of Government.

BOUNDARIES OF STATES.—The protection asked for by New South Wales against the alteration of the boundaries of any State without its consent was given, by requiring that any law or constitutional amendment to that effect should be submitted to the electors of the State affected, and should require the assent of a majority of those voting.

Alteration of the Constitution.—With regard to the suggested amendments in the mode of altering the Constitution, the Premiers reported as follows :—

"The Premiers agree that, where there is a difference of opinion between the two Houses as to whether the people should have the opportunity of deciding if any alteration should be made in the provisions of the Constitution, one House should not have the power to prevent the question being decided by the people. They have therefore endeavoured to provide a means whereby, after full discussion and reasonable delay, the matter may be referred from either House to the electors. The Premiers are unable to agree that the decision should rest on the result of a National Referendum, it being considered of vital importance that any alteration in the Constitution which the States have agreed to accept should only be made if a majority of the electors of the Commonwealth and also a majority of the electors in a majority of the States determine that it is proper to make such alteration."

Accordingly the provision was inserted which enables a proposed law for the alteration of the Constitution, if twice passed by either House of the Federal Parliament, to be submitted to a Referendum notwithstanding the dissent of the other House.

Other Suggestions.—As to Rivers, Money Bills, and Judicial Appeals, the Premiers after fully considering the proposals of New South Wales did not find it practicable to recommend any alteration of the Bill; whilst they did not regard as desirable the proposed increase in the number of Senators. But in addition to the amendments made at the instance of New South Wales, one was agreed to at the instance of Queensland. To meet the peculiar conditions of that colony, it was provided that if Queensland joined as an Original State, the Parliament of that State might, pending federal legislation, divide the State into electorates for the purposes of Senate elections.

Result of the Conference.—As a result of the Conference, therefore, seven amendments were made in the Bill—six at the instance of New South Wales, and one at the instance of Queensland. The three main requests of New South Wales had each been met by a substantial concession. The abolition of the three-fifths majority was a great extension of the actual, as well as the moral, efficiency of the deadlock clause. The provision as to the capital prevented the possibility of the permanent seat of Government being fixed anywhere but in New South Wales. As to the Braddon clause —the temporary retention of which was a general surprise, for it had few friends—it was certainly a great advantage to diminish its rigidity by placing it, after ten years, at the mercy of the Parliament, and thus obviating the necessity for a constitutional amendment if its removal should prove desirable.

(17) ADOPTION OF THE CONSTITUTION, 1899.

The Position in New South Wales.—A welcome piece of news to federalists was Mr. Reid's prompt announcement that he had done with doubt and indecision, and would support the amended Bill with all his powers. It soon became evident, however, that the opposition in New South Wales would be strong. The Sydney *Daily Telegraph*, on second thoughts, took up as uncompromising an attitude as ever, and the opposing forces began to consolidate themselves. Their cry was that the "demands" of New South Wales had been trifled with, and that the Bill was in substance "the same old Bill." The absolute majority at the joint sitting was denounced as being little if any better than the three-fifths majority, and elaborate calculations were made to show how New South Wales would invariably be defeated if most of her representatives absented themselves. The "Braddon Blot" was the subject of renewed attack, and its limitation in point of time was made light of. The 100 mile limit for the federal capital was complained of as a gross insult to Sydney—the corresponding "insult" to the rest of Australia, implied in the demand made by New South Wales, being ignored. The provision was in fact a most unfortunate one, because it aroused fierce opposition in the metropolitan and suburban area—the very district which it was most important to conciliate. In particular the provision for the temporary meeting of Parliament in Melbourne was attacked as hiding a deep conspiracy to establish the seat of Government there permanently, and it was roundly stated that Mr. Reid had been "outwitted" by the cunning of the other colonies. The real fight, however, centred round the financial clauses, against which all the old arguments were reiterated, but with greater wealth of detail.

The Enabling Bill.—The New South Wales Parliament met on 21st February, and the new Enabling Bill was at once introduced in the Assembly. It provided for the submission of the amended Constitution to a Referendum, at which a simple majority was to decide; and it allowed any holder of an elector's right to vote at any polling-booth in the colony, whether or not he was qualified as a Parliamentary voter for any electorate. In the Assembly no difficulties were met; even the malcontents admitting that the Constitution must be submitted to the people, and reserving their hostility for the present. In Committee, amendments were moved to make acceptance by an "absolute majority" of all the electors necessary; to make the inclusion of Queensland a condition of New South Wales entering the Federation; and to take an alternative referendum on the Bill as amended by the Premiers, and on the Bill "as amended by the Legislative Assembly of New South Wales." The object of all these amendments, however, was too apparent, and they were all defeated by overwhelming majorities. An amendment was also moved to defer the referendum for three months after the passing of the Bill; but this was withdrawn on the Premier undertaking to allow an interval of six weeks.

The Bill passed the Assembly without amendment, and went to the Council, where it met with a very different reception. A large

petition was presented against the Bill, and the opposition was led by Dr. McLaurin with a powerful attack on the financial clauses, which he claimed to be unworkable. In Committee, three vital amendments were passed by large majorities; one to defer the referendum for three months; another to make acceptance by one-third of all the electors necessary; and a third making the inclusion of Queensland a condition of Federation. To these amendments the Assembly refused to agree; the Council insisted, and a free Conference was held, but both sides were unyielding, and on 30th March Parliament was prorogued.

The Council was at this time much below its normal strength, owing to deaths and resignations, and a few days after the prorogation the Governor, on the advice of his Ministers, appointed twelve new members. On 11th April Parliament was again called together, and the Enabling Bill was again passed by the Assembly and sent up to the Council. The hint was sufficient. Only one amendment was proposed, to require an interval of eight weeks before the referendum should be taken. This was agreed to by the Assembly, and on 22nd April the Bill was assented to.

The Second Referendum.—The 20th June, 1899, was the day fixed for the Referendum, and the last great fight began at once. The federal campaign was organized by the United Federal Executive, formed of representatives from the non-party Australasian Federation League, from the New South Wales Federal Association, which had fought the last battle for the Bill, and from the Ministerial and Opposition parties in Parliament. On the other side, the Anti-Convention Bill League took up its old attitude. Of the Sydney daily press, the *Telegraph* was alone in its opposition; the *Sydney Morning Herald,* the *Evening News,* and the *Australian Star* all worked zealously for Federation. The *Sydney Bulletin,* which—when it has a positive policy—is a great power throughout Australia, concentrated its unrivalled wealth of ridicule against the opponents of the Bill, and the suburban and provincial press were almost unanimous on the same side. Of the 125 members of the Legislative Assembly, some 86 supported the Bill with varying degrees of zeal; and nine of the New South Wales representatives at the Convention worked earnestly for it—Mr. Lyne alone expressing himself still dissatisfied.

With all these odds against them, the Anti-Bill party made a gallant fight. Their virtual leader was Dr. MacLaurin, whose criticism of the financial clauses undoubtedly made a deep impression; whilst the rank and file of the party made onslaughts upon every joint in their opponents' armour, and devoted themselves especially to stir up jealousy in the metropolitan area. The great bulk of the Parliamentary Labour Party still yearned for the national referendum, and opposed the Bill consistently; though at the polls the labour vote was fairly evenly divided. The heart of the controversy, however, was the financial argument, and the whole country seemed plunged into a bewildering maze of figures, devoted to proving—and disproving—that the Bill would involve oppressive and unfair taxation in New South Wales. Eight days before the vote a fillip was given to the cause by the passing, at last, of a Federal Enabling Bill in Queens-

land—the colony of which federalists and anti-federalists alike had always spoken as the "natural ally" of New South Wales.

The result of the polling was a decisive victory for Federation by a majority of 24,679 votes, the figures in the city, suburban, and country electorates being as follows :—

	Yes.	No.
City	11,019	10,546
Suburbs	24,475	25,237
Country	71,926	46,958
Total	107,420	82,741

Taken by electorates, the vote shows 79 electorates for the Bill, and 46 against—or a majority of 33 for union.

The Southern Colonies.—South Australia had passed the new Enabling Act in March, and seizing the opportunity afforded by a general election, had taken the vote upon the amended Bill on 29th April, when the verdict of the previous year was, without much excitement, reaffirmed by an even larger majority than before—the voting being 65,990 for Federation, and 17,053 against.

Victoria and Tasmania, as soon as the verdict of New South Wales was known, passed Enabling Acts on the same lines, and fixed 27th July, 1899, as Referendum Day. In Victoria, despite the weakness of the opposition, federalists determined to exhibit their strength, and aroused enthusiasm to such a pitch that a great muster of 152,653 votes were recorded for the Bill, and only 9,805 against it. In Tasmania also the majority was increased, and the minority reduced, the figures being 13,437 for and only 791 against the Bill.

Queensland.—The real interest now centred in Queensland. The Premier, Mr. Dickson, ably supported by his colleague, Mr. R. Philp, took up the cause with enthusiasm. The Enabling Bill, providing for the submission of the amended Constitution to a referendum, and for its subsequent transmission, by address of both Houses, to the Home Government, was introduced in May. It was nearly wrecked at the outset by a proposition from the democratic party to adopt the principle of "one man one vote," without restriction, at the referendum. There was in Queensland a "plural vote"—electors being entitled to vote in every electorate in which they possessed property of an annual value of £10—and there was also a considerable nomad population not registered as voters. It was urged that every man over the age of twenty-one should be allowed to vote whether registered as a voter or not. This the Government were unable to accept, but they only gained their point, and saved the Bill, by one vote. They afterwards conciliated opposition by affording facilities for a revision of the rolls before referendum day.

One difficulty to be faced was that Queensland—though it had been ably represented at the 1891 Convention, whose work was the

basis of the draft Constitution now presented—had, through the fault of its politicians, taken no part (except through its Premier, Mr. Dickson, at the Premiers' Conference) in the actual framing of the Constitution. A natural though belated desire was felt to have a voice in the details; and as the Constitution was appended as a schedule to the Enabling Bill they could, technically, make amendments in it. An attempt to do so was, however, thwarted by the leaders of all parties, who pointed out the futility of taking a vote on anything but the identical Constitution agreed to by the other colonies; and the Bill and the schedule were passed through both Houses without amendment, and became law on 19th June—the eve of the referendum in New South Wales. The vote was fixed for 2nd September, and the campaign began.

But the friends of Federation had to face great difficulties. The question in Queensland was comparatively new, and the Constitution came definitely before the people for the first time. The forces of prejudice, ignorance, and suspicion, which in the other colonies had gradually given way as a result of repeated federal campaigns, had to be met and beaten down at a single blow; the principles of the Constitution, which in the other colonies had been expounded, analyzed, attacked and defended, discussed in public and in private, for two or three years, had to be brought home to the people in the space of a few weeks. The friends of the Bill worked zealously, and achieved wonders. It soon became clear that the North and the Centre were the federal strongholds—federal sentiment being there aided by the hope that the separation of those districts into distinct provinces, so long unsuccessfully contended for, would be easier after Federation. The one clause of the draft Constitution which aroused the fears of the Separatist federalists was clause 124, providing that a new State might be formed by separation of territory from a State, "but only with the consent of the Parliament thereof." The Separatists were in a minority in the Queensland Parliament, and objected to the desires of an overwhelming majority in the North and Centre being thwarted by a majority in the South.

In Brisbane and throughout the southern district the opposition to the Bill was very strong. Farmers, merchants, and manufacturers feared the competition of their New South Wales neighbours under a system of intercolonial freetrade; and—while the anti-federalists in New South Wales hailed Queensland as their "natural ally" against the southern colonies—the extreme anti-federalists of Queensland turned against New South Wales the epithets which their brethren in New South Wales had hurled against Victoria. Brisbane feared the competition of Sydney, just as Sydney had feared the competition of Melbourne; and federalists had a hard task in convincing their opponents that the benefits of free intercourse would vastly outweigh any sacrifice of intercolonial protection.

In Queensland, therefore, the opposition was directed against a vital principle of Federation, and was undeniably anti-federal. The objection was not to this Constitution merely, but to any Federation worthy of the name. It was a war of vested interests and intercolonial protection against commercial unity. Minor issues were, of course,

raised, and the "Anti-Bill" catchwords of the other colonies—however inapplicable—were caught up and scattered broadcast. The cry of "increased taxation through the customs," and even the exact figures of "22s. 6d. per head increased taxation," were copied from New South Wales manifestoes with calm indifference to the fact that these forecasts were based upon the existing tariff of New South Wales—which produced about 30s. per head less than that of Queensland. Equal representation in the Senate was, from the Queensland point of view, a merit; but it was largely discounted by the Money-Bill and deadlock clauses, which it was feared would lead to the undue supremacy of the larger colonies.

The result of the vote was a victory for Federation by a substantial majority of 7,492—the figures being 38,488 for the Bill, and 30,996 against. In the Northern district there was an overwhelming federalist majority of 8,993, every electorate showing a majority for the Bill. In the Centre, there was a majority of 2,156, eight electorates being favourable, and three unfavourable. Rockhampton, the capital of the centre, polled against the Bill—a result due, not to antagonism to Federation, but to a Separatist fear of clause 124. The Centre and North thus gave a combined federal majority of 11,149; but this was unfortunately reduced by an anti-federal majority of 3,657 in the South—the metropolitan electorates being all against the Bill, and the rest of the Southern district polling slightly in its favour.

The Total Results.—The voting in the five colonies whose electors had accepted the draft Constitution was as follows:—

	New South Wales.	Victoria.	South Australia.	Tasmania.	Queensland.	Total.
Yes ...	107,420	152,653	65,990	13,437	38,488	377,988
No ...	82,741	9,805	17,053	791	30,996	141,386
Majority ...	24,679	142,848	48,937	12,646	7,492	236,602

These figures are a striking proof of the extent and sincerity of the national sentiment throughout the whole of Eastern Australia; and they are also a unique testimony to the high political capacity of the Australian people. Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood. The States of America, of Switzerland, of Germany, were drawn together under the shadow of war. Even the Canadian provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth, the fifth great Federation of the world, came into voluntary being through a deep conviction of national unity. We may well be proud of the statesmen who constructed a Constitution

which—whatever may be its faults and its shortcomings—has proved acceptable to a large majority of the people of five great communities scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble Social Compact.

The Addresses to the Queen.—The last step towards the acceptance of the draft Constitution by the five colonies was taken by the Legislatures in passing Addresses to the Queen praying that the Constitution should be passed into law by the Imperial Parliament. In the three southern colonies—Victoria, South Australia, and Tasmania—this proceeding, after the emphatic vote of the electors, was little more than a matter of form; and during the month of August both Houses of Parliament in each of those colonies adopted the Addresses without opposition and amid general congratulations.

In New South Wales there was a show of opposition, but only by a few of the most irreconcilable critics. Many of those who had opposed the Bill had been influenced by misgivings rather than by real hostility, and accepted the verdict of the people loyally. The Address was debated at length in the Assembly, but an amendment purporting to inform the Queen that 82,000 of her loyal and dutiful subjects had voted against the Bill, and that "such vote was not a declaration against Federation, but against the adoption of any Constitution which could not be amended by a majority of the Australian people," was defeated by 75 votes to 22, and the Address was then passed on the voices. In the Council the opposition was stronger. An amendment, moved by Mr. C. G. Heydon, to declare that if the Parliament did not meet at the Seat of Government within four years, it should sit in alternate years at Sydney and Melbourne, was prompted by the fear that the sittings of the Parliament at Melbourne might become permanent. Federalists recognized, however, that it was impossible to re-open the terms of union at this stage, and the amend- was defeated by a narrow majority of four. On 17th August the Address itself was carried, after several nights' debate, by 24 votes to 21.

In the Queensland Assembly the verdict of the people was also loyally accepted, and the Address was passed, on 4th August, by 57 votes to 9. In the Council, an amendment was moved to declare that the Bill had been carried by majorities in the Centre and North only; but this effort to elevate sectional differences over the decision of the whole colony failed, and the Address was passed by 16 votes to 9.

Western Australia.—At the close of the Convention, Sir John Forrest had seemed prepared to recommend Western Australia to adopt the Constitution as it stood; but his attitude subsequently became less favourable. At the Premiers' Conference, 1899, it is understood that he asked, unsuccessfully, for certain concessions. In July, 1899, after the second referendum in New South Wales, the Constitution was for the first time submitted to the Parliament of Western Australia, and was referred to a Select Committee of the Legislative Assembly. On 19th September the Committee brought up its report, declaring its opinion that before Western Australia could safely join the Commonwealth, four amendments were necessary:—

(1.) Enabling the colony to be divided into electorates for the election of Senators;

(2.) Empowering the Federal Parliament to authorize the construction of a transcontinental railway;

(3.) Allowing Western Australia, for five years after the adoption of a federal tariff, to impose her own customs duties on intercolonial and other imports;

(4.) Exempting Western Australia, for the same period, from the jurisdiction of the Inter-State Commission.

The object of the second of these amendments was to dispense with the necessity of the consent of South Australia (under sec. 51—xxxiv.) to the selection of the route and the construction of the line within that colony. The five years' control of the tariff was for the double purpose of securing the revenue necessities of the colony and affording temporary protection to the West Australian farmers, and other producers of foodstuffs.

On the consideration of this report in the Legislative Assembly, the Government proposed to submit to the electors both the Bill as adopted by the Premiers' Conference and the Bill with the West Australian amendments. This was stoutly opposed by federalists, who were confident that there was an overwhelming majority of the population, especially on the goldfields, in favour of the Bill as it stood, and that the proposed alternative ballot would confuse the issue. In Parliament, however, the goldfields were very scantily represented as compared with the settled districts; and though Mr. Leake moved an amendment that the Bill as adopted by the Premiers' Conference should alone be referred to the people, the Government proposal was carried by the House.

In the Council the proceedings were hopelessly tangled. First a proposal by Mr. Matheson, that the Bill as adopted by the other colonies should be referred to the people, was negatived. Then a proposal by Mr. Whitcombe, that it was undesirable at present to submit the question of Federation to the people at all, was also rejected. The Government's proposal to submit both Bills met with the same fate; and finally a proposal by Mr. Hackett, to submit only the Bill with the Committee's amendments, was also lost. The result was that the submission of the Bill to the people was blocked altogether. The federalists raised the cry that the whole fiasco had been planned by the Government; and an agitation was promptly started on the goldfields for separation from Western Australia, under the power reserved by the Queen in the Constitution of the colony.

In January, 1900, Sir John Forrest, with a view to securing assent to his amendments, visited the eastern colonies and attended a Conference of Premiers at Sydney. He finally gave up three of the West Australian amendments, but stood firm on the five years' liberty to impose intercolonial customs duties. Had the matter been still in the stage of negotiation, this might have been granted; but the difficulty was that the Constitution was now a compact upon which the people of the accepting colonies had set the seal of their approval,

and whose alteration the Governments of those colonies were unable to countenance.

New Zealand.—New Zealand, alone of the seven Australasian colonies, had, since the Convention of 1891, taken no part in the process of framing the Federal Constitution. Following the example of 1891, New Zealand is mentioned in covering clause 6 as a possible "State," but as yet she has taken no steps to adopt the Constitution. This does not mean that New Zealand is without interest in Australian Federation. The progress of the movement has been watched by that colony with keen attention; and a substantial section of public opinion favours the adoption of the Constitution. In July, 1899, a Federation League was formed in Auckland; and though the question of Federation has not risen to the magnitude of a party issue, it has been much discussed by politicians, by the press, and by the people. For the most part, however, Federation is in New Zealand not so much a national as a commercial question. Her geographical isolation from Australia by 1,200 miles of sea is a factor which cannot be neglected, though it may be exaggerated. At the same time, her commercial and other relations with Australia are most important; her interests, as regards defence and external affairs, are largely identical; and the alternatives either of union or of a reciprocal commercial arrangement with the Commonwealth are pressing themselves upon the attention of the people of New Zealand.

(18) ENACTMENT OF THE CONSTITUTION, 1900.

On 22nd December, 1899, Mr. Joseph Chamberlain, Secretary of State for the Colonies, in a telegraphic despatch to Earl Beauchamp, Governor of New South Wales, expressed a hope that a delegation from the federating colonies would visit England and be present when the Commonwealth Bill was submitted to the Imperial Parliament. This invitation was considered at a Conference of Premiers held at Sydney from 24th to 27th January; and it was arranged that a delegation should be sent, consisting of Mr. Edmund Barton (N.S.W.), Mr. Alfred Deakin (Victoria), Mr. J. R. Dickson (Queensland), Mr. C. C. Kingston (S.A.), and that they should be joined in London by Sir Philip O. Fysh (Tasmania). It was agreed that the delegation should represent all the federating colonies in unitedly urging the passage of the Bill through the Imperial Parliament without amendment, and in explaining any legal or constitutional questions that might arise. The Government of Western Australia also expressed a desire to be represented, and, with the concurrence of the Secretary of State, despatched Mr. S. H. Parker, Q.C., as a Delegate from that colony.

Imperial Criticisms.—Towards the middle of March, 1900, the Australian Delegates arrived in London. Mr. Barton was appointed their spokesman; and on 15th March they had their first informal conference with the Secretary of State for the Colonies and

the Crown Law Officers. Mr. Chamberlain having welcomed the Delegates, Sir Richard Webster, Q.C., Attorney-General, indicated the provisions of the Bill which the Crown Law Officers thought required discussion and explanation, and perhaps amendment. The chief objection made was to clause 74, as restricting the right of appeal to the Privy Council.

It was evident from the outset that, whilst the Delegates were anxious to secure the passage of the Bill without amendment, the Imperial Government were equally anxious to amend certain provisions which seemed to them to affect Imperial interests. The only way in which the Imperial Government had been heard in connection with the framing of the Bill was in consultation with the Australian Premiers at London at the Diamond Jubilee celebrations in 1897, when certain criticisms had been made on the Bill as drafted at Adelaide. Mr. Chamberlain had subsequently sent Mr. Reid a confidential memorandum of the criticism of the Crown Law Officers, which included an objection to the almost total abolition of Privy Council appeals, as proposed in the Adelaide draft. (See Extract from this memorandum, Parl. Papers, May, 1900.) This memorandum had been handed by Mr. Reid to the Drafting Committee, and had led to several amendments being made, and particularly to a considerable modification of the clause relating to Privy Council appeals. The Crown Law Officers, however, were not satisfied with the new clause, and had also some new criticisms to offer.

A memorandum of the amendments suggested by the Crown Law Office was afterwards handed to the Delegates. (House of Com. Pap., May, 1900, p. 19.) These amendments, only five in number, were wholly confined to the covering clauses of the Bill. (1) As regards Privy Council appeals, it was proposed to modify the effect of clause 74 by adding to covering clause 5 a declaration that nothing in the Act or the Constitution should affect any prerogative of the Crown to grant special leave of appeal to Her Majesty in Council. (2) In covering clause 2, the words "This Act shall bind the Crown" were proposed to be omitted, as involving an unnecessary interference with the prerogative. (3) In covering clause 5, the provision that the laws of the Commonwealth should be in force on British ships plying between ports of the Commonwealth was proposed to be omitted as being too wide and involving a possible conflict of jurisdiction; whilst it was thought that all necessary powers of legislation in respect of the coasting trade were given by sec. 736 of the Merchant Shipping Act, 1894 (see p. 50, *supra*). (4) It was proposed to declare, in covering clause 5, that the laws of the Commonwealth were "colonial laws" within the meaning of the Colonial Laws Validity Act, 1865 (28 and 29 Vic. c. 63). A contention had been raised in Canada that this Act was not fully applicable to laws of the Dominion (see Lefroy, Legisl. Power in Canada, pp. 227-8); and the Crown Law Officers feared that in Australia a similar contention might derive some support from the definition of "colony" in covering clause 6. (5) It was proposed that the Constitution, instead of being appended to covering clause 9, should be placed as a schedule to the Act.

Memorandum of the Delegates.—Preliminary to a further interview with the Secretary of State for the Colonies, the Delegates forwarded to him a Memorandum, dated 23rd March, of their reasons for urging the passage of the Bill in the form in which it had been affirmed by the people. (House of Com. Pap., May, 1900, p. 13). In defending the provisions proposed to be altered, they carefully guarded themselves against even appearing to acquiesce in the suggestion that any amendment was necessary. They called attention to the recital in the preamble that the people of the federating colonies had agreed to unite in a federal Commonwealth "under the Constitution hereby established;" and argued that this recital would not be justified if the Constitution were in any way altered.

In answer to a question whether, if alterations were made, it was preferable that they should be placed in the covering clauses rather than in the Constitution itself, the Delegates replied that though this would, in appearance, be the less objectionable method, yet any amendment in the covering clauses which altered the meaning of the Constitution would be in effect an alteration of the Constitution, and would therefore be equally objectionable.

They then dealt categorically with the specific amendments foreshadowed by the Crown Law Officers. As regards the application of the Colonial Laws Validity Act, they thought that the meaning of the Bill was clear without the proposed amendment, and that the definition of "colony" in covering clause 6, which had been framed simply for the purpose of clearly including South Australia in the Bill, could not exclude the definition of "colony" in the Colonial Laws Validity Act from applying to the Commonwealth. In support of this view, they cited the definition of "colony" in the (Imperial) Interpretation Act, 1889 (52 and 53 Vic. c. 63). And they hinted that, if the Imperial Government thought that any doubt was raised by the definition in the Bill, it would be better to omit the definition, as being unnecessary, than introduce new matter.

With regard to the proposed omission of the provision relating to British ships, they pointed out that the provision was much more restricted than that inserted, at the instance of the Imperial Government, in the Federal Council Act of 1885. If the contention were correct that the matter was sufficiently provided for by the Merchant Shipping Act, 1894, the phrase objected to was at the worst a harmless redundancy. But the expression "coasting trade" in that Act was not defined, and might be taken to include only the trade of vessels plying within the "three-mile" territorial limits. Moreover, the provision removed a further anomaly by protecting a vessel which passes from the territorial waters of one colony into those of another from being subjected to a change of laws, and by applying the uniform laws of the Commonwealth during the whole passage from one port of the Commonwealth to another. The power, though larger than that conceded by the Merchant Shipping Act, was larger only for the most beneficial purposes.

To the amendment relating to Privy Council appeals they objected as substantially altering, and in great part nullifying, clause 74 of the Constitution. They entered into an elaborate defence of clause 74, pointing out that it was not as far-reaching as was supposed in some

quarters, and justifying the demand for the finality of the judgments of the High Court, in constitutional cases, by the argument that if the Australians were fit to make a Constitution for themselves they were fit also to interpret that Constitution. The concluding sentence of the clause, giving the Federal Parliament power to limit the right of appeal, only conferred on the Commonwealth (they argued) a right to do what each State could do at present, subject to the reservation of the Bill as affecting the prerogative; and they referred to the Instructions to Australian Governors, dated July, 1892, clause viii., par. 7 (see note, § 56, *infra*) as showing that the framers of the Instructions considered that the colonies had full legislative powers in matters affecting the prerogative, subject to reservation for the royal assent. The last sentence of the clause, therefore, seemed only to confer on the Commonwealth a legislative power which had long been possessed by each of the States. They asked the Imperial Government to consider whether clause 74 was of such a nature as to justify alarm, and whether it was worth while to incur the risk of serious dissatisfaction in Australia for the sake of preserving the small degree of prerogative affected.

They referred to the generous attitude taken by the Imperial Government in respect of the Federal Council Bill in 1885, when it had been recognized that it would be inexpedient to make any unavoidable alterations in the draft submitted from Australia; and they concluded with an eloquent appeal to the mother-country to place in the hands of the Australian colonies the trust for which they asked. This memorandum was signed by the Delegates of the five federating colonies.

Mr. Haldane's Proposal.—At this stage a new element was introduced into the appeal question by a proposal from Mr. R. B. Haldane, Q.C., M.P. Mr. Haldane, in an article in the March number of the *Juridical Review*, dwelt on the confidence felt in the Privy Council by all parts of the Empire, and the valuable work it had done in reviewing the decisions of the High Court of Canada, and giving a liberal interpretation to the powers of the provinces as defined in the British North America Act. The Commonwealth Bill, however, proposed to restrict this right of appeal, and he contended that this could only be averted "by making our Australasian colonies feel that we offer them the finest court of ultimate appeal that the Empire can produce." He proposed that the three colonial members of the Privy Council should be made life peers, and that this step should be followed by the fusion of the Judicial Committee of the Privy Council with the House of Lords in its judicial capacity. There would then be one great Imperial tribunal, and the anomaly of having one court of final appeal for the United Kingdom, and another for the dependencies, would be removed.

Mr. Haldane's suggestion attracted much notice in the press, and was regarded with favour by the Imperial Government and the Crown Law officers.

Memorandum of Imperial Objections.—In answer to the Memorandum of the Delegates, the Imperial Government prepared a Memorandum, dated 29th March, setting forth their objections to some

provisions of the Bill. (House of Com. Pap., May 1900, p. 22.) It stated that they were most anxious for the speedy passage of the Bill in a form which would give the Australian colonies the Federation which they desired; but, at the same time, it was their bounden duty to protect the interests of the United Kingdom and the rest of the Empire. The points of difference were few, and involved a minimum of alteration. They observed that the Memorandum of the Delegates abstained from discussing any of the proposed alterations on their merits, and consisted almost wholly of an appeal to the Government to accept the Bill unaltered, as embodying the wishes of the Australian people. They felt it their duty to place on record some of the reasons which made it impossible for them to accede to this request.

In the first place, they contended that the distinction, which the Delegates now refused to recognize, between the "covering clauses" and the Constitution, had been clearly recognized in the debates of the Convention, and that the Enabling Acts showed that the agreement at which the people of the colonies had arrived related to the "Constitution" only and not to the covering clauses.

As to the application of the Colonial Laws Validity Act, they cited a suggestion by Mr. R. E. O'Connor (Conv. Deb., Syd., p. 252) that the Act would not apply to the laws of the Commonwealth. They contended that doubts arose, not only from covering clause 6, but also from sub-sections xxix. and xxxviii. of section 51; and they added that "in the absence of any definition or limitation of the privilege claimed by these provisions of the Constitution, Her Majesty's Government would fail in their duty if they left any room for doubt as to the paramount authority of Imperial legislation."

As to the enforcement of the laws of the Commonwealth on British ships trading between ports of the Commonwealth, they said that the provision in the Federal Council Act, relied on by the Delegates, was unduly wide. They contended that the power to control the coasting trade, given by sec. 736 of the Merchant Shipping Act, 1894, was not confined to territorial waters, and that the words "first port of clearance" and "port of destination" were not free from ambiguity.

As to Privy Council appeals, they thought there would be uncertainty as to the definition of "matters involving the interpretation of the Constitution" and "public interests." They objected to the powers given to the Federal Parliament to limit the prerogative, and urged that the establishment of two final courts of appeal would introduce confusion and uncertainty. The clause seemed to have originated, to some extent, in objections to the present constitution and working of the Judicial Committee—which however had, on the whole, commanded the confidence of the Empire. But the time was specially inopportune to curtail its jurisdiction. Proposals were under consideration for securing a permanent and effective representation of the colonies on the Judicial Committee, and for amalgamating the Judicial Committee with the House of Lords, so as to constitute a Court of Appeal from the whole British Empire. It would be unfortunate if Australia should choose this moment to take from the Imperial tribunal the determination of the class of cases of greatest

importance and often of greatest difficulty. They stated at some length the arguments against the contention for the finality of judgments of the High Court, and concluded by saying:—"The retention of the prerogative to allow an appeal to Her Majesty in Council would accomplish the great desire of Her Majesty's subjects both in England and Australia, that the bonds which now unite them may be strengthened rather than severed, and, by ensuring uniform interpretation of the law throughout the Empire, facilitate that unity of action for the common interests which will lead to a real Federation of the Empire. The object of everyone at present should be to draw closer together all parts of the Empire. The existence of the right of appeal, subject to the leave of the Privy Council, has been a link effectively binding together every part of Her Majesty's dominions; the weakening of this tie would seriously lessen the value of even so great and beneficent a result as the Federation of Australia. If the Bill were passed in its present form, while it would mark a step in advance as far as the Federation of Australia is concerned, it would be a retrograde measure so far as it affects the larger question of Imperial Federation."

New Zealand.—On 27th March, Mr. W. P. Reeves, the Agent-General for New Zealand, informed the Colonial Office that he had been appointed a Delegate for that colony; and on 30th March he forwarded to the Colonial Office a Memorandum of certain amendments desired by New Zealand. (House of Com. Pap., May 1900, p. 29.) These amendments, three in number, were in effect:—

(1.) That New Zealand should preserve the right of joining the Commonwealth at any time, or within a specified time, on the same terms as the Original States.

(2.) That while New Zealand remains outside the Commonwealth, litigants in her Higher Courts, though reserving the right of appeal to the Privy Council, should have an alternative right of appeal to the High Court.

(3.) That the Commonwealth and New Zealand should be empowered to make the necessary arrangements for joint naval and military defence, including operations outside their own boundaries, and for that purpose to form a homogeneous Australasian force.

In support of the first amendment—the request for an "open door"—Mr. Reeves urged that New Zealand, on account of her geographical distance and her peculiar circumstances, ought to be given a longer time to make up her mind than had been necessary in the case of contiguous colonies. Though New Zealand was linked to Australia by bonds of intercourse, friendship, and sympathy, she had also vital and separate interests. She had watched the federal movement with caution and reserve, and her decision needed prudent deliberation. To forestall a possible objection that his demands came too late, Mr. Reeves said that New Zealand had been unable to judge of the intentions of the Australian colonies until they had accepted the Commonwealth Bill; and as the leading statesmen of Australia, in response to a request by the Premier of Western Australia, had

refused to consider any further amendments, the only course open to New Zealand was that now taken.

Western Australia.—On the same day Mr. S. H. Parker, the Delegate for Western Australia, forwarded to the Colonial Office a Memorandum of the amendment asked for by that colony. (House of Com. Pap., May, 1900, p. 31). Following the recommendation of the West Australian Select Committee (p. 226 *supra*) he asked that clause 95 should be struck out, and a clause substituted empowering Western Australia, for five years after the imposition of the Federal tariff, to receive the same customs duties as were in force at the passing of the Commonwealth Act, such duties to be collected by the Commonwealth. He announced that if this amendment were made, the Government of Western Australia would immediately summon Parliament in order to pass an Act to refer the Commonwealth Bill to the people, and would use their utmost endeavours to secure its acceptance.

Conference at the Colonial Office.—On 5th April there was a Conference at the Colonial Office, at which Mr. Chamberlain presided, and the Delegates from all the seven colonies were present (House of Com. Pap., May, 1900, p. 35). Mr. Chamberlain first asked Mr. Parker and Mr. Reeves to say anything which they might wish to add to their respective Memoranda. Mr. Parker urged that the sliding scale in the Bill, by which the intercolonial duties of Western Australia would be annually reduced by one-fifth, was not a sufficient protection for infant industries, and particularly for agriculture, and that an annual alteration of duties would greatly injure and disturb trade. If the Bill were to be amended at all by the Imperial Legislature, he did not see why the West Australian amendment should not be introduced. The argument against the amendment was that a further referendum would be necessary; and if there must be a referendum there was an opportunity for this amendment. Questioned by Mr. Chamberlain, he admitted that a referendum would cause some delay, and that he could not ask for the amendment if it alone necessitated a referendum. He also urged that if his amendment were accepted, a further amendment would be necessary to enable Western Australia, within a certain time, to be admitted as an Original State. Cross-examined by Mr. Kingston, he admitted that there was a strong feeling on the goldfields in favour of accepting the Bill without amendment, but maintained that the majority of the producing population were against it. He could not form an opinion whether the Bill if referred to the people would be accepted.

Mr. Reeves expanded the arguments of his Memorandum, and said that while the attitude of New Zealand was one of "cautious examination," the feeling in favour of Federation was growing. Asked by Mr. Chamberlain whether two of his suggestions—namely, the appeal to the High Court and the arrangements for mutual defence—were not rather a matter for subsequent agreement with the Commonwealth than for amendment of the Bill, he merely pointed to other special provisions in the Bill relating to particular colonies. He suggested seven years as the time during which the "open door" should be allowed to New Zealand. As to the question of delay, he

agreed with Mr. Parker that if the Bill were to be amended at all these amendments could be put in.

From remarks made by Mr. Chamberlain, it appears that though some amendment of the covering clauses was contemplated by the Imperial Government, no decision had then been come to whether any amendment would be made in the Constitution itself.

Mr. Parker and Mr. Reeves then withdrew, and the remainder of the Conference was devoted to discussing, with the Delegates of the five federating colonies, the different points at issue. The Delegates seem to have understood that the amendments relating to the Colonial Laws Validity Act and to British ships would be abandoned.

At midnight, Mr. Chamberlain despatched to the Governors of the five colonies a telegram announcing the result of the Conference. He disclaimed any intention to interfere in interests exclusively Australian, but was confident that the Ministers of the colonies would give full weight to the suggestions of the Imperial Government when urged on behalf of the United Kingdom, or as Trustees for the Empire at large. The Imperial Government would have desired amendment as to various questions which had arisen, but were unwilling to risk delaying Federation by pressing their views; and the operation of clause 74, in restricting the right of appeal to the Privy Council, was now practically the only matter in issue. The Imperial objections to the clause were set out substantially as follows:—

(1.) The term "public interests" is vague, and would lead to increased litigation.

(2.) A most important link of Empire would be seriously impaired, and the consequences would be far-reaching in allowing divergency to spring up where uniformity is most desirable.

(3.) In the interests of Australia, the final decision in important questions as to boundaries of Federal and State powers should lie with the highest court of the Empire, beyond suspicion of local bias.

(4.) Important questions as to the operation of Commonwealth laws on British shipping, or generally as to whether such laws are *ultra vires*, can hardly be allowed to be concluded by the High Court.

(5.) Commonwealth laws on fisheries, &c., may seriously affect the interests of other parts of the Empire.

(6.) Banks and other institutions having large interests in Australia are strongly against the limitation, and weighty representations on the subject have been made to the Imperial Government.

(7.) The actual restriction, and the power claimed to make further restriction, equivalent to practical abolition of appeal, are specially inopportune when a Bill is under consideration for enhancing the dignity and efficiency of the Judicial Committee by practically amalgamating it with the House of Lords, and providing for the adequate and permanent representation of the great colonies in a new court.

For these and other reasons the Imperial Government felt that they must press for the amendment of clause 74, but they wished to effect the amendment in the way most agreeable to Australian sentiment, and so as to avoid if possible the delay and expense of a further referendum. Several suggestions had been made, but the Delegates' lack of instructions prevented their discussing the form of the proposed amendment.

The only other amendment alluded to was the declaration that the Colonial Laws Validity Act applied to Acts of the Commonwealth —a declaration which the Imperial Government still regarded as necessary. Mr. Chamberlain earnestly appealed to the colonial governments to co-operate with him in securing the unopposed passage of a Bill which, while accepting the draft Constitution practically in its entirety, would take account of the above considerations; and he trusted that they would enlarge the instructions to their Delegates, and authorize them to arrange with the Imperial Government the speediest and best method of securing these objects.

On the same date Mr. Chamberlain telegraphed to the Governors asking whether their Ministers would consent to the amendment desired by Western Australia being inserted in the covering clauses.

Premiers' Conference.—On receipt of these telegrams the five Australian Governments decided to hold a conference of Premiers to discuss the position. Meanwhile, on 16th April, Mr. Chamberlain sent a further telegram stating that whilst he would be glad to learn that the Premiers concurred in his policy of amending the Bill, what he immediately desired was that the Delegates should be authorized to consult with the Imperial Government as to the best means of effecting the alterations, especially with a view to avoiding, if possible, a further referendum. The responsibility would rest with the Imperial Government, but they were anxious to avail themselves of the assistance of the Delegates. On 17th April Mr. Chamberlain, at the request of Mr. Reeves, sent a telegram inviting consideration of the New Zealand request for an "open door" for seven years. If the Premiers approved, he would be prepared to consider the amendment, otherwise he would not be justified in making it.

The Premiers' Conference sat at Melbourne from 19th to 21st April. Neither Mr. Philp, for Queensland, nor Mr. Lewis, for Tasmania, were averse to the alteration of clause 74; but ultimately the following resolution was agreed to :—

"The Premiers of New South Wales, Victoria, Queensland, South Australia, and Tasmania, in conference assembled, having given full consideration to the despatches from the Secretary of State for the Colonies respecting suggested amendments in the Commonwealth Bill, reply :—

"(1.) While they fully recognize the feeling of the Imperial Government that vigilance on their part is essential in the interests of all parts of the Empire, and also the importance of securing the inclusion of Western Australia in the Federation from the first, they cannot forget that by the enabling Acts and in pursuance of them (*a*) the framing of the Federal Constitution was expressly entrusted to the Convention of Representatives, specially elected by the people for

the purpose, in all the Colonies, except Queensland and Western Australia, and that the final acceptance or rejection of the Constitution when framed was also remitted to the people; (*b*) the question as to appeals was, *inter alia*, considered by the Convention in Adelaide, and no appeal to the Privy Council was allowed. During the visit of the Premiers to England at the Jubilee the matter was referred to by the Secretary of State for the Colonies, who urged reconsideration. It was accordingly reconsidered at the meeting of the Convention in Melbourne, and resolved in the opposite direction to the decision in Adelaide. Later, the matter was again discussed, and the compromise now in the Bill agreed to. It was yet again debated in the Premiers' Conference prior to the last referendum, and no alteration was made in the form of the Bill. The vote was then taken and the Bill was adopted by a large majority of the electors; (*c*) the Commonwealth Bill belongs therefore in a very special sense to the people of Australia, whose only mandate to Governments and Parliaments is to seek its enactment by the Imperial Parliament in the form in which it was adopted by the people.

"(2.) The Premiers believe that the Appeal Clause, as framed, could not work injuriously to any part of the Empire, although the proposed new Court of Appeal for the Empire would doubtless present attractions to the people of Australia.

"(3.) The only alternatives suggested in the despatches are:—(1) Amendment of the Bill and (2) postponement of its consideration. Of these two the Premiers do not hesitate to say that the latter course would be much more objectionable to Australians generally even than the former.

"(4.) Without disputing the constitutional power of the Imperial Parliament to amend the Bill on its own responsibility, the Premiers respectfully urge that the voice of the Australian people given on the Bill as it stands should receive that favourable consideration which such a weighty referendum demands. The Premiers do not consider themselves as having authority to accept any amendments. They hope that the colony of Western Australia, whose representatives assisted to frame the Bill and in the Convention almost unanimously agreed to clause 95, may be urged to accept it as it stands. They think that the Bill already sufficiently provides for the admission of New Zealand."

Western Australia and New Zealand.—On 27th April, Mr. Chamberlain telegraphed to Sir A. C. Onslow, the Acting-Governor of Western Australia, that the Premiers had declared that they had no authority to accept amendments, and had given their Delegates no fresh instructions. He therefore could not press the matter further, and now urged West Australian Ministers to consider whether they should not, in the best interests of that colony as well as of Australia, make a resolute effort to bring the colony into Federation at once. Western Australia, unless she joined as an Original State, could only enter later on condition of complete intercolonial freetrade, and would thus lose the temporary protection of clause 95; whilst, in view of her present population, she might find it difficult to secure such large representation in the Federal Parliament as she would get

as an Original State. He also asked them to consider the effect of the agitation of the Federalist party, especially in the goldfields, if the colony did not enter as an Original State. He thought it of the utmost importance to the future of Western Australia that she should join at once, and he urged that they should immediately summon Parliament and take steps for ascertaining the wishes of the people. If they agreed to this course, a clause would be inserted in the Bill providing that, if the people intimated, before the issue of the Queen's proclamation, a desire to be included, Western Australia might join as an Original State.

To this the Acting-Governor replied, on 2nd May, that Parliament had been summoned for 17th May, when an Enabling Bill would be introduced by the Premier providing for the immediate submission of the Commonwealth Bill to the people.

On 28th April the Colonial Office informed Mr. Reeves that the Premiers at the Melbourne Conference had decided that they had no authority to accept any amendments, and considered that the Bill already provided sufficiently for the admission of New Zealand. Under these circumstances he did not feel justified in further pressing for amendments in regard to a question which appeared to be one to be settled by the Australian colonies without Imperial interference.

The Delegates' Second Memorandum.—In some quarters, the Premiers' resolution was viewed as an "invitation" to the Imperial Government to amend the Bill. The Delegates of the federating colonies—except Queensland—made haste to correct this impression. They addressed a second Memorandum to the Colonial Office, dated 27th April. (House of Com. Pap., May, 1900, p. 65.) They said that the one remaining amendment suggested by the Imperial Government had been fully considered by the Premiers in Conference. As the Premiers had been unable to accept it, or to withdraw, enlarge, or modify the instructions to the Delegates, it continued to be the common duty of the Delegates—each of whom was appointed to represent all the colonies—to press for the speedy passage of the Bill, as prepared by the instructions, and endorsed by the votes, of the Australian people. In firmly preferring this request with all possible respect, they deemed it desirable to offer some comment on the Colonial Office Memorandum of 29th March.

The substantial issue which they again pressed upon the attention of Her Majesty's Government was that the Bill as prepared was an Australian Constitution in a double sense—Australian not only in origin, but by the deliberate endorsement of Parliaments and peoples. Any amendment, not both absolutely essential and incapable of achievement by any other means and at any other time, was to be deprecated as destroying the character of the measure, and re-opening numerous issues at present happily and conclusively settled. They again drew attention to the phrase in the preamble, reciting that the people of the colonies had agreed to federate "under the Constitution hereby established;" and urged that the proposed amendment would at once vitiate the agreement, and render this solemn declaration a violation of the facts.

They pointed out that it was not quite accurate to say that the

Enabling Acts referred to the "Constitution" only, and not to the covering clauses. Both in the Enabling Acts and in the Addresses the "Constitution" meant the whole Bill—the Acts having imposed on the Convention the duty of framing a Federal Constitution "in the form of a Bill for enactment by the Imperial Parliament." It was true that there were ways in which the covering clauses might be amended without changing the meaning of the Constitution itself; but the proposed amendment of clause 74 was not of this character. It had never been admitted that such an alteration would preserve the intercolonial compact of the electors.

They feared that the amendment of clause 74 would encourage the persistent opponents of the Bill to renew their agitation. A fresh referendum would involve expense, delay, and vexation; and if a referendum were not granted it would be truly asserted that the Bill no longer contained the compact accepted by the people. In either case, the initiation of the Commonwealth would be embittered by the introduction of issues fruitful in strife.

They had hitherto forborne to dilate on the disadvantages of the present system of appeals to the Privy Council; for not only were the delay and expense incapable of serious dispute, and the evils patent which were inseparable from the want of judicial knowledge of Australian laws and conditions, but the court as at present constituted was not attempted to be defended. Whether its proposed reconstitution would suffice from the Australian point of view would depend on subsequent Imperial legislation. When Australia had at length, after infinite pains, formulated a scheme which satisfied Australian requirements, it would be manifestly unfair to postpone its adoption pending the consideration of a measure not yet prepared, and which might, or might not, be satisfactory.

The substantial questions were:—(1) whether clause 74 derogates from the rights of other parts of the Empire; and (2) even if it technically appears to do so, whether its operation would injuriously affect other parts of the Empire. The delegates confessed their inability to see that an affirmative answer could be given to either question. The clause expressly preserved the rights—or, in its own words, the "public interests"—of every part of the Queen's Dominions outside the Federation. If the words "public interests" had no technical meaning, they must be construed in their ordinary and common-sense signification, which was sufficiently definite.

They elaborated the arguments for the final interpretation in Australia of the Australian Constitution. The capacity and integrity of Australian Judges would not be disputed. The contention that clause 74 would "tend to destroy uniformity of decision on constitutional questions" was untenable. The principles of interpretation of statutes were so well understood that lack of uniformity in that regard was out of the question; and in their application to the words of the Australian Constitution the question of uniformity with decisions given on (say) the Canadian Constitution would not arise. Uniformity of decision as to Constitutions of different design would be as unattainable as it was undesirable. Judicial knowledge of local conditions was essential to true interpretation.

To the contention that the final decision in Australia of a few Australian questions would weaken a "link of Empire," and that uniform interpretation of the law would facilitate that unity of action which would lead to a real Federation of the Empire, the Delegates replied that "unity of action" and "uniform interpretation of the law" seemed to them wholly unrelated, and certain to remain so. They reflected with pride that there were sentiments which would constitute eternal links of Empire. "The consciousness of kinship, the consciousness of a common blood and a common sense of duty, the pride of their race and history—these are the links of Empire; bands which attach, not bonds which chafe. When the Australian fights for the Empire, he is inspired by these sentiments; but no patriotism was ever inspired or sustained by the thought of the Privy Council."

The Delegates assured Her Majesty's Government that the proposed amendment, even through a covering clause, could not fail to be distasteful and harassing to the Australian people. "If they accepted the Constitution with such an amendment, it would be because they were made to choose between the bowl of intervention and the dagger of delay."

In conclusion, they submitted that the object of those who sought "to draw closer together all parts of the Empire" would be best served in Australia by never permitting its Federation to be placed in even apparent opposition to "the larger question of Imperial Federation." So far from there being any conflict between the two, it had always been maintained in the colonies that local union was an essential preliminary to any practical scheme of Imperial co-operation. The suggestion that they were antagonistic was therefore to be deprecated, as it was not only unjustified, but must deal a serious blow in Australia to the prospects of Imperial Federation.

"The Delegates therefore plead most earnestly with Her Majesty's Government that effect may be given to the representations made by the Australian Premiers in their recent telegram. That despatch makes it clear that the clause as it stands was repeatedly considered and ratified by Convention, Premiers, and people; that the electoral adoption of the Bill is a mandate to Executives and Legislatures to seek its enactment in the form which the people gave it by their representatives, and confirmed by their votes; that the Premiers decline to accept alterations, because that course is unauthorized in view of the mandate, and would therefore be improper; and that they decline to authorize others to do on their behalf that which they cannot rightly do themselves. This request implies no questioning of the trusteeship of Her Majesty's Government, of the wisdom of Parliament, or of its sovereign power; but often it has been the truest wisdom of sovereignty to abstain from the exercise of its power, or so to exercise it as only to win the gratitude of those who are subject to its authority."

This Memorandum was subscribed by the Delegates of four of the federating colonies; but Mr. Dickson, the Queensland Delegate, refused to sign it, on the ground that to continue to press upon the Imperial Government correspondence which might lead to further arguments would invite delay in presenting the Bill to Parliament,

with a possibility of imperilling its immediate consideration. In a subsequent Memorandum to the Colonial Office, dated 5th May, Mr. Dickson explained that a further reason for his refusal to sign was "a conviction that the maintenance of plenary appeal to the Privy Council, notwithstanding the provisions of the Bill, is regarded with most cordial approval by every loyal subject—certainly in Queensland —and, I believe, generally throughout Australia." He added that since their arrival in London, the Delegates had had the honour and immense advantage of consultations with the Attorney-General, Sir Richard Webster, and Sir Robert Finlay, Solicitor-General, who, at interviews and in the reply to the Delegates' first Memorandum, had expressed arguments for the maintenance of full appeal which seemed to him to be practically unanswerable.

Final Imperial Memorandum.—On 4th May, the Imperial Government addressed a final Memorandum to the Delegates. They said that a detailed reply to the Delegates' arguments would merely involve repetition of their previous Memorandum; but there were one or two points which deserved a brief comment. First, it could not fairly be contended that the referendum on the Bill was to be taken as an unqualified and considered ratification of every detail of the Constitution, and that no single provision could be altered without contravening the decision of the electors. Next, as to the alleged disadvantages attending appeals to the Privy Council, they did not believe that there was such delay and expense as suggested, and were not aware of any patent evils arising from want of knowledge of Australian laws and conditions. It had never been admitted, nor could it be justly asserted, that the Judicial Committee as at present constituted was incapable of defence. They referred to the statement, in their first Memorandum, that the administration of justice by the Privy Council had, on the whole, been such as to command the confidence of the Empire. This statement was amply justified by the history of that Tribunal, and no inference to the contrary could be drawn from any proposals for improving its constitution. The excellent work which it had done in deciding the difficult and delicate questions arising between the Dominion and the Provinces in Canada was in itself a complete refutation of such an idea. The proposed amendments were based upon no distrust of the people of Australia; the sole desire of the Government was that, in a matter which affected the whole Empire, the Bill should be passed in a form which would be best alike for Australia and for every other part of the Queen's Dominions. In this endeavour they confidently hoped for the co-operation and support of the Australian people.

Delegates' Final Memorandum.—To this the four Delegates replied briefly with yet another Memorandum dated 8th May. They agreed that no useful purpose would be served by further written discussion of the proposed amendments. They denied, however, that the amendment as to appeals was in any sense "a detail of the Constitution." It had been treated from the first, on both sides, as vital. To the suggested amendment in regard to the Colonial Laws Validity Act they had made no reference in their second Memorandum, as they had understood that it had been abandoned. Without re-

ceding from their previous opinion, they now urged that such an Act ought not to apply to great self-governing communities like the Dominion and the Commonwealth, whose statutory authority should be subordinate only to that of the Imperial Parliament when exercised after the establishment of their Constitutions and expressly applied. They trusted that even now the Imperial Government might be willing to provide by separate legislation for this and any other matter they might consider essential, passing the Commonwealth Bill without amendment as desired by the peoples. Parliaments, and Governments of the colonies. For the immediate and ultimate consequences if the suggested amendments were made the Delegates could not be held responsible. If they had been outspoken and tenacious of their views, the sincerity of their apprehensions would, no doubt, be accepted as sufficient justification.

Introduction of the Bill.—On 14th May, Mr. Chamberlain introduced the Commonwealth Bill into the House of Commons. The Bill as introduced differed from the draft of the Convention in the following particulars :—

In the preamble, the words "and under the Constitution hereby established" were omitted. In covering clause 2, the words "This Act shall bind the Crown" were omitted, and the clause consequentially amended so as to read "The provisions of this Act *and of the Constitution set forth in the schedule to this Act,*" &c. The blanks in the preamble and in covering clause 3 were filled in, and in the latter clause the words providing for the admission of Western Australia as an Original State were inserted. To covering clause 5 the following words were added :—"*Notwithstanding anything in the Constitution set forth in the schedule to this Act, the prerogative of Her Majesty to grant special leave to appeal to Her Majesty in Council may be exercised with respect to any judgment or order of the High Court of the Commonwealth or of the Supreme Court of any State.*" To the definition of "Commonwealth" in covering clause 6 the following words were added :—"*and the laws of the Commonwealth shall be colonial laws within the meaning of the Colonial Laws Validity Act, 1865.*" Covering clause 9 was altered to read :—"*Subject to the foregoing provisions,* the Constitution of the Commonwealth shall be as *set forth in the schedule to this Act.*" Before the Constitution the word "*SCHEDULE*" was inserted ; and at the end of the table of divisions of the Constitution the words "The Schedule" were omitted.

In the Constitution itself, the blank in clause 26 was filled in, with an alternative provision in the event of Western Australia being an Original State. In clause 42, the words "*to this Constitution*" were added after "schedule." Clause 74 was omitted, and the last paragraph of clause 73 was placed as clause 74. In clause 95, after "Western Australia," the words "*if that State be an Original State*" were added. In clause 125, the words "if New South Wales be an Original State" and "if Victoria be an Original State" were omitted, with consequential amendments. At the end of the Constitution, the word "The" before "Schedule" was omitted.

In introducing the Bill, Mr. Chamberlain said, to a crowded and enthusiastic House, that it marked an era in the history of Australia,

and a great and important step towards the organization of the British Empire. This Bill—the result of the careful and prolonged labours of the ablest statesmen of Australia—enabled that great island continent to enter at once the widening circle of English-speaking nations. It would be in the interests of Australia, and also of the Empire, rendering the relations between the colonies and the mother-land more cordial, more frequent, and more unrestricted. "Therefore we all of us—independently of party—welcome the new birth of which we are witnesses, and anticipate for these great, free, and progressive communities a future even more prosperous than the past, and an honourable and important position in the history of the Anglo-Saxon race."

He then briefly sketched the history of the movement, and lauded the services of Sir Henry Parkes, Sir Samuel Griffith, and Mr. Barton. He described the Bill as "a monument of legislative capacity." Though it might not be perfect, yet, considering the magnitude and variety of the interests dealt with, no praise could be too high for those whose moderation, patience, skill, mutual consideration, and patriotism, had been able to produce so great a result.

He contrasted the Constitution with that of Canada, and briefly outlined its provisions. The Bill had been prepared by the Australian people; and though he denied altogether that Australia regarded the Imperial Parliament merely as a court for the registration of their decrees—though he was convinced that the Australian people would be neither offended nor insulted at the alteration of a word or even a clause—he did think that they expected a reasonable regard to their opinion whenever it had been conclusively shown, and to those rights of self-government of which they had made so magnificent a use. The principles on which the Imperial Government had dealt with the Bill were these. They had accepted without demur, and they asked the House to accept, every word, every line, every clause, which dealt exclusively with the interests of Australia. But where the Bill touched the interests of the Empire as a whole, or of Her Majesty's subjects or possessions outside Australia, the Imperial Parliament occupied a position of trust which it was not the desire of the Empire —nor, he believed, of Australia—that they should fulfil in a formal or perfunctory manner. In accordance with these principles they had made some amendments; but they had refused—even at the desire of Western Australia and New Zealand—to make amendments where Imperial interests were not affected.

With regard to the Colonial Laws Validity Act, he proposed to make its application clear. The Delegates had recently raised a new point—whether the Act ought to apply to great Commonwealths like Australia and Canada. He admitted that this was a perfectly fair point to raise; but such an important change could not be introduced without mature consideration, and consultation with both Canada and Australia. He thought that clause 74 of the draft Bill would weaken a link of Empire. He admitted that those links depended entirely on freewill and assent; but before agreeing to so serious a change, he wanted to be quite certain that it had behind it the whole force of Australian opinion. The resolutions of the Premiers did not indicate

that there would be any strong feeling in Australia against the amendments. The Governments of three out of seven colonies—Queensland, Western Australia, and New Zealand—were in favour of the amendments; so were the Chief Justices of all the colonies, and an enormous preponderance of the newspapers of Australia.

With regard to the reconstitution of the Supreme Court of the Empire, he admitted that the tentative provisions of the Judicial Committee Amendment Act, 1895, for the appointment of Colonial Judges to the Privy Council, had not been satisfactory. The question of constituting a new Court required further consideration; but, meanwhile, he proposed to introduce a Bill to provide for the appointment of a representative from each great colonial possession and from India to the Privy Council; such representatives to hold office for seven years, to sit during that time as Lords of Appeal, to receive from the Imperial Exchequer the salary of Lords of Appeal, and to have life peerages.

Sir Henry Campbell-Bannerman, leader of the Opposition, expressed regret and disappointment that the Government had not felt themselves obliged to accept the Bill in its entirety. He thought that any proposed amendments should have been formulated and submitted to Australia at an earlier stage, and that Conferences and Memoranda in the Jubilee Year were not enough, in view of the many subsequent opportunities for intervention. The Government, by reserving action, had in effect, though not in intention, flouted Australia. He deprecated the conduct of the Government in going behind the opinions of the accredited representatives of Australia.

Mr. George Denison Faber, the new member for York, spoke of the appeal clauses from an experience of nine years as Registrar of the Privy Council. He pointed out that the nominal strength of the Privy Council was greater than that of the House of Lords; the real trouble was when both were sitting. He opposed amalgamation, but thought that the time had come for the establishment of a new Court altogether, and the appointment of more paid Judges. Sir Charles Dilke was glad that the substantial amendments had been reduced to two, and thought that Mr. Chamberlain had failed to show any vital necessity for amending the Bill. Mr. Vicary Gibbs spoke in favour of the amendments. Mr. Haldane saw no necessity for postponing the amalgamation of the Judicial Committee and the House of Lords; and urged that so long as the jurisdiction of the House of Lords was retained, it would be impossible to preserve the status of the Privy Council. Whilst there were two tribunals, one was starved to keep up the other, and judicial strength inevitably gravitated to the House of Lords. Mr. Stanley Leighton agreed that the objections to the present constitution of the Judicial Committee were well founded. The first reading was carried on the voices, with cheers.

The First Compromise.—In spite of the apparently uncompromising attitude of the Imperial Government, the Delegates did not despair of securing some modification of the proposed amendment. They had failed in what they believed to be their mandate to endeavour to secure the passage of the Bill without amendment; and

when the amended Bill had been actually introduced, they conceived that the position was altered, and that they were authorized to negotiate with a view to securing a compromise. The publication of the Blue Book, containing the correspondence between the Delegates and the Imperial Government, had greatly increased public interest in the question; and the English press, whilst generally approving the resolve of the Government to protect Imperial interests, showed a marked sympathy with the aims of the Delegates. The Delegates had several interviews with Mr. Chamberlain and the Crown Law Officers, who met them cordially, and were willing to concede what they could, consistently with the principle of reserving the right of appeal to the Privy Council where interests outside Australia were affected. At last, on 19th May, Mr. Chamberlain offered to substitute for the first paragraph of clause 74 the following words:—

"No question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, shall be capable of final decision except by the High Court, and no appeal shall be permitted to the Queen in Council from any decision of the High Court on any such question unless by the consent of the Executive Government or Governments concerned, to be signified in writing by the Governor-General in the case of the Commonwealth, and by the Governor in the case of any State."

The second paragraph of clause 74 was unaltered, except that to the power to make laws limiting the right of appeal was added a proviso that "any proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure." To clause 73, after "final and conclusive," it was proposed to add "unless the Queen grants special leave to appeal in accordance with section 74."

The object of this provision was to make the decision of the High Court final on questions as to the limits of Federal and State powers *inter se*, unless both parties—or, if the parties were private citizens, the Governments whose powers were affected—desired an appeal. The Delegates, at their own request, were authorized by their Governments to secure the nearest approach possible to the original Bill; and as this was offered by Mr. Chamberlain as the utmost limit of concession, they expressed their approval of it, subject to possible verbal improvements.

Second Reading of the Bill.—On 21st May, Mr. Chamberlain moved the second reading of the Bill in the House of Commons. With regard to the Colonial Laws Validity Act, he announced that after further discussion with the Delegates, the Government had decided that the best way of removing doubts would be to omit the definition of "colony" in covering clause 6. It would then be unnecessary to make any further amendment in this respect. With regard to Privy Council appeals, he reaffirmed the principle of non-interference with purely Australian interests, and vigilance for Imperial interests. He pointed out that clause 74 of the draft Constitution recognized this distinction by making an exception where

"the public interests" of some part of Her Majesty's dominions outside Australia were involved; but the distinction did not go far enough. It was uncertain whether the phrase "public interests" would cover, for instance, the private interests of investors, or of any body of Her Majesty's subjects. Moreover, foreign relations were of equal importance with Imperial relations. The proposals of the Imperial Government had been before Australia for a week, and had been in most cases favourably considered. The Delegates, too, finding it impossible to carry out what they believed to be their mandate to secure the passage of the Bill without amendment, had been most considerate, and he had now arrived at an absolute agreement with four of them. He then read and explained the proposed new clause. With regard to the power of the Federal Parliament to limit the right of appeal, the Delegates had pointed out to him that a similar power was inherent in the Parliaments of the Australian colonies, subject to the reservation of the Bill exercising such power. Accordingly, it was proposed to grant this right to the Commonwealth, subject to an absolute statutory requirement that such Bills should be reserved.

Mr. Asquith, for the Opposition, expressed his gratification at Mr. Chamberlain's announcement of a settlement. He admitted the trusteeship of the Imperial Parliament, but thought that the danger of clause 74 had been exaggerated in some quarters. Mr. Henniker Heaton, Mr. Blake, Mr. James Bryce, and Mr. S. Evans joined in the congratulations. The Attorney-General expressed his appreciation of the tone of the debate, which was concluded by Mr. W. Redmond and Mr. T. M. Healy declaring, on behalf of Ireland, their envy at the rights of self-government accorded to Australia. The Bill was then read a second time with cheers, and taken into Committee *pro forma*.

Australian Criticisms.—In Australia, however, the suggested compromise was received, first with hesitation, and then with distinct disapproval, both the drafting and the policy of the new clause being condemned. On 24th May, a telegram seems to have been sent by the Government of New South Wales to Mr. Chamberlain, indicating acceptance of the arrangement by the Premiers; but a study of the cabled text of the clause changed the situation. In Queensland, Sir Samuel Griffith pointed out that the provision that no constitutional question should be "capable of final decision except by the High Court" was a clumsy and inaccurate mode of saying that all appeals in such cases should be brought to the High Court alone. He also argued that this would be a restriction, and not an extension, of the right of appeal to the Privy Council given by the original clause—under which he contended that appeals, even in constitutional cases, would lie from the State Courts direct to the Privy Council. This, however, was not the generally received interpretation of the original clause, nor was it the intention of the Convention, which clearly intended that the prohibition of appeals to the Privy Council in constitutional matters should include appeals from the State Courts; (see Historical Note to sec. 74 *infra*). But his strongest point was that in cases between private suitors, in which a constitutional point arose, a party's right of appeal ought not to be made dependent on the consent of the Executive Government of his

State or of the Commonwealth. In all the colonies it was forcibly urged that the interference of the political with the judicial department would be fraught with danger. Mr. Philp threatened that, if the new amendment were adhered to, he would demand the insertion of a clause requiring the assent of the Queensland Parliament before the Bill became operative in that colony. In South Australia, the Chief Justice, Sir Samuel Way, commented on the new clause as being not only obscure, but dangerous, novel, and unauthorized.

Meanwhile, to remove ambiguities and meet some of the criticisms from Australia, the first part of the proposed clause was redrafted as follows:—

"No question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth on the one hand, and those of any State or States on the other, shall be capable of final decision by any Court other than the High Court, except that an appeal may be permitted to the Queen in Council from any decision of the High Court on any such question by the consent of the Executive Governments concerned, whether parties or not to the litigation, the consent to be signified by the Governor-General in the case of the Commonwealth, and by the Governor in the case of a State."

This verbal improvement, however, did not meet the main objections to the proposed clause; and on 14th June the Premiers of the southern colonies sent a joint telegram to Mr. Chamberlain, stating that opinion throughout Australia was strongly opposed to subjecting the right of appeal to the consent of the Executive Governments. They urged the reconsideration of the proposal to pass the Bill without amendment. If that was impossible, they said that the original proposal to preserve the prerogative right of appeal intact would be less objectionable than the new proposal.

The Final Compromise.—Sir George Turner, in an interview, suggested the substitution of the leave of the High Court for that of the Executive Councils. Mr. Wise and Mr. O'Connor telegraphed the same suggestion to Mr. Barton; but on 16th June, just before the arrival of this telegram, Mr. Chamberlain, in consultation with the Delegates, had at last resolved to make this further concession, and to offer clause 74 in the form in which it now stands in the Constitution. This was gladly accepted by the Delegates, including Mr. Dickson. The Queensland Government withdrew their protest, and offered no objection. The Government of Victoria expressed approval of the clause as altered; and the Government of South Australia, while reiterating their inability to accept any amendment, telegraphed that they did not anticipate any difficulty from the amendment now proposed. The Government of Western Australia telegraphed that the new proposal was preferable to the previous one, but that they would have preferred an appeal as a right, without leave. In New South Wales—the only colony in which Parliament was then sitting—the Government submitted to both Houses a resolution affirming that the amendment now proposed was not such an important departure from the original Bill as would justify any action which would further delay Federation. This was carried without division in the Assembly on 21st June, and in the Council on 27th June.

The Bill in Committee.—On Monday, 18th June, the discussion of the Bill in Committee of the House of Commons was begun. In covering clause 5, Mr. Chamberlain moved the omission of the words which had been inserted to save the prerogative of appeal in all cases (see p. 242, *supra*). He suggested that as some of the verbal amendments which were on the notice paper in his name hinged upon the acceptance of clause 74 as now proposed, this would be the best time for a general debate on the subject of appeals. He described the proposed settlement as an "arrangement" rather than a compromise, as neither party gave up anything to which they attached importance. The Australian objections to the previous proposal had been (1) that it would limit the right of appeal from the State courts more than was done by the original Bill—it being thought in some quarters that the original Bill did not prohibit appeals from the State courts to the Privy Council in constitutional cases; (2) that it introduced the Executive into judicial questions. The new arrangement—in connection with which he acknowledged the assistance given by Sir Samuel Griffith—met these objections, and satisfied all the five Delegates; though no reply had yet been received from their Governments. Several members of the Opposition complained that the House was placed in a difficult position by being asked to debate so important a clause on such short notice, and without information as to the views of the Australian Governments. Eventually, after some discussion, the debate was adjourned till Thursday, 21st June.

On that date the Committee stage was resumed. Mr. Chamberlain read telegrams announcing that the Governments of Victoria, Queensland, South Australia, and Tasmania, were satisfied with the proposed arrangement, and that the Parliament of New South Wales was being consulted, and would probably agree. He pointed out that the right of appeal to the Privy Council would be the same as in Canada, with the trifling exception—which he was almost inclined to think an improvement—that in certain rare cases the leave to appeal would be granted by the High Court and not by the Privy Council. Mr. Haldane and Mr. Bryce thought that in some respects—and particularly as regards cases involving the public interests of Imperial possessions outside the Commonwealth—the clause in the original Bill was better than that now proposed; and they suggested that there would be some ground for the argument that in constitutional cases the High Court was co-ordinate with, and not subordinate to, the Privy Council. This contention was answered by Sir William Anson and by the Attorney-General, Sir Robert Finlay. Mr. Asquith admitted that as the colonies had assented to the arrangement, it should be carried into effect. Mr. Chamberlain's amendment to covering clause 5 was agreed to.

In covering clause 6, the reference to the Colonial Laws Validity Act was omitted, as was also the definition "Colony shall mean any colony or province." Covering clause 9 was restored to its original form, the Constitution being thus appended to the clause, instead of forming a Schedule to the Act.

In the Constitution itself, the original last paragraph of clause 73 was restored to its position, instead of standing as clause 74, and

the new clause 74 was inserted according to arrangement. In the Preamble, the words "and under the Constitution hereby established" were restored. The Bill was then reported with amendments.

The Bill in the House of Lords.—In the House of Lords, the Bill was read a first time on 26th June. The second reading was moved on 29th June by the Earl of Selborne, Under-Secretary for the Colonies. Earl Carrington accused Mr. Chamberlain of imprudence which had imperilled the Bill, and characterized his settlement as an unconditional surrender. The Earl of Halsbury, Lord Chancellor, deprecated this as a partizan attack which would mar the harmony and unanimity of the Empire's acceptance of the Bill. Lord Davey thought the appeal clause was not a happy solution of the difficulty, and hoped that the colonies would hereafter modify it. The Earl of Jersey, the Earl of Kimberley, Lord James of Hereford, Lord Russell of Killowen, Viscount Knutsford, and Lord Brassey, spoke in terms of congratulation. The Bill was read a second time and taken into committee *pro forma*. On 3rd July, it was carried through Committee without amendment, and on 5th July it was read a third time and passed.

The Royal Assent.—On 9th July, the Queen gave her assent to the Bill. At the request of the Delegates, Her Majesty signed the Commission, declaring her assent to the Bill, in duplicate, and gave Mr. Barton one of the copies, as well as the pen, inkstand, and table used by Her Majesty, to be preserved in the Federal Parliament Buildings. On the same day, in the House of Lords, the House of Commons having been summoned to the bar, the Lords Commissioners (the Earl of Halsbury, the Earl of Hopetoun, and the Earl of Kintore), announced the Royal assent to the Bill, which was received with cheers.

Adoption by Western Australia.—On 17th May—three days after the introduction of the Commonwealth Bill in the House of Commons—the West Australian Parliament met, and an Enabling Bill was at once introduced. It was on the lines of the Enabling Acts passed in the other colonies, and provided for the submission of the Constitution to a referendum of the people of the colony, and for an address to the Queen in the event of the vote being in the affirmative.

On 23rd May Sir John Forrest moved the second reading, and announced that he would vote for Federation, though he did not see that it would be any great benefit to Western Australia for some time. The Bill as introduced provided for a referendum on the existing rolls; but during the debate the Government consented to have it taken in accordance with the newly extended franchise of the colony (see p. 71 *supra*), so that all adults—men and women—who had been twelve months in the colony should be entitled to vote.

The second reading was carried without a division on 31st May. In the Council slight amendments were made, which were accepted by the Assembly. On 13th June the Bill was assented to.

The referendum was fixed for 31st July, and the campaign for and against the Constitution began at once. Sir John Forrest fought hard for the Bill, though some of his colleagues opposed it. The logical and sentimental argument for the completion of the continental union was made the most of. The ultimate entry of Western Australia into the Commonwealth was recognized as inevitable; and

it was forcibly urged that even if the immediate benefits of Federation to Western Australia were not obvious, her interests would be better secured by joining the union at the outset, and helping to mould the federal policy, than by standing aloof. The strongest argument of the opponents was that a federal tariff with intercolonial freetrade would dislocate the finances of the colony, and that section 95, allowing Western Australia to retain intercolonial duties on a diminishing scale for five years, was inadequate to meet the difficulty. This argument was assisted by appeals to intercolonial jealousy and by vague allusion to the terrors of the unknown. The stronghold of the federal party was on the goldfields, where the population was largely recruited from the other colonies; whilst the most solid opposition came from the agricultural interests, which dreaded the removal of the duties on intercolonial produce.

Though federalists were confident of victory, the decisive issue was a surprise. The result of the poll was a vote of 44,800 for the Constitution, and 19,691 against, leaving an affirmative majority of 25,109. An analysis of the voting gives the following result:—

—	Yes.	No.	Majority.
Metropolitan Electorates	7,008	4,380	2,628
Fremantle Electorates	4,687	3,141	1,546
Goldfields Electorates	26,330	1,813	24,517
Country Electorates	6,775	10,357	(Min. 3,582)
Total	44,800	19,691	25,109

On 21st August, both Houses of the Parliament of Western Australia passed addresses to the Queen, praying that Western Australia might be included as an Original State of the Commonwealth in the Proclamation shortly to be made.

The Royal Proclamation.—The issue of the Queen's Proclamation fixing the day for the establishment of the Commonwealth had been withheld pending the issue of the referendum in Western Australia, in order to enable her Majesty to be "satisfied that the people of Western Australia have agreed" to join the Commonwealth. Meanwhile some telegraphic communications passed between the Imperial and Colonial Governments as to the date on which the Commonwealth should be established. The prevailing opinion was in favour of the 1st January, 1901, the first day of the twentieth century—a dramatic and significant date for the birth of Australian nationhood. The sentimental argument was reinforced by the practical one that the 1st January was the beginning of a financial half-year in all the colonies. On the other hand there was some advocacy of the 26th January—the anniversary of the foundation of New South Wales in 1788—which was celebrated in several of the colonies as the patriotic festival of the year. The date chosen was the 1st January; accordingly, on 17th September, 1900, the Queen signed the Proclamation declaring that on and after the first day of January, 1901, the people of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western

Australia should be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Thus all the five colonies of the mainland of Australia, and also the adjacent island of Tasmania, become Original States of the Commonwealth which is to be inaugurated on the first day of the twentieth century. The Commonwealth, as few dared to hope it would, comes into existence complete from the first—"a nation for a continent, and a continent for a nation." The delays at which federalists have chafed have been tedious, and perhaps dangerous, but they have been providential; they have given time for the gradual but sure development of the national spirit in the great colonies of Queensland and Western Australia, and have prevented the establishment of a Commonwealth of Australia with half the continent of Australia left, for a time, outside.

But though Australian union has been completed, Australasian union has not. New Zealand—separated from Australia by 1,200 miles of sea, and correspondingly more self-contained and less in touch with the national sentiment of Australia—has not yet decided to enter the Commonwealth. The choice between union or isolation, which has not yet been directly presented to the people of New Zealand, cannot long be deferred. On 19th October, 1900, a resolution was passed by the New Zealand House of Representatives, on Mr. Seddon's motion, declaring it to be desirable (*a*) That a Royal Commission should be appointed to inquire into and report upon the desirability or otherwise of New Zealand becoming a State of the Commonwealth: (*b*) that if the Commissioners deem Federation for the present inadvisable or premature, they should report as to the establishment of a reciprocal treaty between the Commonwealth and New Zealand, and indicate the lines on which it should be based: (*c*) that the Commissioners entrusted with this all-important matter, affecting the national life and well-being of New Zealand, should be conversant with the agricultural, commercial, and industrial interests of the colony, and be otherwise eminently fitted for their high office: (*d*) that they should be empowered to proceed to Australia to take evidence: and (*e*) that their report should be presented to the New Zealand Parliament within ten days of the opening of the next session.

The report of this Commission will be awaited with interest. Meanwhile Mr. Seddon's "Greater New Zealand" policy (see p. 639, *infra*) indicates that he is endeavouring to secure as advantageous a position as possible for a commercial treaty with the Commonwealth, in the event of a decision adverse to immediate union.

Appointment of the Governor-General.—On 14th July it was officially announced that the first Governor-General of the Commonwealth of Australia would be the Right Honourable the Earl of Hopetoun, G.C.M.G., then Lord Chamberlain. Lord Hopetoun was already well known in Australia, having been Governor of Victoria from 1889 to 1895, during which time he had been one of the most popular, although one of the youngest, of Australian Governors, and had earned the reputation of a tactful and capable administrator, and a worthy representative of the Crown. His choice as the first holder of the high and honourable office of Governor-General of the Commonwealth gave general satisfaction.

The actual appointment of the Governor-General could not, in accordance with clause 3 of the Commonwealth Act, be made until after the issue of the Queen's Proclamation which fixed the date of the establishment of the Commonwealth. On 21st September Lord Hopetoun waited upon the Queen at Balmoral Castle, when Her Majesty invested him with the knighthood of the Order of the Thistle. He delivered into Her Majesty's hands the wand and badge of the Lord Chamberlain of Her Majesty's Household, and received the commission of his appointment as Governor-General.

Preparations for the Inauguration.—Shortly after the Royal Proclamation, it was announced that the inauguration of the Commonwealth, on the 1st January, 1901, would take place in Sydney. The Parliaments of the six colonies began to legislate, under the authority of clause 4 of the Commonwealth Act, and secs. 9 and 29 of the Constitution, for prescribing the method of choosing senators, determining the times and places of elections of senators, and determining the electoral divisions for the House of Representatives; with such other local legislation as was deemed advisable in view of the approaching change in the political condition of the colonies.

On 17th September, it was officially announced that the Queen, on the recommendation of Lord Salisbury, had assented to a visit by the Duke and Duchess of York to Australia, early in the year 1901, when the Duke of York would be commissioned by Her Majesty to open the first session of the Parliament of the Commonwealth in her name. Although Her Majesty naturally shrank from parting from her grandson for so long a period, she fully recognized the greatness of the occasion which would bring her colonies of Australia into federal union, and desired to give this special proof of her interest in all that concerned the welfare of her Australian subjects. Her Majesty wished at the same time to signify her sense of the loyalty and devotion which had prompted the spontaneous aid so liberally offered by all the colonies in the South African War, and of the splendid gallantry of her colonial troops.

Conclusion.—During the past century the foundations of Australian nationhood have been laid; with the new century will begin the task of building the superstructure. Political barriers have been broken down, and the constitutional compact which, politically speaking, creates the Australian people, has been framed, accepted, and established. But all this is only the beginning. The new national institutions of Australia have to be tested in the fire of experience; provincial jealousies have to be obliterated; national sentiment has to be consolidated; the fields of national legislation and national administration have to be occupied. Australian statesmanship and patriotism, which have proved equal to the task of constructing the Constitution, and of creating a new nation within the Empire, are now face to face with the greater and more responsible task of welding into a harmonious whole the elements of national unity, and of guiding the Australian people to their destiny—a destiny which, it may be hoped, will always be linked with that of the mighty Empire of which they form a part.

LIST OF MEMBERS OF FEDERAL CONVENTIONS, CONFERENCES, &c.

Intercolonial A.N.A. Federation Conference, Melbourne, January, 1890.

OFFICERS:

PRESIDENT.—Sir John C. Bray, K.C.M.G., Speaker of the House of Assembly, South Australia.

VICE-PRESIDENTS.—Messrs. G. H. Wise and B. B. Nicoll, M.P..

SECRETARIES.—Messrs. F. C. Wainwright, W. Burnet, and J. W. Hill.

DELEGATES.

New South Wales.

Mr. E. Dowling
Mr. W. S. Dowel, M.P.
Mr. J. W. Hill
Mr. B. B. Nicoll, M.P.
Mr. Ninian Melville, M.P.
Mr. H. Slatyer
Mr. R. Thompson
Mr. J. T. Wilshire, M.P.

South Australia.

Sir John C. Bray, M.P.
Mr. H. H. Barrett
Hon. J. C. F. Johnson, M.P.
Mr. W. Burnet
Mr. S. H. Prior
Mr. W. J. Sowden
Mr. C. Tucker
Mr. W. H. Wadey

Western Australia.

Mr. W. Maley
Mr. E. P. Nesbit

Queensland.

Mr. J. Allan
Mr. J. R. Bradshaw
Mr. W. V. Brown

Victoria.

Mr. T. J. Connelly
Mr. J. C. Bottomley
Mr. Field Barrett
Mr. J. W. Larter
Mr. A. J. Peacock, M.P.
Mr. G. H. Wise
Mr. F. C. Wainwright

AUSTRALIAN NATIVES' ASSOCIATION, VICTORIA.

List of Presidents of the Board of Directors, from its inception to June, 1900:—

Mr. T. O'Callaghan ...	Melbourne ...	1877 and 1878
,, S. Cadden	Ballarat ...	1879 and 1880
,, M. J. Cahill ...	Bendigo ...	1881
,, Wm. Anderson ...	Creswick ..	1882
,, R. H. Hart ...	Stawell ..	1883
,, O. E. Wilson ...	Ballarat ...	1884
,, A. J. Peacock, M.L.A....	Creswick ...	1885, 1886, 1893
,, T. J. Connelly ...	Bendigo ...	1887
,, J L. Purves, Q.C. ...	Melbourne ...	1888, 1889
,, D. J. Wheal ...	Ballarat ...	1890
,, G. H. Wise ...	Sale ...	1891
,, J. W. Larter ...	Ballarat ...	1892
,, G. Fitzsimmons ...	Prahran ...	1894
,, J. W. Kirton, M.L.A. ...	Ballarat ...	1895
,, J. H. Cook, M.L.A. ...	Brunswick ...	1896
,, R. F. Toutcher, M.L.A ...	Richmond ..	1897
Dr. C. Carty Salmon, M.L.A.	Avoca ...	1898
Mr. E. E. Roberts ...	Flemington ...	1899
,, Walter Skelton ...	Dunolly ...	1900

NATIONAL AUSTRALASIAN CONVENTION, 1891.

OFFICERS:

PRESIDENT.—The Honourable Sir Henry Parkes, G.C.M.G., M.L.A.

VICE-PRESIDENT.—The Honourable Sir Samuel Walker Griffith, K.C.M.G., Q.C., M.L.A.

DELEGATES.

New South Wales.

The Honourable Sir Henry Parkes, G.C.M.G., M.L.A.
The Honourable William MeMillan, M.L.A.
The Honourable Joseph Palmer Abbott, M.L.A.
George Richard Dibbs, Esquire, M.L.A.
The Honourable William Henry Suttor, M.L.C.
The Honourable Edmund Barton, Q.C., M.L.C.
The Honourable Sir Patrick Alfred Jennings, K.C.M.G., LL.D., M.L.C.

New Zealand.

Sir George Grey, K.C.B.
Captain William Russell Russell, M.H.R.
The Honourable Sir Harry Albert Atkinson, K.C.M.G., M.L.C.

Queensland.

*The Honourable John Murtagh Macrossan, M.L.A.
The Honourable John Donaldson, M.L.A.
The Honourable Sir Samuel Walker Griffith, K.C.M.G., Q.C., M.L.A.
The Honourable Sir Thomas McIlwraith, K.C.M.G., LL.D., M.L.A.
The Honourable Arthur Rutledge, M.L.A.
The Honourable Andrew Joseph Thynne, M.L.C.
The Honourable Thomas Macdonald-Paterson, M.L.C.

South Australia.

The Honourable Richard Chaffey Baker, C.M.G., M.L.C.
The Honourable John Hannah Gordon, M.L.C.
The Honourable Sir John Cox Bray, K.C.M.G., M.H.A.
John Alexander Cockburn, Esquire, M.D., M.H.A.
The Honourable Sir John William Downer, K.C.M.G., Q.C., M.H.A.
The Honourable Charles Cameron Kingston, Q.C., M.H.A.
The Honourable Thomas Playford, M.H.A.

Tasmania.

The Honourable William Moore, M.L.C.
The Honourable Adye Douglas, M.L.C.
The Honourable Andrew Inglis Clark, M.H.A.
The Honourable William Henry Burgess, M.H.A.
The Honourable Nicholas John Brown, M.H.A.
The Honourable Bolton Stafford Bird, M.H.A.
The Honourable Philip Oakley Fysh, M.L.C.

Victoria.

The Honourable Alfred Deakin, M.L.A.
The Honourable James Munro, M.L.A.
The Honourable Lieutenant-Colonel William Collard Smith, M.L.A.
The Honourable Nicholas Fitzgerald, M.L.C.
The Honourable Henry John Wrixon, Q.C. M.L.A.
The Honourable Duncan Gillies, M.L.A.
The Honourable Henry Cuthbert, M.L.C.
†The Honourable William Shiels, M.L.A.

Western Australia.

The Honourable John Forrest, C.M.G., M.L.A.
The Honourable William Edward Marmion, M.L.A.
The Honourable Sir James George Lee-Steere, M.L.A.
The Honourable John Arthur Wright, M.L.C.
The Honourable John Winthrop Hackett, M.L.C.
Alexander Forrest, Esquire, M.L.A.
William Thorley Loton, Esquire, M.L.A.

* Decease reported 31st March. † Acting from 2nd to 9th March, during absence of Mr. Wrixon.

COROWA FEDERATION CONFERENCE.

AUGUST, 1893.

OFFICERS:

PRESIDENT.—Mr. B. B. Nicoll, M.L.A.
VICE-PRESIDENTS.—Messrs. J. Wilkinson, M.L.A., E. J. Gorman, A. Jameson, and Dr. Quick.
SECRETARY.—Mr. Edward Wilson.
ASSISTANT SECRETARY.—Mr. E. Lapthorne.
TREASURER.—Mr. A. A. Piggin.
FINANCE COMMITTEE.—Messrs. G. H. Willis, G. H. Smith, C. T. Brewer.

DELEGATES:

Arnott, D.	Federation League, Yarrawonga.
Barker, S.	Protection Liberal and Federation League, Melbourne.
Barrett, Herbert	Vice-President Board of Directors of A.N.A., Victoria.
Berryman, G. H.	Federation League, Moama.
Boyle, A. O.	Federation League, Howlong.
Brewer, C. T.	Federation League, Corowa.
Bridson, H.	Progress Committee, Germanton.

Bromfield, H.	Federation League, Howlong.
Brown, A. B.	Progress Committee, Germanton.
Brown, Andrew R.	Federation League, Tocumwal.
Buckley, Allan K.	Federation League, Rutherglen.
Camplin, A.	Federation League, Mulwala.
Chanter, J.M., M.L.A. ...	Federation League, Koondrook and Barmah.
Church, W. R....	Young Victoria Patriotic League, Melbourne.
Clifton, W. A.	Federation League, Corowa.
Cook, James	Protection Liberal and Federation League, Melbourne.
Cowderoy, B.	President Chamber of Commerce, Melbourne.
Crockett, M. C. M.	Federation League, Yarrawonga.
Dowling, Edward	Hon. Secretary A.N.A., Sydney.
Drummond, W. D.	Federation League, Berrigan.
Easterby, W. H.	Federation League, Howlong.
Edmundson, F. W.	Federation League, Wodonga.
Garran, R. R., B.A.	Federation League, Sydney.
Gorman, D.	Federation League, Savernake.
Gorman, E. J.	Federation League, Berrigan.
Grondona, C. H. ...	Chamber of Manufactures, Melbourne.
Haig, Geo. G.	Federation League, Wahgunyah.
Hallett, C.	Chamber of Commerce, Melbourne.
Hampson, A. J.	A.N.A., Bendigo.
Harricks, F. M.	Young Victorian Patriotic League, Melbourne.
Hemmings, R.	A.N.A., Clifton Hill.
Holland, James	Federation League, Yarrowonga.
Hose, Rev. W. Clarke ...	Federation League, Corowa.
Jameson, A.	Federation League, Deniliquin.
Kilborn, R.	Federation League, Rutherglen.
Lapthorne, Ernest	Federation League, Berrigan.
Lormer, W. J.	Protection Liberal and Federation League, Melbourne.
McGeoch, R.	Federation League, Mulwala.
Maloney, W., M.L.A.	Protection Liberal and Federation League, Melbourne.
Miller, John J.	Municipality, Cootamundra.
Mitchell, P. S.	Progress Committee, Tooma.
Morris, W. A.	Vice-President Commercial Travellers' Association, Melbourne.
Nicoll, B. B., M.L.A.... ...	President A.N.A., Sydney.
O'Dwyer, E. D.	Federation League, Savernake.
O'Grady, Charles	Federation League, Rutherglen.
O'Sullivan, E. W., M.L.A. ...	Federation League, Sydney.
Peacock, A. J., M.L.A. ...	President Board of Directors A.N.A.
Piggin, Alex. A.	Federation League, Corowa.
Piggin, F. C.	Federation League, Corowa.
Pigott, E. F.	Progress Association, Cobram.
Prendergast, G. M.	President Progressive Political League, Melbourne.
Quick, John, LL.D. ...	A.N.A., Bendigo.
Rain, W.	A.N.A., No. 1 Branch, Melbourne.
Ross, Alex.	Progress Committee, Germanton.
Ross, John	Progress Committee, Germanton.
Russell, Geo.	A.N.A., Numurka.
Shields, John G.	Federation League, Wodonga.
Sloane, J. A. S.	Federation League, Mulwala.
Smith, G. S.	Federation League, Wahgunyah.
Stretton, D.	Federation League, Echuca.

Taylor, H., D'E. ... ... Imperial Federation League, Melbourne.
Thomas, O. C. ... ... Imperial Federation League, Melbourne.
Thorpe, Jas. ... . Federation League, Wahgunyah.
Towel, Dr. ... ... Federation League, Berrigan.
Warner, Jas. ... . Municipality, Beechworth.
Whitaker, T. .. .. Federation League, Albury.
Whitford, F. P. ... ... Federation League, Wahgunyah.
Whitty, H. P. ... ... Federation League, Tocumwal.
Wilkinson, J , M L.A. ... Federation League, Albury.
Willis, Geo. H.... ... ... Federation League, Corowa.
Wilson, Edw. ... ... Federation League, Corowa.
Young, J. B. ... . A.N.A., Bendigo.

PEOPLE'S FEDERAL CONVENTION, BATHURST, 1896.

OFFICERS:

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Fox, Frank ... ... Sydney
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McLaren, W. ... ... Blayney
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Paul, W. H. ... ... Bathurst
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Pilcher, G. de V. ... Orange

Quick, John, LL.D. ... Bendigo

Rees, Evan ... ... Stockton
Reid, Hon. G. H., Premier, N.S.W. ... Sydney
Reid, A. C. ... ... Cowra
Renehan, J. T. ... ... Cootamundra
Richardson, J. J. ... Goulburn
Robson, Thos. ... ... Merewether

See, John, M.P. ... ... Sydney
Shackle, A. ... ... Grenfell
Sharpe, John ... ... Sebastopol
Shute, Richard ... ... Burwood
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Milne, Alexander M. ... Balmain
Moore, S. W., M.P. ... Bingara
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Muller, Narcisse ... ... Dubbo

Norton, John ... ... Sydney

O'Haran, Dr. ... ... Sydney
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Pryor, Benjamin... ... Greta
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Pymont, Alfred ... ... Hill End

Rodgers, J. S. ... ... Newcastle
Rohner, Wm. ... ... Cobram, Vic.
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STATUTORY FEDERAL CONVENTION, 1897-8.

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The Honourable Harry Whittal Venn, M.L.C.†

* Resigned 26th August, 1897. † From 26th August, 1897.

THE

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT.

63 & 64 VICT.

CHAPTER 12.

An Act to constitute the Commonwealth of Australia.

.D. 1900. [9th July 1900.]

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

t title. **1.** This Act may be cited as The Commonwealth of Australia Constitution Act.

o extend to Queen's essors. **2.** The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

lamation of monwealth. **3.** It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

nencement t. **4.** The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

ation of the itution aws. **5.** This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

itions. **6.** "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of Federal Council Act. 48 and 49 Vict. c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Application of Colonial Boundaries Act. 58 and 59 Vict. c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

Constitution.

9. The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION.

This Constitution is divided as follows:—

CHAPTER I.—THE PARLIAMENT:
PART I.—General:
PART II.—The Senate:
PART III.—The House of Representatives:
PART IV.—Both Houses of the Parliament:
PART V.—Powers of the Parliament:
CHAPTER II.—THE EXECUTIVE GOVERNMENT:
CHAPTER III.—THE JUDICATURE:
CHAPTER IV.—FINANCE AND TRADE:
CHAPTER V.—THE STATES:
CHAPTER VI.—NEW STATES:
CHAPTER VII.—MISCELLANEOUS:
CHAPTER VIII.—ALTERATION OF THE CONSTITUTION
THE SCHEDULE.

CHAP. I. THE PARLIAM

CHAPTER I.

The Parliament.

PART I. GENERAL.

PART I.—GENERAL.

Legislative power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called "The Parliament," or "The Parliament of the Commonwealth."

Governor-General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

Provisions relating to Governor-General

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

Sessions of Parliament. Prorogation a dissolution.

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

Summoning Parliament. After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

First session. The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth

Yearly session of Parliament. 6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

PART II.

THE SENATE.

PART II.—THE SENATE.

The Senate. 7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Qualification of electors. 8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Method of election of senators. 9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places. The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Application of State laws. 10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of Senators for the State.

Failure to choose senators. 11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs. 12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

Rotation of senators. 13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

Further provision for rotation. 14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Casual vacancies. 15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens.

But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

Qualifications of senator.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of President.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III. HOUSE OF REPRESENTATIVES.

PART III.—THE HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

(i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as to races disqualified from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

A.D. 1900.

Representatives in first Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows :—

New South Wales	twenty-three ;
Victoria	twenty ;
Queensland	eight ;
South Australia	six ;
Tasmania	five ;

Provided that if Western Australia is an Original State, the numbers shall be as follows :—

New South Wales	twenty-six ;
Victoria	twenty-three ;
Queensland	nine ;
South Australia	seven ;
Western Australia	five ;
Tasmania	five.

Alteration of number of members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Duration of House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Electoral divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

Qualification of electors.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State ; but in the choosing of members each elector shall vote only once.

Application of State laws.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Writs for general election.

32 The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

Writs for vacancies.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows :—

(i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen :

(ii.) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of Speaker.

35. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

PART IV.

BOTH HOUSES OF THE PARLIAMENT.

PART IV.—BOTH HOUSES OF THE PARLIAMENT.

Right of electors of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth

Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

Member of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Disqualification.

44. Any person who--

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State. or to the receipt of pay, half pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Vacancy on happening of disqualification.

45. If a senator or member of the House of Representatives—

(i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

Penalty for sitting when disqualified.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

Privileges, &c. of Houses.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Rules and orders.

50. Each House of the Parliament may make rules and orders with respect to—

(i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:

(ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

PART V. POWERS OF THE PARLIAMENT.

PART V.—POWERS OF THE PARLIAMENT.

Legislative powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to:—

(i.) Trade and commerce with other countries, and among the States:

(ii.) Taxation; but so as not to discriminate between States or parts of States:

(iii.) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv.) Borrowing money on the public credit of the Commonwealth:

(v.) Postal, telegraphic, telephonic, and other like services:

(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii.) Lighthouses, lightships, beacons and buoys:

(viii.) Astronomical and meteorological observations:

(ix.) Quarantine:

(x.) Fisheries in Australian waters beyond territorial limits:

(xi.) Census and statistics:

(xii.) Currency, coinage, and legal tender:

(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv.) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

(xv.) Weights and measures:

(xvi.) Bills of exchange and promissory notes:

(xvii.) Bankruptcy and insolvency:

(xviii.) Copyrights, patents of inventions and designs, and trade marks:

(xix.) Naturalization and aliens:

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi.) Marriage:

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii.) Invalid and old-age pensions:

(xxiv.) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

(xxvii.) Immigration and emigration:

(xxviii.) The influx of criminals:

(xxix.) External affairs:

(xxx.) The relations of the Commonwealth with the islands of the Pacific:

(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

(xxxii.) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

(xxxiii.) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

(xxxiv.) Railway construction and extension in any State with the consent of that State:

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Exclusive powers of the Parliament

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Powers of the Houses in respect of legislation.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bills.

55 Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

Royal assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Recommendations by Governor-General.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Disallowance by the Queen.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Signification of Queen's pleasure on Bills reserved.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II.

CHAP. II. THE GOVERNMENT.

The Executive Government.

Executive power.

61. The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Provisions referring to Governor-General.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Ministers of State.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Appointment of civil servants.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Command of naval and military forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth :—

Posts, telegraphs, and telephones :

Naval and military defence :

Lighthouses, lightships, beacons, and buoys :

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Certain powers of Governors to vest in Governor General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAP. III.

THE JUDICATURE.

CHAPTER III.

The Judicature.

Judicial power and Courts.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judges' appointment, tenure, and remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

Appellate jurisdiction of High Court.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Appeal to Queen in Council.

74 No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Original jurisdiction of High Court.

75. In all matters—

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:

(v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction

Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i.) Arising under this Constitution, or involving its interpretation:

(ii.) Arising under any laws made by the Parliament:

(iii.) Of Admiralty and maritime jurisdiction:

(iv.) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i.) Defining the jurisdiction of any federal court other than the High Court:

(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii.) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

CHAPTER IV.

CHAP. IV FINANCE AND TRADE.

Finance and Trade.

Consolidated Revenue Fund.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

Money to be appropriated by law

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

Transfer of officers

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

Transfer of property of State.

85. When any department of the public service of a State is transferred to the Commonwealth—

(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

Uniform duties of customs.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

(i.) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii.) The Commonwealth shall debit to each State—

(a) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Exceptions as to bounties.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Payment to States for five years after uniform tariffs.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides—

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

(ii.) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or

unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

Commissioners' appointment, tenure, and remuneration

103. The members of the Inter-State Commission—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

Saving of certain rates.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

Taking over public debts of States.

105. The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

CHAP. V. THE STATES.

CHAPTER V.

The States.

Saving of Constitutions.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Saving of Power of State Parliaments.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Saving of State laws.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

Inconsistency of laws.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

A.D. 1900.

Intoxicating liquids.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

States may not raise forces. Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

States not to coin money.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Recognition of laws, &c. of States.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

Protection of States from invasion and violence.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Custody of offenders against laws of the Commonwealth.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI.

CHAP. VI.

New States.

NEW STATES.

New States may be admitted or established.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

Government of territories.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII.

CHAP. VII.

Miscellaneous.

MISCELLANEOUS

Seat of Government.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

Power to Her Majesty to authorise Governor-General to appoint deputies.

126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

Aborigines not to be counted in reckoning population

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Chap. VIII.

Alteration of Constitution.

CHAPTER VIII.

Alteration of the Constitution.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

SCHEDULE.

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. So help me God!

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(Note.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

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COMMENTARIES

ON THE

CONSTITUTION

OF THE

COMMONWEALTH OF AUSTRALIA.

NOTE.

In these Commentaries, the text of each clause of the Act and each section of the Constitution is printed in large type. After the several clauses and sections are printed in small type the corresponding provisions of other Federal Constitutions. Then follows a Historical Note on each clause and section; after which come the notes, which are numbered consecutively (with the sign §) throughout the Act and Constitution.

In the large-type text each word or phrase annotated is followed by an index number referring to the corresponding note. At the top inner corner of each left-hand page there is a reference to the clause or section under discussion; and at the top inner corner of each right-hand page is a reference to the number of the note.

COMMENTARIES

ON THE

CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH.

An Act[1] to constitute the Commonwealth of Australia.

UNITED STATES.—Constitution of the United States. (17th September, 1787.) [Title.]
CANADA.—An Act for the union of Canada, Nova Scotia, and New Brunswick, and the Government thereof, and for purposes connected therewith. (29th March, 1867). [Title.]
GERMANY.—The Imperial Constitution. (18th January, 1871). [Title.]
SWITZERLAND.—Federal Constitution of the Swiss Confederation (29th May, 1874). [Title.]

§ 1. "An Act."

PARTS.—This Act may, for the purpose of analysis and classification, be considered as consisting of the following parts:—(1) Title, (2) Preamble, (3) Words of enacting authority, (4) The Covering Clauses 1 to 9, (5) The Constitution introduced by Clause 9, and divided into Chapters, Headings, Parts, and Sections, (6) The Schedule, (7) The Marginal Notes.

TITLE.—The title of a Statute forms no part of the law, and in strictness ought not to be taken into consideration at all. No more argument can be justly built upon the title prefixed in some editions of the Statutes than upon the marginal notes against the several sections - per Tindal, C.J., in delivering to the House of Lords the opinion of the consulted Judges. (Birtwistle *v.* Vardill, 1839, 7 Cl. and Finn., p. 929.)

The title of a statute is no part of the law—per Lord Mansfield, Rex *v.* Williams, 1 W. Bl. 95. Per Lord Hardwicke, Att.-Gen. *v.* Lord Weymouth, Ambl. 25. Per Pollock, C.B., Salkeld *v.* Johnson, 2 Exch. 283, Digest of English Case Law, Vol. XIII., p. 1881.

There is no authority for saying that the title of a statute may be used where there is any ambiguity in the statute. (Coomber *v.* Berks Justices, 9 Q.B.D. 33. *Id.*)

The title cannot be resorted to for the purpose of construing the provisions of the Act. (Hunter *v.* Nockolds, 19 L.J. Ch. 177. *Id.*)

"The title of a statute does not go for much in construing it, but I do not know that it is to be absolutely disregarded. The title of Lord Campbell's Act, 9 and 10 Vic. c. 93, was certainly referred to as not without significance in the Court of Queen's Bench in Blake *v.* Midland Ry. Co., 18 Q.B. 93." (Per Wills, J., in Kenrick *v.* Lawrence, 25 Q.B.D. 99. *Id.*)

If there is in the provisions of an Act anything admitting of a doubt, the title of the Act is a matter proper to be considered in the interpretation of the Act. (Shaw *v.* Ruddin, 9 Ir. C.L.R. 214. *Id.*)

The enacting part of an Act is not to be controlled by the title or recitals unless the enacting part is ambiguous, and then the title and recitals may be referred to for the purpose of ascertaining the intention of the legislature. (Bentley *v.* Rotherham Local Board; 4 Ch. D 588. *Id.*)

HEADINGS.—The headings of a portion of a statute may be referred to in order to determine the sense of any doubtful expressions in sections ranged under it. (Hammersmith and City Railway Co. *v.* Brand, L.R. 4 H.L. 171, 203; but see—per Lord Cairns, *id.* p. 217. Eastern Counties Rail. Co. *v.* Marriage, 9 H.L. Ca. 32. Union Steamship Co. of N.Z. *v.* Melbourne Harbour Trust, 9 App. Ca. 365.)

MARGINAL NOTES.—The marginal notes of the Act and the Constitution are copious and systematic; yet the bulk of authority would seem to show that they form no portion of the law. In Claydon *v.* Green, L.R. 3 C.P. 511, Mr. Justice Willes said:—

"Something has been said about the marginal note in section 4 of 9 Geo. IV. c. 61. I wish to say a word upon that subject. It appears from Blackstone's Commentaries, vol. I. p. 183, that formerly, at one stage of the Bill in Parliament it was ordered to be

engrossed upon one or more rolls of parchment. That practice seems to have continued down to the session of 1849, when it was discontinued, without, however, any statute being passed to warrant it (see May's Parliamentary Practice, 3rd ed., 382). Since that time, the only record of the proceedings of Parliament—the important proceedings of the highest tribunal of the Kingdom—is to be found in the copy printed by the Queen's printer. But I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the Act, the marginal notes, and the punctuation, not as forming part of the Act, but merely as *temporanea expositio*. The Act, when passed, must be looked at just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament."

Some doubts were thrown on the opinion of Mr. Justice Willes, expressed in 1868, by a contrary view taken and acted upon in 1876 by Sir George Jessel, Master of the Rolls, who, in the case of *re* Venour's Settled Estates, 2 Ch. D. 525, said:—"This view is borne out by the marginal note, and I may mention that the marginal notes of Acts now appear on the rolls of Parliament, and consequently form part of the Acts, and in fact are so clearly so that I have known them to be the subject of motion and amendment in Parliament." In the case of Attorney-General *v.* Great Eastern R. Co., 1879, 11 Ch. D. 449, the Master of the Rolls gave expression to the same view. When this case came before the Court of Appeal, consisting of James, Bramwell, Baggallay, L.JJ., he was overruled, and the law was finally settled that marginal notes form no legal part of a statute. Per James, L.J.: "What authority has the Master of the Rolls for saying that the courts do look at the marginal notes?" Per Bramwell, L.J.: "What would happen if the marginal notes differed from the section, which is a possibility, as is shown in section 112 of this Act? Does the marginal note repeal the section, or does the section repeal the marginal note?" Per Baggallay, L.J.: "I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note."

Punctuation.—The punctuation is no part of an Act of Parliament. In the case of Barrow *v.* Wadkin, 24 Beav. 327, it was held that certain words in an Act were to be read "aliens' duties, customs, and impositions," not as they were printed, "aliens, duties, customs, and impositions."

Preamble.

Whereas[2] the people[3] of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God[4], have agreed[5] to unite in one indissoluble Federal Commonwealth[6] under the Crown[7] of the United Kingdom of Great Britain and Ireland[8], and under the Constitution[9] hereby established[10]:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty[11], by and with the advice and consent of the Lords Spiritual[12] and Temporal[13], and Commons[14], in this present Parliament assembled, and by the authority of the same[15], as follows:—

Declaration of American Independence.—We therefore the representatives of the United States of America in general Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do in the name and by the authority of the good people of these colonies solemnly publish and declare that these united colonies are and of right ought to be free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is and ought to be totally dissolved . . . and for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour. (4th July, 1776.)

Articles of Confederation.—And whereas it hath pleased the great Governor of the World to incline the hearts of the Legislatures we respectively represent in Congress, to approve of and to authorize us to ratify the said articles of confederation and perpetual union, know ye, that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents in the name and in behalf of our respective constituents fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual union and all and singular the matters and things therein contained. (9th July, 1778; ratified, 1781.)

United States Constitution.—We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America. (Preamble, went into operation 4th March 1789.)

British North America Act.—Whereas the Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. And whereas such a union would conduce to the welfare of the Provinces and promote the interests of the British Empire. And whereas on the establishment of the union by authority of Parliament it is expedient not only that the Constitution of the Legislative authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared. And whereas it is expedient that provision be made for the eventual admission into the union of other parts of British North America. (Preamble, 29th March, 1867.)

Constitution of the German Empire.—The Imperial Constitution for the protection of the territory of the Confederation and of the laws of the same as well as for the promotion of the welfare of the German people. (Preamble, 18th January, 1871.)

Constitution of Switzerland.—In the name of Almighty God. The Swiss Confederation, desiring to confirm the alliance of the Confederates, to maintain and to promote the unity, strength and honour of the Swiss nation. . . The purpose of the Confederation is to secure the independence of the country against foreign nations, to maintain peace and order within, to protect the liberty and the rights of the Confederates and to foster their common welfare. (Preamble and Art. 2, 29th May, 1874.)

Historical Note.—The preamble of the Commonwealth Bill of 1891 was as follows:—

"Whereas the Australasian colonies of [*here name the colonies which have adopted the Constitution*] have by [*here describe the mode by which the assent of the colonies has been expressed*] agreed to unite in one Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to make provision for the admission into the Commonwealth of other Australasian colonies and possessions of Her Majesty."

Under the Enabling Acts by which the Convention of 1897-8 was constituted, the mode by which the assent of the colonies was to be expressed—namely, by the vote of the people—was already determined; and accordingly the first recital in the preamble as drawn at Adelaide was as follows:—

"Whereas the people of [*here name the colonies which have adopted the Constitution*] have agreed to form one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:"

In Committee, at Mr. Deakin's suggestion, the word "form" was omitted and "unite in" substituted. Several largely-signed petitions had been received praying that there should be some recognition of God in the Constitution; and Mr. Glynn moved to insert the words "invoking Divine Providence." The Convention, however, felt some doubt as to the propriety of introducing at that stage any religious formula into the Constitution, and the amendment was negatived by 17 votes to 11. (Conv. Deb., Adel., pp. 1183-9.) During the statutory adjournment, all the Legislative Chambers, with one exception, suggested the insertion of some recognition of a Divine Being. The Legislatures of New South Wales and South Australia, and the Legislative Council of Western Australia, suggested the words "acknowledging Almighty God as the Supreme Ruler of the Universe." The Legislature of Victoria suggested "in reliance upon the blessing of Almighty God." The House of Assembly of Tasmania

suggested "duly acknowledging Almighty God as the Supreme Ruler of the Universe and the source of all true Government" The Legislative Assembly of Western Australia suggested "grateful to Almighty God for their freedom, and in order to secure and perpetuate its blessings." Numerous petitions were received to a similar effect; and at the Melbourne session a proposal by Mr. Glynn to insert the words "humbly relying on the blessing of Almighty God" was agreed to. (Conv. Deb., Melb., 1732-41.)

In the Bill as introduced in the Imperial Parliament, the names of the five colonies which had accepted the Bill were inserted in the blank left for that purpose. The words "under the Constitution hereby established" were omitted, owing to the contention of the Delegates that the alterations then proposed by the Imperial Government would make this recital inaccurate; but in Committee they were afterwards restored (see Historical Introduction, pp. 230, 238, 242, 249, *supra*).

§ 2. "Whereas."

The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited, before the enactments contained in an Act of Parliament can be understood. A preamble may be used for other reasons: to limit the scope of certain expressions or to explain facts or introduce definitions. (Lord Thring, Practical Legislation, p. 36.) The preamble has been said to be a good means to find out the intention of a statute, and, as it were, a key to the understanding of it. It usually states, or professes to state, the general object and meaning of the Legislature in passing the measure. Hence it may be legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act, whenever the enacting parts are, in any of these respects, open to doubt. But the preamble cannot either restrict or extend the legislative words, when the language is plain and not open to doubt, either as to its meaning or its scope. (Maxwell on the Interpretation of Statutes [1875], pp. 35-45.)

In the case of Overseers of West Ham *v.* Iles (1883), 8 App. Cas. p. 388, Lord Blackburn said: "My Lords, in this case the whole question turns upon the construction of sect. 19 of 59 Geo. III. c. 12. I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the Legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material."

Although the enacting words of a statute are not necessarily to be limited or controlled by the words of the preamble, but in many instances go beyond it, yet, on a sound construction of every Act of Parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act; and the preamble affords a good clue to discover what that object was. (Per Lord Tenterden, C.J., in Halton *v.* Cove, 1 B. and Ad. 538; Salkeld *v.* Johnson, 2 Exch. 283; per Kelly, C.B., in Winn *v.* Mossman, L.R. 4 Ex. 300; cited, Broom's Legal Maxims, 5th ed. p. 572.) "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which

according to Chief Justice Dyer (Plowd. 369) is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress." (Per Tindal, C.J., delivering the opinion of the Judges in the Sussex Peerage Case, 11 Cl. and Fin. 143; per Buller, J., in R. *v.* Robinson, 2 East P.C. 1113; cited R. *v.* Johnson, 29 St. Tr. 303; Broom's Legal Maxims, 5th ed. 573.

It is a general rule, in the construction of statutes, that the preamble may extend, but cannot restrain, the effect of an enacting clause. (Kearns *v.* Cordwainers' Co., 28 L.J. C.P. 285; D.E.C.L. xiii. p. 1882.)

We ought not to restrict a section in an Act of Parliament by the preamble or general purview of the Act where the section is not inconsistent with the spirit of the Act. (Sutton *v.* Sutton, 22 Ch. D. 521. *Id.*)

The preamble of an Act of Parliament is proper to explain the general body of it. (Copeman *v.* Gallant, 1 P. Wms. 317. *Id.*)

If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; but if it is doubtful, the preamble may be applied to throw light upon it. (Mason *v.* Armitage, 13 Ves. 36. *Id.*)

In construing an Act of Parliament, or any other instrument, the court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the Act of instrument prove to have been the existing circumstances at the time of its preparation. (Attorney-General *v.* Powis, 2 Eq. R. 566. *Id* 1883.)

The preamble of an Act of Parliament, though it may assist ambiguous words, cannot control a clear and express enactment. (Lees *v.* Summersgill, 17 Ves. 508. *Id.*)

But it may serve to give a definite and qualified meaning to indefinite and general terms. (Emanuel *v.* Constable, 3 Russ. 436, overruling Lees *v.* Summersgill. *Id.*)

In construing Acts, the court must take into consideration not only the language of the preamble, or any particular clause, but of the whole Act; and if, in some of the enacting clauses, expressions are to be found of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if, upon a view of the whole Act, it appears to have been the intention of the Legislature that they should have effect. (Doe d. Bywater *v.* Brandling, 6 L.J. (o.s.) K.B. 162. *Id.*)

The effect of the preamble of a repealed Act was considered in Harding *v.* Williams, 1880, 14 Ch. Div. 197. The effect of a preamble to a particular section of an Act was considered in *ex parte* Gorely, *re* Barker, 34 L.J. (B.) 1.

§ 3. "The People."

The opening words of the preamble proclaim that the Constitution of the Commonwealth of Australia is founded on the will of the people whom it is designed to unite and govern. Although it proceeds from the people, it is clothed with the form of law by an Act of the Imperial Parliament of Great Britain and Ireland, the Supreme Sovereign Legislature of the British Empire. The legislative supremacy of the British Parliament is, according to Dicey and all other modern jurists, the keystone of the law of the British Constitution. John Austin holds (Jurisprudence, vol. I. pp. 251-255) that the sovereign power is vested in the King, the House of Lords, and the House of Commons or electors. Referring to Austin's definition, Dicey points out that the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is politically sovereign or supreme in a State, the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy, independently of the King and the Peers, to be the body in which the political sovereignty is vested. (Dicey, Law of the Constitution, p. 67.)

Sovereignty of the People.—In the United States the political as well as the legal sovereignty of the people has been generally recognized ever since the Declaration of Independence. John Wilson, one of the framers of the American Constitution, in addressing the Pennsylvania State Convention in exposition and defence of that instrument said:—

"When I had the honour of speaking formerly on the subject I stated in as concise a manner as possible the leading ideas that occurred to me to ascertain where the supreme and sovereign power resides. It has not been, nor I presume will be denied that somewhere there is, and of necessity must be, a supreme absolute and uncontrollable authority. This I believe may justly be termed the sovereign power; for, from that gentleman's (Mr. Findlay's) account of the matter it cannot be sovereign unless it is

supreme; for, says he, a subordinate sovereignty is no sovereignty at all. I had the honour of observing that if the question was asked where the supreme power resided, different answers would be given by different writers. I mentioned that Blackstone would tell you that in Britain it is lodged in the British Parliament; and I believe there is no writer on this subject on the other side of the Atlantic but supposed it to be vested in that body. I stated further that if the question was asked of some politician who had not considered the subject with sufficient accuracy, where the supreme power resided in our Government, he would answer that it was vested in the State Constitutions. This opinion approaches near the truth, but does not reach it, for the truth is the supreme absolute and uncontrollable authority remains with the people. I mentioned also that the practical recognition of this truth was reserved for the honour of this country. I recollect no Constitution founded on this principle; but we have witnessed the improvement and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of Locke seems to be the only one that pointed towards even the theory of this great truth." (Elliot's Debates on the Federal Constitution, vol. ii., pp. 455, 456.) Cited, Roger Foster's Comment. on the Constit. (1895), I., p. 107.

The Constitution of the United States was not ordained and established by the States, but, as the preamble declares, by "the people of the United States." It was competent for the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers, according to their own good pleasure, and to give them a paramount and supreme authority. (Martin *v.* Hunter's Lessee, 1 Wheat. 304-324; Chisholm *v.* Georgia, 2 Dall. 419; Brown *v.* Maryland, 12 Wheat. 455. Noted in Baker, Annot. Const. (1891), p. 1.)

The Government of the American Union is a Government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised on them and for their benefit. (Per Marshall, C.J., McCulloch *v.* Maryland, 4 Wheat. 316. *Id.*)

The expressions "the people of the United States" and "citizens" are synonymous and mean the same thing. They both describe the political body which according to American institutions, forms the sovereignty, holds the power and conducts the Government through its representatives. The members of that body are called the "sovereign people," and every citizen is one of this people and a constituent member of the sovereignty. (Dred Scott *v.* Sandford, 19 How. 393. *Id.*)

Affirmations of the Preamble.—It will be noticed that the preamble to this Constitution contains no less than eight separate and distinct affirmations or declarations.

(i.) The agreement of the people of Australia.
(ii.) Their reliance on the blessing of Almighty God.
(iii.) The purpose to unite.
(iv.) The character of the Union—indissoluble.
(v.) The form of the Union—a Federal Commonwealth.
(vi.) The dependence of the Union—under the Crown.
(vii.) The government of the Union—under the Constitution.
(viii.) The expediency of provision for admission of other Colonies as States.

Of the above eight declaratory parts of the preamble only four, viz., the third, fifth, seventh, and eighth, find legislative expression in identifiable clauses to be found in the body of the Act. The remaining four have, therefore, to be regarded as promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of its framers, and by them imparted to and approved by the people to whom it was submitted. These principles may hereafter become of supreme interest and importance in guiding the development of the Constitution under the influence of Federal Statesmen and Federal Electors. They may also be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly evolved opinions. It may be asked, why are four at least of these momentous declarations to be found only in the preamble, and why have they no corresponding counterparts in the *corpus* of the Act? The answer is obvious. First as to the agreement of the people; that is the recital of a historical fact, and it could not therefore be reduced to the form in which a section of an Act of Parliament is generally cast, viz., that of a command coupled with a sanction. Then, again, their reliance on the Divine blessing is another recital of fact, incidental to the primary

affirmation, and introduced in a participial sentence for the purpose of avoiding the suspicion of ostentation and irreverence; there would, indeed, have been not only a technical difficulty, but an absolute impropriety in attempting to frame a clause designed to give legislative recognition of the Deity. The indissolubility of the Federal Commonwealth is affirmed as a principle: the effect of that affirmation will be discussed at a later stage. The declaration that the Union is under the Crown is appropriate and fundamental; this also will be discussed at a later stage.

§ 4. "Humbly Relying on the Blessing of Almighty God."

This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention. When the expression was first formulated, towards the close of the session held in Adelaide, it was thought advisable to postpone the final determination of a proposition so delicate and significant until a later stage, in order to give time and opportunity for further consideration and for the additional manifestation of public opinion and sentiment. In the interval between the Adelaide and Sydney sessions of the Convention, the Legislative Councils and Legislative Assemblies of New South Wales, Victoria, South Australia, and Western Australia, and the House of Assembly of Tasmania, resolved to recommend to the Convention the insertion in the preamble of appropriate words acknowledging and invoking the blessing of the Supreme Being. During the session held in Sydney, as well as in the last session held in Melbourne, supplementary petitions were received in favour of insertion of words of the foregoing import. A few petitions were also received in opposition to the proposal. Finally the words were inserted in the preamble without a division, but not without protest from several members of the Convention. In justification of the insertion of the words stress was laid on the great demonstration of public opinion in their favour, as expressed in the recommendations of the Legislative bodies and in the petitions presented. It was also pointed out that such an allusion was not without precedent in other notable instruments of Government, such as the American Declaration of Independence, the Articles of Confederation, and the Swiss Constitution. The views for and against are fully expressed in the following extracts:—

"The foundations of our national edifice are being laid in times of peace; the invisible hand of Providence is in the tracing of our plans. Should we not, at the very inception of our great work, give some outward recognition of the Divine guidance that we feel? This spirit of reverence for the Unseen pervades all the relations of our civil life. It is felt in the forms in our Courts of Justice, in the language of our statutes, in the oath that binds the Sovereign to the observance of our liberties, in the recognition of the Sabbath; in the rubrics of our guilds and social orders, in the anthem, through which on every public occasion we invocate a blessing on our executive head; in our domestic observances, in the offices of courtesy at our meetings and partings, and in the time-honoured motto of the nation. Says Burke: 'We know, and what is better, we feel inwardly that religion is the basis of civil society.' The ancients, who in the edifices of the mind and marble have left us such noble exemplars for our guidance, invoked, under a sense of its all-pervading power, the direction of the Divine mind. Pagans though they were, and as yet but seeing dimly, they felt that the breath of a Divine Being, 'that pure breath of life, that spirit of man,' which God inspired – as Milton says – was the life of their establishments. It is of this that Cicero speaks when he writes of that great elemental law at the back of all human ordinances, that eternal principle which governs the entire universe, wisely commanding what is right and prohibiting what is wrong, and which he calls the mind of God. Right through the ages we find this universal sense of Divine inspiration – this feeling, that a wisdom beyond that of man shapes the destiny of states; that the institutions of men are but the imperfect instruments of a Divine and beneficent energy, helping their higher aims. Should not we, sir, grant the prayer of the many petitions that have been presented to us, by recognizing at the opening of our great future our dependence upon God? Should we not fix in our Constitution the elements of reverence and strength, by expressing our share of the universal sense that a Divine idea animates all our higher objects, and that the guiding hand of Providence leads our wanderings towards the dawn? In doing so we will be but acting on what a great statesman called 'the

uniformly considered sense of mankind.' It was from a consciousness of the moral anarchy of the world's unguided course that all races of man saw in their various gradations of light the vision of an eternal Justice behind the veil of things whose intimations kept down the rebellious hearts of earth's children. It was this that made them consecrate their national purposes to God ; that their hands might grow strong and their minds be illuminated by the grace of that power Divine through which alone, as Plato says, the poet sings—

> ' We give like children, and the Almighty plan
> Controls the forward children of weak man.'

Under a sense of this great truth, expressed some thousand years ago, I ask you to grant the prayer of these petitions: to grant it in a hope that the Justice we wish to execute may be rendered certain, in our work, and our union abiding and fruitful by the blessing of the Supreme Being."—Mr. P. M. Glynn, Conv. Deb., Adel., 1897, p. 1185-6.

"I say frankly that I should have no objection to the insertion of words of this kind in the preamble, if I felt that in the Constitution we had a sufficient safeguard against the passing of religious laws by the Commonwealth. I shall, I hope, afterwards have an opportunity, upon the reconsideration of the measure, to bring before the Convention a clause modified to meet some criticisms which have been made on this point, and if I succeed in getting this clause passed it will provide this safeguard. I shall have an opportunity then of explaining how exceedingly important it is to have some such safeguard. There is no time for me now to go into an elaborate history of this question so far as the United States of America are concerned. I have investigated it with a great deal of care, and I can give the result of my investigations to honourable members, who, I hope, will not believe that I would mislead them if I could help doing so with regard to the effect of what has taken place there. Because they had no words in the preamble of the Constitution of the United States to the effect of those which the honourable member (Mr. Glynn) wishes to insert, Congress was unable to pass certain legislation in the direction of enforcing religion. There was a struggle for about thirty years to have some words of religious import inserted in the preamble. That struggle failed ; but in 1892 it was decided by the Supreme Court that the people of the United States were a Christian people. . . . That decision was given in March or February, and four months afterwards it was enacted by Congress that the Chicago Exhibition should be closed upon Sundays, simply upon the ground that Sunday was a Christian day. The argument was that among a Christian nation you should enforce Christian observances. . . . There is nothing in the Constitution of the United States of America, even indirectly, suggesting a law of this sort. No doubt the State of Illinois could have passed such a law, because it has all its rights reserved. But there was nothing in the Constitution enabling the Congress to pass a law for the closing of the Exhibition on Sunday. As soon as ever those parties who had been working for the purpose of getting Sunday legalized throughout the United States found that decision given in February, 1892, that 'this is a Christian nation,' they followed it up quickly, and within four months there was a law passed for the closing of the Exhibition on Sunday. . . . It has been in force for five and a half or six years, and it was struggled against, as my honourable friend will know. There was a strong monetary interest against it, but I will say frankly that I was not aware that it has been held to be constitutional. I understand though that there has been no dispute among the legal men in that country as to its being constitutional. Honourable members will hardly realize how far the inferential powers have been extended in America. I should have thought it obvious, and I think Mr. Wise will agree with me that the Congress had no power to pass a law of that sort. . . . I should have thought that it was not in the scope of Congress to pass a law, no matter how righteous, to close the Exhibition on Sunday, but I find, on looking to a number of decisions in the United States, that it has been held again and again that, because of certain expressions, words, and phrases used in the Constitution, inferential powers are conferred upon the Congress that go beyond any dreams we have at present. I know that a great many people have been got to sign petitions in favour of inserting such religious words in the preamble of this Bill by men who knew the course of the struggle in the United States, but who have not told the people what the course of that struggle is, and what the motive for these words is. I think the people of Australia ought to have been told frankly when they were asked to sign these petitions what the history in the United States has been on the subject, and the motive with which these words have been proposed. I think the people in Australia are as reverential as any people on the face of this earth, so I will make no opposition to the insertion of seemly and suitable words, provided that it is made perfectly clear in the substantive part of the Constitution that we are not conferring on the Commonwealth a power to pass religious laws. I want to leave that as a reserved power to the State, as it is now. Let the

States have the power. I will not interfere with the individual States in the power they have, but I want to make it clear that in inserting these religious words in the preamble of the Bill we are not by inference giving a power to impose on the Federation of Australia any religious laws."—Mr. H. B. Higgins, Conv. Deb., Melb., pp. 1734-5.

The case referred to by Mr. Higgins was Church of the Holy Trinity *v.* United States, 143 U.S., p. 457. It came before the Supreme Court of the United States on error from a United States circuit court. The question involved was the construction and effect of the federal statute of 26th February, 1885, prohibiting the importation and migration of foreigners and aliens under agreement to perform labour in the United States. (23 Stat. 332 c. 164.) The Church of the Holy Trinity was duly incorporated as a religious society under the laws of the State of New York. E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the Church made a contract with him, by which he was to remove to the city of New York and enter into its service as rector and pastor, which Warren accordingly did. It was claimed by the United States that this contract, on the part of the Church, was forbidden by the federal Act, and an action was commenced to recover the penalty prescribed by that Act. The Circuit Court held that the contract was within the prohibition of the statute, and rendered judgment accordingly. (36 Fed. Rep. 303.) The Church appealed to the Supreme Court of the United States, and the single question presented was, whether the Circuit Court had erred in giving that decision. The decision of the Court was delivered by Mr. Justice Brewer on 29th February, 1892. The Court was of opinion that the act of the Corporation was within the letter of the prohibition; for the relation of rector to his church was one of service, and implied labour on the one side with compensation on the other. Further, as noticed by the Circuit Judge in his opinion, the 5th section, which made specific exceptions, among them being professional actors, artists, lecturers, singers, and domestic servants, strengthened the idea that every other kind of labour and service was intended to be reached by the first section. While there was great force in that reasoning, the Court did not think that Congress intended to denounce, with penalties, a transaction like that in the present case. It was a familiar rule, that a thing might be within the letter of a statute, and yet not be within the statute, because not within the spirit, nor within the intention of its makers. The Court therefore found that the whole of the Act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the Committee of each House, all concurred in affirming that the intent of Congress was simply to stay the influx of cheap unskilled labour.

"It was never suggested that we had in this country a surplus of brain toilers, and least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the Act. . . . But beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national; because, this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The Commission to Christopher Columbus, prior to his sail westward, is from 'Ferdinand and Isabella, by the Grace of God, King and Queen of Castile, &c.,' and recites that it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered, &c. . . . . The first colonial grant, that made to Sir Walter Raleigh, in 1584, was from 'Elizabeth by the grace of God, of England, France, and Ireland, Queen, Defender of the Faith,' &c.; and the grant, authorizing him to enact statutes for the government of the proposed colony, provides that 'they be not against the true Christian faith now professed in the Church of England.' Coming nearer to the present time, The Declaration of Independence recognizes the presence of the Divine in human affairs, in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.' 'We therefore, the Representatives of the United States of America in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by the authority of the Good People of these colonies solemnly publish and declare,' &c., 'and for the support of the Declaration, with a firm reliance on the Protection of Divine Providence, we mutually

pledge to each other our Lives, our Fortunes, and our sacred Honour.' On examination of the Constitutions of the various States we find in them a constant recognition of religious obligations. . . . It is the duty of the Court, under those circumstances, to say that, however broad the language of the statute may be, the Act, although within the letter, is not within the intention of the legislature, and cannot be within the statute." (Per Mr. Justice Brewer, Church of the Holy Trinity *v.* United States, 143 U.S. 457.)

On 25th April, 1890, Congress passed an Act to provide for celebrating the four hundredth anniversary of the discovery of America by Christopher Columbus, by holding in the city of Chicago, in the State of Illinois, an International Exposition of arts, industries, manufactures, and products of the soil, mine, and sea. A Commission was constituted for carrying out the enterprise, and preliminary arrangements were made. This Act was passed by Congress in the exercise of its power to regulate and promote inter-state and foreign commerce. On 5th August, 1892, Congress passed an Act (ch. 381, 1892) in furtherance of the first-mentioned Act. It recited that it was enacted "For the purpose of aiding in defraying the cost of completing in a suitable manner the work of preparation for inaugurating the World's Columbian Exposition." It then proceeded to provide that there should be coined, at the mints, five million half-dollar silver pieces, to be known as Columbian half-dollars. It next went on to make other provisions and arrangements for the holding of the Exposition. Then came section 4, as follows :—

"That it is hereby declared that all appropriations herein made for, or pertaining to, the World's Columbian Exposition are made upon the condition that the said Exposition shall not be opened to the public on the first day of the week, commonly called Sunday; and if the said appropriations be accepted by the corporation of the State of Illinois, known as the World's Columbian Exposition, upon that condition, it shall be, and is hereby, made the duty of the World's Columbian Commission, created by the Act of Congress of April twenty-fifth, eighteen hundred and ninety, to make such rules or modification of the rules of same corporation as shall require the closing of the Exposition on the said first day of the week commonly called Sunday."

The amending Act, like the principal Act, was passed by Congress in the exercise of its power over trade and commerce. In the debates which took place in Congress during the passage of the amending Bill no reference appears to have been made to any religious aspect of the proposed closing of the Exposition on Sundays, or to the case of the Church of the Holy Trinity *v.* United States.

§ 5. "Have Agreed."

These words make distinct and emphatic reference to the consensus of the people, arrived at through the procedure, in its various successive stages, prescribed by the substantially similar Enabling Acts adopted by the Legislatures of the concurring colonies. In four of the colonies Acts were passed enabling the people to take part in the framing and acceptance or rejection of a Federal Constitution for Australia. Through those Acts the people agreed, first, to send representatives to a Federal Convention charged with the duty of framing for Australia a Federal Constitution under the Crown in the form of a Bill for enactment by the Imperial Parliament; and, secondly, they agreed to pronounce their judgment upon the Constitution at a referendum, which in each colony was arranged to follow the Convention. In all the colonies the Constitution was eventually referred to the people. At this referendum each voter was enabled to vote by ballot "Yes" or "No" on the question asked in the ballot paper, "Are you in favour of the proposed Federal Constitution?" In this manner there was in four colonies a popular initiative and finally in all the colonies a popular ratification of the Constitution, which is thus legally the work, as it will be for all time the heritage, of the Australian people. This democratic method of establishing a new form of government may be contrasted with the circumstances and conditions under which other Federal Constitutions became law.

United States.—"It was well said by John Quincy Adams that the Constitution was 'extorted from the grinding necessity of a reluctant nation.' It was accepted by a

small majority as the only alternative to disruption and anarchy. Its ratification was the success of the men who were interested in the security of property, the maintenance of order, and the enforcement of obligations against those who desired communism, lawlessness, and repudiation. It was a conflict between the cities and backwoods, between the mountains and plains. And the opposition was led by those cliques and families who had learned to control for their private interests the State patronage of which the new Government must necessarily deprive them. . . Two States refused to agree until after it had gone into successful operation, and the rest threatened severe retaliation in order to compel their coalition. Five of the other nine ratified with expressions of disapproval of its terms and a demand for subsequent amendments. In but three was it adopted without a struggle. In several, success was only obtained by the application of force, threats, or stratagem. In Connecticut, they silenced with tar and feathers an anti-federalist delegate who tried to talk out the Convention. A majority of the New Hampshire delegates were determined or instructed to vote against ratification, and at the first session the federalists considered a vote for an adjournment of three months as a victory. At the second, while some of its opponents were 'detained' at dinner, the Constitution was ratified by a snap vote taken at sharp one o'clock. The Legislature of Pennsylvania obtained a quorum to call the State Convention by the unwilling presence of two members dragged to the meeting by a mob who prevented their leaving the house. In the State of New York, a majority of the Convention was anti-federal, and victory was won by the threat of Hamilton, that in case of defeat New York, Kings, and Westchester would ratify the Constitution as an independent State, and leave the northern counties alone unprotected from foreign enemies without any outlet for their commerce to the sea. The charge was believed, if not proved, that the federalists prevented the circulation of the newspapers of the opposition with the mails. And in Pennsylvania and Maryland they suppressed, by purchase and boycott, the reports of the debates in the State Conventions." (Foster's Comment. on the Coustit. I. p. 5.)

Canada.—"Delegates, comprising the leading men of both parties, were appointed by the Governors of Canada, Nova Scotia, New Brunswick, and Prince Edward Island at the instance of the several Legislatures. They met and drew up a scheme which, having been submitted to the Legislatures, was afterwards carried to London; there finally settled with the Colonial Office, and embodied by the Imperial Parliament in the British North America Act, which forms the instrument of confederation. The consent of the Canadian Legislature was freely and fairly given by a large majority. That of the Legislature of New Brunswick was only obtained by heavy pressure, the Colonial Office assisting, and after strong resistance, an election having taken place at which every one of the delegates had been rejected by the people. That of the Legislature of Nova Scotia was drawn from it, in defiance of the declared wishes of the people and its breach of recent pledges by vigorous use of personal influence with the members. Mr. Howe, the patriot leader of the Province, still held out and went to England, threatening recourse to violence if his people were not set free from the bondage into which, by the perfidy of their representatives, they had been betrayed. But he was gained over by the promise of office, and those who in England had listened to his patriot thunders, and had moved in response to his appeal, heard with surprise that the orator had taken his seat in a Federationist Administration. Prince Edward Island bolted outright, though high terms were offered her by the delegates, and at the time could not be brought back, though she came in some years afterwards, mollified by the boon of a local railway, for the construction of which the Dominion paid. In effect. Confederation was carried by the Canadian Parliament, led by the politicians of British and French Canada, whose first object was to escape from their deadlock, with the help of the Home Government, and of the Colonial Governors acting under its direction. The debate in the Canadian Parliament fills a volume of one thousand and thirty-two pages. A good deal of it is mere assertion and counter assertion as to the probable effects of the measure, political, military, and commercial. One speaker gives a long essay on the history of federation, but without much historical discrimination. Almost the only speech which has interest for a student of political science is that of Mr. Dunkin, who, while he is an extreme and one-sided opponent of the measure, tries at all events to forecast the workings of the projected Constitution, and thus takes us to the heart of the question, whether his forecast is right or wrong. Those who will be at the trouble of toiling through the volume, however, will, it is believed, see plainly enough that whoever may lay claim to the parentage of confederation—and upon this momentous question there has been much controversy—its real parent was Deadlock. Legally of course Confederation was the act of the Imperial Parliament, which had full power to legislate for dependencies. But there was nothing morally to prevent the submission of the plan to the people any more than there was to prevent a vote of the Colonial Legislatures on the project. The framers can hardly have failed to see how much the Constitution would gain in sacredness by being the act of the whole community. They must have known what was the source of the veneration with which the American

Constitution is regarded by the people of the United States. The natural inference is that the politicians were not sure that they had the people with them. They were sure that in some of the provinces they had it not." (Canada and the Canadian Question, by Goldwin Smith, pp. 141-3.)

§ 6. "To Unite in One Indissoluble Federal Commonwealth."

All the words included in this expression, except "Indissoluble," occur in the covering clauses of the Imperial Act, and they will be duly noted in the order in which they appear there. "Indissoluble" is found in the preamble only and therefore demands a detailed notice at this stage. A brief allusion to the presence of the word in the preamble and its absence from the body of the Act has already been made (see note § 3, "Affirmations of the preamble"), but it is now necessary to enter upon a more extended discussion and explanation of the principle of indissolubility.

Nullification and Secession.—The omission from the Constitution of the United States of an express declaration of the permanence and indestructibility of the Union led to the promulgation of the disastrous doctrines of nullification and secession, which were not finally exploded until the Civil War of 1862-4 forever terminated the controversy. The Kentucky and Virginia Resolutions, drafted by Jefferson (1798), and adopted by the Legislatures of those States, in protest against the Alien and Sedition Laws passed by the Federal Congress, contained the germ of the fatal and insidious contention that the Union was merely a compact among the States; that the States severally had the right to resist any breach of the compact, and to pronounce that a Legislative Act of the Federal Congress in excess of its powers, and encroaching on the rights of the States, was a nullity to be followed, if necessary, by resistance, revolution, and bloodshed.

This political heresy was afterwards (1828-33) elaborated by Hayne and Calhoun, both in their debates with Daniel Webster, and in a series of addresses formulating their views of the relations which the States and the general Government bore to each other. In October, 1832, a State Convention was held in South Carolina, at which it was declared and ordained by the people of the State that the several Acts of Congress purporting to impose duties on the importation of foreign commodities were unauthorized by the Constitution of the United States, and were, therefore, utterly null and void. This was the first serious experiment in nullification by any State. The State Legislature of South Carolina followed up the ordinances of the State Convention by passing several Acts intended to give effect to the declaration of nullification, by authorizing the citizens of the State to refuse to obey the Federal law which had been declared null and void. The President of the Republic, General Jackson, issued a proclamation to the people of South Carolina, requiring them to obey the Federal law, and he followed up his proclamation by calling out the Federal troops. Hayne, the Governor of the State, responded by mustering and drilling 20,000 volunteers. Jackson is said to have sent a private message to Calhoun threatening that he would hang him higher than Haman if nullification were not abandoned. An armed conflict between the State and the Union was only averted by a compromise, according to which Congress passed a new tariff law redressing some of the grievances complained of; and the controversy for the time was terminated.

Each side, says Foster (Constitution, I. p. 154), claimed a victory. Calhoun's policy had been successful, and the result encouraged his successors when they put to the test their claim to the right of secession from the Union. The contest was resumed in a more dangerous shape on 20th December, 1860, when a Convention of the people of South Carolina was held, at which an ordinance of secession was adopted in the following terms:—

"An ordinance to dissolve the union between the State of South Carolina and other States united with her under the compact entitled 'The Constitution of the United States of America.' We the people of the State of South Carolina in Convention assembled do declare and ordain and it is hereby declared and ordained that the Ordin-

ance adopted by us in Convention on the 23rd of May, 1788, whereby the Constitution of the United States was ratified, and also all other Acts and part of Acts of the Federal Constitution, are hereby repealed, and the Union now subsisting between South Carolina and other States under the name of the United States of America is hereby dissolved."

This ordinance of secession was followed up by a declaration of independence, which alleged that the Union was dissolved, and that South Carolina had resumed her position amongst the nations of the world as a free, sovereign, and independent State. The example of South Carolina was afterwards followed by the States of Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. A Congress of seceding States was held at Montgomery, Alabama, at which a provisional Constitution was adopted and a provisional Government was formed. The Confederate Constitution was in many respects similar to that of the United States. In April, 1861, the provisional Government was called upon to give orders relating to Fort Sumter, a fortification still held by the United States, but situated within the territory of one of the Confederate States; the militia of South Carolina were directed to attack the fort, and the Civil war began. Four other States, Virginia, North Carolina, Tennessee and Arkansas, then seceded from the Union and joined the Confederacy. During the progress of the Civil war the Provisional Constitution was for a considerable time unaltered, but in February, 1862, a formal instrument of Government was adopted, which contained a few deviations from the Constitution of the United States.

"The trial of the wager of battle lasted more than five years. The dispute as to the construction of the Constitution was too mighty to be decided in a Court of Justice. The South had appealed to the final argument: in imitation of the Gallic Brennus, she had thrown her sword into the scale. To her surprise the North, less timid than the Romans, followed her example, and the weapon of the latter proved the heavier. The result determined the character of the Constitution for all time and compelled the conquered to consent to amendments which eradicated the evil (slavery) that had been the cause of the fraternal discord. No amendment which disclaimed the right of secession was written into the great Charter; pen and ink were not needed to express what had been stamped upon it by blood and iron." (Foster, Comment. on the Constit. I., p. 185.)

The war was declared ended in August, 1866. Although the Federal Constitution was not amended by the insertion of a new clause explicitly stating that the Union was a permanent form of Government, several State Constitutions, including those of seven of the rebellious States, were amended by the introduction of provisions expressly repudiating the right of secession. In the case of the rebellious States, no doubt, the amendment was carried through the pressure and coercion of the victorious army of the North; but it was also adopted in several new States, where no such influence prevailed.

It was at a fearful cost that the principle was thus, once and for all, placed beyond the region of doubt that the United States form a perpetual union of indestructible States. This view received direct judicial sanction in the leading case of Texas *v.* White, 7 Wall. 700, which came before the Supreme Court in 1868. The question raised in that case was whether the State of Texas, by framing in Constitutional Convention the ordinance of secession, and by passing through its legislature Acts to give effect to such ordinance, ceased to be a State of the Union, and whether its citizens ceased to be citizens of the United States.

"The union of the States never was a purely artificial and arbitrary relation. . . It received definite form and character and sanction by the Articles of Confederation. By these the Union was solemnly declared to be 'perpetual.' And when these Articles were found to be inadequate to the exigencies of the country the Constitution was ordained to form a more perfect union. It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence or of the right of self-government by the States. . . . It may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union; that the Constitution in all its provisions looks to an indestructible union composed of indestructible States. When,

therefore, Texas became one of the United States she entered into an indissoluble relation. . . . There was no place for reconsideration or revocation except through revolution or through the consent of the States. Considered therefore as transactions under the Constitution the ordinance of secession adopted by the Convention and ratified by a majority of the citizens of Texas was absolutely null and utterly without operation in law. The obligations of the State as a member of the Union and of every citizen of the State as a citizen of the United States remained perfect and unimpaired. The State did not cease to be a State nor her citizens to be citizens of the Union." (Per Chase, C.J., in Texas *v.* White, 7 Wall. 700.) Boyd's Const. Cases, p. 555.

The triumphant Federalists in the United States did not propose any amendment of the Constitution to remove doubts on the question raised by lawyers and revolutionary publicists. They denied that there was any doubt as to the perpetual duration of the Union. To propose an amendment declaring it indissoluble, after it had been so settled by the sword, would have been equal to an admission that such a doubt existed.

Canada.—The Constitution of Canada does not contain any clause declaring the perpetuity or indissolubility of the Dominion. That Constitution is embodied in an Imperial Act, and, save with respect to certain matters of detail not affecting the fundamental features of the scheme, it can only be altered by the Imperial Parliament. No general power to amend the Constitution has been granted to the Parliament and people of Canada. Should they require to modify any constitutional provision, not within the jurisdiction of the Dominion, an application has to be made to the Imperial Parliament to effect the required legislation. Consequently, the Dominion is absolutely indissoluble so far as the Parliament and people of Canada are concerned. The Imperial Parliament, which created it, could at any time dissolve it. No clause in the Imperial Act declaring the Dominion indissoluble could have interfered with or limited the supreme sovereign power by which the Dominion was created. Nothing is more certain than that "a Parliament cannot so bind its successors, by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from entire freedom of action at any future time, when it might be needful to invoke the interposition of Parliament to legislate for the public welfare." (Todd, Parliamentary Government in the British Colonies, 2nd ed. p. 243.)

These considerations explain the circumstance that the Canadian Constitution contains no reference to the durability, or otherwise, of the Dominion. They do not account for the fact that, whilst the indissolubility of the Commonwealth is not affirmed by any clause in the Imperial Act, it is recited as an accepted principle in the preamble. Why was it placed in the preamble? The only reason which can be suggested, is that the Australian Parliament and people have a general power to amend the Constitution, and it may have been considered wise and prudent that, coupled with a right so great and important, there should be a reminder, placed in the fore-front of the deed of political partnership between the federating colonies, that the union, sealed by Imperial Parliamentary sanction, was intended by the contracting parties to be a lasting one, and that no alteration should be suggested or attempted inconsistent with the continuity of the Commonwealth as an integral part of the British Empire.

§ 7. "Under the Crown."

This phrase occurs in the preamble, and is not repeated, either in the clauses creating the Commonwealth or in the Constitution itself. It corresponds with similar words found in the preamble of the British North America Act (*supra*) and in the Commonwealth Bill of 1891. It is a concrete and unequivocal acknowledgment of a principle which pervades the whole scheme of Government; harmony with the British Constitution and loyalty to the Queen as the visible central authority uniting the British Empire with its multitudinous peoples and its complex divisions of political power. It has been introduced rather out of an abundance of caution, than from any consideration that its omission might suggest a doubt or from any present idea of actual necessity.

Some years ago a few ardent but irresponsible advocates of Australian federation indulged in predictions that the time would inevitably come when Australia would separate from the mother country and become an independent Republic. Those ill-considered utterances caused, at the time, strong expressions of disapproval throughout the colonies, which effectually prevented the repetition of such suggestions, as being beyond the arena of serious contemplation and debate. Throughout the political campaign which preceded the election of the Federal Convention, not a solitary public writer or speaker seriously discussed the possibility, much less the probability, of separation.

Hence the words, "Under the Crown," have been inserted in the preamble to the Constitution, not as a protest against any growing sentiment adverse to the British connection, but partly to harmonize it with the Canadian precedent and partly because there was no reason for departure from the precedent of 1891.

In explanation of the appearance of the words in the preamble and their non-repetition in any of the enacting clauses or sections, it may be mentioned that though the words, "Under the Crown," are introduced in the shape of a recital of an apparently accepted and indisputable fact that the people have so agreed, and not in the shape of a command, coupled with a sanction, yet the origin of the Commonwealth and its form of government shows :—

1. That it has been established by the concurrence of the Queen.
2. That the Queen is an essential part of the Federal Parliament.
3. That the Queen is the head of the Federal Executive.
4. That the Queen is to be represented in the Commonwealth by a Governor-General.

These provisions are stronger than any formal affirmation in the preamble, as evidences and guarantees that the Commonwealth is an integral part of the Empire presided over by the wearer of the Triple Crown of England, Ireland, and Scotland—which, let us hope, it will continue to be so as long as that Empire endures. Although to some extent they are surplusage, as involving a recapitulation of what is otherwise provided in the Constitution, the words, "Under the Crown," standing as they do in the preamble to the Imperial Act, may hereafter be of service in answering arguments in favour of amending the Constitution by repealing the provisions above referred to. Strictly speaking, such amendments might be proposed, in the manner provided by the Constitution ; they are not in terms prohibited by the Constitution. Should they be proposed, however, strong arguments against their constitutionality, and even their legality, would be available in the words of the preamble. It might be contended with great force that such amendments would be repugnant to the preamble ; that they would at least involve a breach of one of the cardinal understandings or conventions of the Constitution, and, indeed, the argument might go so far as to assert that they would be *ultra vires* of the Constitution, as being destructive of the scheme of Union under the Crown contemplated in the preamble.

On the other hand, it would be urged that section 128 of the Constitution defines the procedure by which, and the limits within which, the Constitution may be altered ; that the only limitation on the power of alteration is the one indicated at the end of the section, viz.:—That no alteration diminishing the proportionate representation of any State in either House of the Parliament or the minimum representation of a State in the House of Representatives, or altering the limits of a State, shall become law, unless the majority of the electors voting in that State affirm the proposed amendments. That is the only thing like an exception to, or a restriction on, the general power of amendment specified in the Constitution, and it might afford ground for the contention that according to the rule of construction, *expressio unius exclusio alterius*, no other limitation was intended. It might also be submitted that an alteration not contrary to any express provision in the covering clauses would be quite legal even though it were inconsistent with the preamble, and even though it were contrary to the obvious intentions of the

plan of Government therein contemplated. It might be added that the preamble could not be utilized to cut down the general power to amend, and that if there were any inconsistency between an affirmation in the preamble and the power to amend, conferred by the Constitution, the enacting words must prevail.

To this the opponents of such amendments might rejoin by drawing attention to the Colonial Laws Validity Act, 1865 (28 and 29 Vic. c. 63), passed to remove doubts as to the validity of colonial laws; section 2 of which provides that any colonial law, repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, shall, to the extent of such repugnancy, but not otherwise, be absolutely void and inoperative. An amendment of the Constitution of the Commonwealth would of course be a colonial law within the meaning of this section.

Probably such a question would not be so far developed by legislative action as to assume a form capable of being discussed in the Federal High Court. Even if any amendment, to the effect under consideration, were carried by an absolute majority in both Houses of the Federal Parliament—even if it were approved of by a majority of the electors and a majority of the States—it would still have to be reserved for the Royal assent. It is not likely that such assent would be given without the authority of the Imperial Parliament. If that Parliament, which created the Commonwealth and the Constitution of the Commonwealth, consented to a form of legislative and executive government which ignored the Crown, no trouble would arise. It is not likely that such consent would either be asked for or given, except in a combination of circumstances and a revolution of ideas and sympathies of which we can now form no possible conception.

§ 8. "United Kingdom of Great Britain and Ireland."

The composite nature of the United Kingdom created by the union of the Crowns of England, Scotland, and Ireland, presents interesting points of comparison and contrast with the form of federal union established by the Constitution of the Commonwealth of Australia. The United Kingdom is ruled by a single sovereign Parliament; but the identity of the component parts is by no means wholly lost, as will appear from a brief reference to the Acts of Union.

Union of England and Scotland.—Although the Crowns of England and Scotland were united upon the accession of James VI. of Scotland to the English throne, under the title of James I., in 1603, the two countries continued separate and distinct kingdoms, subject to the administration of two different executives and to the legislation of two independent Parliaments, for over one hundred years. The Union of the two kingdoms was, for many years, projected and discussed before the proposal assumed a tangible shape. During the reigns of Charles II. and James II., Commissioners were appointed in England to negotiate with Commissioners similarly appointed in Scotland in order to settle the terms of the Union, but no agreement was then arrived at. The realization of the manifest destiny of England and Scotland was reserved for the reign of Queen Anne.

By the Act of 1 Anne c. 8 (1702), authority was given for the appointment of a Commission representing England to meet a similar Commission representing Scotland to settle the Articles for the Union of the two kingdoms. The Commissioners met at Whitehall on 16th April, 1706, and they completed their labours and signed the treaty of Union on 22nd July following. The Treaty consisted of 25 Articles, of which the leading provisions were as follows:—

> *The Union.*—That on 1st May, 1707, and for ever afterwards, the kingdoms of England and Scotland should be united into one kingdom by the name of Great Britain; that the succession to the throne of Great Britain should be vested in the Princess Sophia and her heirs according to the Act of Settlement passed by the English Parliament for that purpose; that there should be one Parliament for the whole kingdom.

Rights of Subjects.—That all the subjects should enjoy the same rights, immunities and privileges; have the same allowances, encouragements and drawbacks, and be under the same regulations and restrictions as to trade and commerce.

Trade and Finance.—That Scotland should not be charged with temporary duties on certain commodities; that the sum of £398,103 should be granted to Scotland as equivalent for such parts of the customs and excise charged upon that kingdom in consequence of the union, as would be applicable to the payment of the debts of England, according to the proportions which the customs and excise of Scotland bore to those of England; that as the revenues of Scotland should increase, a fair equivalent should be allowed for such proportion of the said increase as should be applicable to payment of the debts of England; that the sums to be thus paid should be employed in reducing the coin of Scotland to the standard and value of the English coin, in paying off the capital, stock and interest due to the proprietors of the African Company which should immediately be dissolved, in discharging all the public debts of the Kingdom of Scotland, in promoting and encouraging manufactures and fisheries under the direction of Commissioners to be appointed by Her Majesty and accountable to the Parliament of Great Britain.

Public Laws.—That laws relating to public right, policy, and civil government should be alike throughout the whole kingdom, and that no alteration should be made in laws which concerned private right except for the evident benefit of the people of Scotland.

Judicial System.—The Court of Session and all other courts of judicature in Scotland should remain as constituted, with all authority and privileges as before the union, subject only to the power of the Parliament of the United Kingdom.

Local and Municipal.—All heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life, should remain the same as rights and properties as then enjoyed by the laws of Scotland. The rights and privileges of the royal boroughs in Scotland were to remain unaltered.

Representation in Imperial Parliament.—Scotland should be represented in Parliament by sixteen peers elected from Parliament to Parliament, and forty-five commoners to be elected in a manner to be settled by the Parliament of Scotland before its dissolution. All peers of Scotland and the successors to their honours and dignities should from and after the union take rank and precedency next and immediately after the English peers of the like orders and degrees at the time of the union, and before all English peers of the like orders and degrees as should be created after the union; they should be tried as peers of Great Britain, and enjoy all the privileges of peers of England except that of sitting in the House of Lords and the privileges depending thereon, and particularly the right of sitting upon the trials of peers.

The Crown.—The crown, sceptre and sword of state, the records of Parliaments, and all other records, rolls and registers whatsoever, should still remain as they were in Scotland.

Existing Laws.—All laws and statutes in either kingdom inconsistent with these terms of union should cease and be declared void by the Parliaments of the two kingdoms. The standard of weights and measures should be reduced to that of England. The laws relating to trades, customs and excise should be the same in England and Scotland; all other laws in Scotland to remain in force until altered by the Parliament of Great Britain.

Religion.—The establishment of the Presbyterian religion was guaranteed in Scotland, with a proviso that it should not at all concern the established religion of England; each religion was in its respective country to maintain its acknowledged ascendency. It was further provided that every professor of a Scottish University should acknowledge, profess and subscribe to the 'Confessions of Faith;' these provisions relating to religion were asserted to be fundamental and essential conditions of the union in all time coming.

In the Scottish Parliament, October, 1706, every article in the treaty was bitterly resisted, but eventually it was carried by an overwhelming majority of votes, with but few alterations of any consequence; in fact the only additions made to the articles in the Scottish Parliament related to some trivial bounty on oats, which were then grown largely in Scotland; to regulations relating to salted meats and salted fish, and to the encouragement of the herring industry. In the final session of the Scottish Parliament an Act was passed to regulate the election of 16 peers and 45 commoners to represent Scotland in the British Parliament. On the 25th March, 1707, the Scottish Parliament rose never to reassemble.

On 28th January, 1707, the English Parliament met and was informed by the Queen that the Articles of Treaty with some slight modifications had been adopted by the Scottish Parliament. The terms of the treaty were fiercely resented in some quarters. High Churchmen denounced the establishment of two religions; others protested against the financial part of the arrangement. However, a Bill ratifying the treaty was passed by the English Parliament, amid vehement protests from a few, but without serious opposition. The result of the ratification of the treaty by the two Parliaments was the establishment of the one Kingdom of Great Britain in place of the two Kingdoms of England and Scotland. The Parliament of England and the Parliament of Scotland both ceased to exist, and the Parliament of Great Britain took their place. (6 Anne c. 11.)

"No change ever took place under more violent or general opposition, none in which more evils and calamities were prognosticated. The Scotch believed that their trade would be destroyed, their nation oppressed, and their country altogether ruined through the overwhelming influence of England. But if we look at the condition of Scotland now—at the increase of its population, the increase of its wealth and comfort, the growth of its towns, the extension of its trade and manufactures—there is scarcely anything so striking in the history of the world as the wonderful advance of Scotland since and in consequence of the union. If we look at the vast numbers of Scotch who have settled in England and in all the colonies, at the numbers who have located themselves in eminent places in the literature, law, and government of England, how wonderful is the contrast betwixt the outcry against the union and the results! But to all parts of the Empire the union has been scarcely less beneficial by the peace, unity, and strength which it has conferred, and by the infusion of Scotch enterprise, industry, and perseverance into the texture of the English character. What Defoe says of the treaty is undoubtedly true. It is one of the greatest measures and most ably-framed which ever distinguished any reign or country. 'I shall not,' says that great writer, 'descend to encomiums on the persons of these treaters, for I am not about to write a panegyric here, but an impartial and unbiassed history of fact, but since the gentlemen have been illtreated, especially in Scotland—charged with strange things, and exposed in print by some who had nothing but their aversion of the treaty to move them to maltreat them, I must be allowed on all occasions to do them justice in the process of this story. And I must own that generally speaking, they were persons of the greatest probity, the best characters, and the stoutest adherents to the true interests of their country: so their abilities will appear in every step taken in so great a work; the bringing it to so good a conclusion and that in so little time, the rendering it in so concise a form and so fixing it that when all the obstruction imaginable was made to it afterwards in the Parliament of Scotland, the mountains of objections that first aroused the world proved such molehills, were so easily removed, raised so much noise, and amounted to so little in substance that, after all was granted that could in reason be demanded, the amendments were so few and of so little weight, that there was not one thing material enough to obtain a negative in the English Parliament.'" (Cassell's Hist. of Eng., IV., p. 225.)

By the Reform Act of 1832 (2 and 3 Will. IV. c. 45) the number of Scotch members in the House of Commons was increased to 53 in all, and by the Reform Act of 1867 (30 and 31 Vic. c. 102) that number was increased to 60, whilst by the redistribution of seats in 1885 (48 Vic. c. 3) Scotland was allotted 12 additional seats, making in all 72 members.

Union of Great Britain and Ireland.—In the reign of Henry II. (1172-3) Ireland became a Dominion or Lordship of the King of England, who was styled '*Dominus Hiberniæ.*' Since then the Crown has been continuously represented in Ireland by an Administrative Official under the varying names of Chief Governor, Justiciary, Lord Deputy and Lord Lieutenant. The Lordship of Ireland was eventually converted into a kingdom, and in 1542 the King of England became King of Ireland; that title was conferred on him by an Irish Act, 33 Henry VIII, Ir. c. I., and was recognized by an English Act, 35 Henry VIII. c. 3. From that period the Crown of Ireland became inseparably annexed to the Crown of England.

Ireland may be deemed to have had legislative assemblies or councils similar to those in England, based on the principle of elective representation, from the year 1295. Those assemblies or councils gradually developed into a Parliament, composed, according to the English model, of a House of Lords and a House of Commons. There were, how-

ever, several serious limitations on the authority of the Irish Parliament; (1) internal restraints in the shape of the Irish Privy Council, and restrictive regulations self-imposed by the Irish Parliament, under the dominating influences of the executive; and (2) external restraints in the competing authority of the English Parliament. In 10 Hen. VII. (1495) an Act was passed by the Irish Parliament called "Poynings' Law;" taking its name from Sir Edward Poynings, the Chief Governor. This law provided that no Parliament should be convened in Ireland until the causes and considerations thereof, and all such measures as were proposed to be introduced and all such Acts as were proposed to be passed, were previously certified by both Houses to the King, and the King's license for the holding of the Parliament was issued; and only such business as was previously approved of by the King could be introduced into the Parliament and dealt with by it when it was assembled. This greatly contracted the authority of the Irish Parliament, and, in time, nothing was left to it but the power to reject without the power to initiate or amend Bills.

In addition to this internal limitation, the Irish Parliament was restrained, in its legislative action, by a claim put forward by the English Parliament that it had a concurrent, if not a paramount, jurisdiction over, and right to legislate for, Ireland; it being contended that the authority of the Irish Parliament was not exclusive but secondary and subordinate. In the reigns of Charles II., William III., and Anne, several statutes were passed in England expressly binding Ireland, such as the Navigation Act, the Woollen Act, and the Tobacco Act. Despite protests, the English Parliament continued to legislate for Ireland. Especially in the matter of foreign trade, the Parliament of England, and afterwards the Parliament of Great Britain, claimed the right to legislate for the whole of the British Isles, and at length the Act of 6 Geo. I. c. 5 (1719) was passed, declaring that Ireland was a subordinate kingdom, and that the Parliament of Great Britain had full power to bind the people of Ireland. In 1782, however, the legislative independence of the Irish Parliament was restored by three statutes. (1) By 22 Geo. III. c. 53 (1782), the Act of 6 Geo. I. c. 5 was repealed. (2) By 23 Geo. III. c. 28 (1783), the right of the Irish people to be bound only by the Acts of the Irish Parliament was affirmed in these words:—"The right claimed by the people of Ireland to be bound only by laws enacted by His Majesty and the Parliament of that kingdom in all cases whatsoever, and to have all actions and suits instituted in that kingdom decided in His Majesty's courts there finally and without appeal from thence, is established and ascertained for ever." (3) By 21 and 22 Geo. III. Ir. c. 47 (1781), the Crown assented to a modification of Poynings' Law, and thus freed the Irish Parliament from its self-imposed restraints, and from the control of the Privy Council.

After 1782, as before, the Irish Parliament had no control of the Executive, which was vested in the Lord-Lieutenant and his Chief Secretary, who were nominated by the British Government. The King, as King of Great Britain, acted on the advice of his Ministers; as King of Ireland, on the advice of the Irish Executive. The views and interests of England might seriously differ from those of Ireland on grave questions, such as peace and war, trade and commerce. The Irish Parliament, however, whilst it had no voice in such great issues, could not be forced to raise men or money to carry on a war. A conspicuous defect of such a complicated distribution of sovereign power was that it was unaccompanied by any provisions for the settlement of deadlocks or for reconciling differences that might arise between the two kingdoms.

The circumstances that led up to the passage of the Act of Union necessarily belong to the political history of Ireland. By the Irish Act, 40 Geo. III. Ir. c. 38, and by the British Act, 39 and 40 Geo. III. c. 67 (1800) the Kingdoms of Great Britain and Ireland became united into one Kingdom under the name of the United Kingdom of Great Britain and Ireland. The Parliaments of Great Britain and of Ireland became merged in one Imperial Parliament of the United Kingdom. Some of the chief Articles of this great statute, condensed from Tomlins' Law Dictionary, may be reproduced:—

The Union.—The kingdoms of Great Britain and Ireland shall after 1st January, 1801, and for ever, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.—Art. I.

The Crown.—The succession to the Crown of the United Kingdom shall continue limited and settled in the same manner as the succession to the Crown of Great Britain and Ireland stands limited and settled according to the existing laws, and to the Terms of Union between Great Britain and Scotland.—Art. II.

The Executive.—The Act of Union made no alteration in the Constitution of the Irish Executive, which still consists of a Lord Lieutenant, assisted by the Privy Council of Ireland.—Art. II.

Parliament.—The United Kingdom to be represented in one Parliament. Four Lords Spiritual of Ireland, by rotation of Sessions, viz.—One of the four Archbishops, and three of the eighteen bishops, and 28 Lords Temporal of Ireland (elected for life, by the Peers of Ireland), shall sit in the House of Lords of the Parliament of the United Kingdom; and in the House of Commons, 100 Commoners; two for each of the 32 counties in Ireland; two for Dublin; two for Cork; one for Trinity College, Dublin; and one for each of the 31 most considerable cities, towns, and boroughs.—Arts. III.-IV.

Ecclesiastical.—The Churches of England and Ireland shall be united into one Protestant Episcopal Church to be called "The United Church of England and Ireland," according to the doctrine, worship, discipline, and government of the Church of England. The Church of Scotland to remain as under the Union of that Kingdom.—Art. V.

Commerce.—The subjects of Great Britain and Ireland shall be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in the ports and places in the United Kingdom, and its dependencies; and in all foreign treaties Irish subjects shall be put on the same footing as subjects of Great Britain. All prohibitions and bounties on the export of articles, the growth, produce, or manufacture of either country to the other, shall cease. All articles, the growth, produce or manufacture of either country (not enumerated and subjected by the Act to specific duties) shall be imported into each country from the other free of duty, except countervailing duties. For 20 years from the Union certain articles were subjected to specified duties.

National Debt.—By Article VII. it was provided that the charge of the separate national debt of either country before the Union should continue to be separately defrayed by the respective countries.—Art. VII.

Existing Laws.—All laws in force at the time of the Union, and all courts, civil and ecclesiastical, within the respective kingdoms, shall remain as established, subject to future alterations by the United Parliament. All writs of error and appeals (determinable in the House of Lords of either kingdom) shall be decided by the House of Lords of the United Kingdom. The Instance Court of Admiralty in Ireland shall continue, with appeals to the delegates in Chancery there.—Art. VII.

§ 9. "Under the Constitution."

The words, "Under the Constitution," imply substantial subjection. The Commonwealth is a political community, carved out of the British empire and endowed through its Constitution with a defined quota of self-governing powers. Those powers are delegated by and derived from the British Parliament, and they are to be held, enjoyed, and exercised by the people of the Commonwealth in the manner prescribed by the grant, subject—(1) to the supreme British Sovereignty (under the Crown), and (2) to the Constitution of the Commonwealth. The Commonwealth is consequently under a double subjection. It is subject in the first place to the British Parliament, which, as the ultimate sovereign authority of the Empire, has the legal power to legislate for the Commonwealth as a part of the Empire, and even to amend or repeal the Constitution of the Commonwealth. The grant of a Constitution to any dependency of the Empire is, however, a practical guarantee that no Imperial legislation conflicting with such grant will be passed except at the express request and with the concurrence of the dependency.

On a few subjects of specially Imperial concern, and as to which uniformity of regulation is specially important, the Imperial Parliament still occasionally legislates for all the Queen's Dominions; see for instance the Copyright Act, 1842 (5 and 6 Vic. c. 45); parts of the Merchant Shipping Act, 1894 (57 and 58 Vic. c. 60) and the Privy Council Acts. Such legislation when expressly extended to the Colonies will be as binding on the Parliament and people of the Commonwealth as is the Constitution itself. (See Lefroy, Leg. Power in Canada, p. 208.) In the second place, it is under a real subjection to the Constitution, as a living central force, continuously in action, keeping the ruling organs of the federated community within the respective spheres mapped out by the Constitution, and checking invasions and encroachments beyond the limits of those spheres. Not only the Federal Government, but the Governments of the States, will be under the Federal Constitution to the extent to which the Constitution limits their powers, and to the extent to which the power of amendment may be exercised. The Constitution will therefore be the supreme law of the land binding the people of the Commonwealth, the Federal Parliament, and all the governing agencies and instruments of the Commonwealth to the extent expressed.

§ 10. "Hereby Established."

The Commonwealth is not established and the Constitution does not take effect until the date specified in the Queen's proclamation issued under Clauses 3 and 4. This proclamation was required to be issued within one year after the passing of the Act of the Imperial Parliament.

Be it therefore enacted by the Queen's Most Excellent Majesty,[11] by and with the advice and consent of the Lords Spiritual[12] and Temporal,[13] and Commons,[14] in this present Parliament assembled, and by the authority of the same,[15] as follows:—

UNITED STATES.—We the People of the United States, . . . do ordain and establish this Constitution for the United States of America. [Preamble.]

CANADA.—Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:— [Preamble.]

GERMANY.—His Majesty, the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Wurtenburg, His Royal Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance. . . This Confederation shall bear the name of the German Empire, and shall have the following Constitution:— [Preamble.]

SWITZERLAND.—In the name of Almighty God. The Swiss Confederation, . . has adopted the Federal Constitution following:— [Preamble.]

§ 11. "By the Queen's Most Excellent Majesty."

The enacting words, showing the Authority by which the Commonwealth is created, are in the form in which Acts of Parliament have been framed from a remote period of English history. According to the theory of the Constitution the Queen is the source of law, the Queen makes new laws, the Queen alters or repeals old laws, subject only to the condition that this supreme power must be exercised in Parliament and not otherwise. Every Act of Parliament bears on its face the stamp and evidence of its royal authority. It springs from the Queen's Most Excellent Majesty. It is in the Crown, and not in Parliament, that legislative authority is, according to Constitutional theory, directly vested. Parliament is the body assigned by law to advise the Crown in matters of legislation, and the Crown could not legally legislate without the advice and consent of Parliament. "It is, however, constitutionally and theoretically true that the legislative function resides in Queen Victoria no less than it resided in William the Conqueror. The conditions and limitations under which that power is exercisable have

indeed been profoundly modified." (Hearn's Government of England, p. 51.) Several stages in the history of the Royal legislative function, and in the mode of its initiation and its exercise, may be summarized :—

Legislation by the King in Council.—In the earliest periods of English history of which we have any authentic records, we find that both the subjects of legislation and the mode of dealing with them rested entirely with the King and his Council of immediate advisers and great men ; the King presiding at the Council in person, preparing and presenting the matters for consideration, and sharing in the deliberations of the Council. From time immemorial the Crown has always been assisted by a consultative or advisory body under the fluctuating names of "The Michel Synoth," or Great Council ; "The Michel Gemot," or Great Meeting ; "The Witena Gemot," or Meeting of Wise Men. In Latin it was variously styled the *Commine Concilium Regni ;* the *Magnum Concilium ;* and the *Curia Regis Magna.* Long before the Norman conquest all matters of public importance were debated and settled by the King in the Great Council of the realm. (Freeman's Growth of the English Constitution, pp. 40 and 53.)

This practice seems to have been universal among the Northern nations, and particularly among the Teutonic tribes, in whose primitive institutions, as described by Tacitus, there can be discerned the germs which afterwards expanded into the elaborate mechanism of representative and parliamentary government. In the very earliest accounts of these tribes we find the community generally ruled by a chief or prince with the advice and consent of the assembled nobles and people. This system was afterwards carried by the Germans into all the countries of Europe which they over-ran upon the dissolution of the Roman Empire. (Tomlin's British Law, vol. II. [Parliament] ; Hearn's Government of England, p. 416.) So early as the reigns of Ina, King of the West Saxons ; Offa, King of the Mercians ; Ethelbert, King of Kent, instances occur of the meeting of such a Council "to consider the affairs of the kingdom and to advise the king to make new laws as well as to mend old ones."

After the union of the several realms of the Heptarchy, King Alfred ordained for a perpetual usage, that these Councils should meet twice in the year, or oftener, if need be, to treat of the government of the people ; "how they should keep themselves from sin, should live in quiet, and should receive right." Our succeeding Saxon and Danish monarchs frequently held councils of this sort, as appears from their respective codes of laws ; the title whereof usually speak them to be enacted, either by the King with the advice of his Witena-gemot, or wise men, or by these sages with advice of the King, or lastly, by both together. There is also no doubt but that these great councils were occasionally held under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry II., speaking of a particular amount of an amercement in the Sheriff's Court, says, "It had never yet been ascertained by the General Assizes or Assemblies, but was left to the custom of particular counties." (Glanvil, b. 9, c. 10.) Here the general assizes are spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common law.—Tomlin's B.L. vol. II. (Parl.).

Legislation by the King on Petition.—The "Great Council," whose concurrence in legislation was thus required, was the historical original of the House of Lords. Long after the sole right of the Commons to grant supplies to the Crown was established, there was no recognition of their right to be consulted in matters of general legislation. The "power of the purse," however, enabled them to claim legislation for the redress of grievances ; and in 1309, early in the reign of Edward II., we find them granting a subsidy "upon this condition, that the King should take advice and grant redress upon certain articles, in which their grievances were set forth." Thirteen years later their right to concur in all legislation was affirmed. The Act of 15 Edward II. (1322) contains a clause which is said to be the first formal recognition of our present legislative system, viz., "the matters which are to be established for the estate of our Lord the King and

of His Heirs and for the estate of the realm and of the people, shall be treated, accorded and established in Parliaments by our Lord the King and by the assent of prelates, earls and barons, and the commonalty of the realm, according as it hath been heretofore accustomed." (Taswell-Langmead, p. 269.) Almost all the Acts passed during the reign of Edward III. (1327-1377) express in some shape the concurrence of the Lords and of the Commons. At the same time they were the laws of the King, made by the King, at the request of or on the petition of the people or communities of the people with the assent of the Lords "for the common benefit of the people of the realm." (Hearn's Gov. of Eng. 54.)

Legislation by the King, on Bill Presented by Parliament.—The third period marks the transition from legislation preceded by petition, to the modern form of legislation by Bill, presented to the Crown by Parliament. The Commons, disappointed at the frequent neglect of their petitions, and equally aggrieved by the frequent passage of laws, not according to the terms of their petitions, adopted a new expedient; they submitted for the Royal assent "a petition containing in itself the form of a bill." This instrument, which contained the precise provisions that they desired, was the identical document on which the Royal fiat was placed. No room was thus left for fraud or misunderstanding. But an unforeseen and remarkable consequence followed. It became difficult, if not altogether impossible, for the Crown to amend the petition thus presented. When a request was made in so precise a form, nothing remained but either to assent to it or to reject it as a whole. Hence, although a few exceptions occur in the reign of Edward IV., the practice was established, at all events before the accession of the Tudors, that the Royal assent should be given to or withheld from the precise advice tendered to the King by his Parliament. (Hearn's Gov. of Eng. p. 59.)

§ 12. "Of the Lords Spiritual."

One of the oldest Acts in which this expression occurs is the Statute of 4 Hen. IV. (1402), which begins - "To the honour of God and Holy Church, and for the common wealth and profit of all the realm of England, our Lord the King, by the assent of the Lords Spiritual and Temporal, and at the special instance and request of the Commons, assembled at the Parliament holden at Westminster the morrow after the feast of St. Michael, the fourth year of his reign, hath ordained and established certain statutes and ordinances by the manner as followeth." (Stat. Rev. Ed., 1870, Vol. I., p. 272.) This form was used in all the Acts of Henry IV. It was followed in the Acts of Henry V., and with few exceptions it became the regular method of referring to the ecclesiastical element in the House of Lords. This reference to "Lords Spiritual" has led to the impression, in the minds of a large number of writers, that they constitute one of three estates of the realm. That is not so. The Lords Spiritual, in reality, form a component part of the House of Lords, which is, as a whole, only one of the estates. Another equally incorrect assumption, frequently met with, is that the Crown represents one of the three estates.

The Three Estates.—Among most of the nations of Western Europe, it was in the early and middle ages customary to consider a political community as divided into three orders or estates. In England it was generally held during a part of that period that the nobility, the clergy, and the commons, constituted the three states of which the Parliamentary Assembly was composed. The Crown shared in the sovereignty with the Parliamentary body, but it was not an estate.

The Clergy as an Estate.—When William the Conqueror assumed the Government of England, he changed the spiritual tenure of Frankalmoign or free alms under which the bishops, mitred abbots, and other Spiritual Lords held their land, in Saxon times, into feudal tenure by barony. This tenure subjected the ecclesiastical estate to civil charges, pecuniary claims, assessments and aids from which they were before exempt. The inferior clergy and owners of religious houses, however, continued to

hold their lands on Frankalmoign, and thus free from liability to feudal burdens and taxation. As an incident of their right to the enjoyment of a succession to their baronies and of their consequent liability to feudal obligations, the bishops and abbots were summoned to attend the sittings of the King's Great Council (*Magnum Concilium*), which afterwards developed into the House of Lords, and they have ever since been allowed the privilege of membership of that order under the name, finally recognized, of the "Lords Spiritual." The Lords Spiritual, however, never constituted an estate or assembly of the clergy as a whole. The parochial clergy and owners of religious houses being legally exempt from taxation, and protected by law as well as by the sanctity of their order, the King could not tax them without their consent. An expedient was therefore adopted for the purpose of obtaining their consent. A special assembly, or convocation, was organized in which the mass of the clergy could be officially represented by men of their own class, and of their own selection, charged with the duty of deciding the manner and measure of their taxation in aid of the King's revenue.

In the "Model Parliament" of 1295 (23 Edw. I.) the clergy were for the first time represented as one of the three estates in a really national Legislature. In the Parliamentary writ of summons served on every bishop, requiring his attendance in the King's Great Council, he was "premonished" to cause the Dean of his Cathedral Church and the Archdeacon of his Diocese in person, and the chapter and the parish clergy of the Diocese, by their proctors, to attend the Parliament and there take part in the deliberations of the assembly of the clergy. This command to the bishops, usually known from its initial word as the "Premunientes Clause," was first issued in 1295; it was uniformly issued after 1354, and it was generally obeyed by the formal election of proctors until the Reformation (Hen. VIII. 1509-1547). (Hearn's Gov. of Eng. p. 432.)

The inferior clergy, however, though always summoned under the writ of premunientes, seldom attended. They preferred to keep aloof from secular legislation, and to tax themselves in their own Convocation. In the 14th century their attendance ceased altogether; though in Convocation they still formed a Legislative Council, by whose advice and consent alone, without that of the growing Commons, Edward III. and Richard II. passed laws, on ecclesiastical matters, to bind the laity. At last, in 1664, without any special legislative enactment, the practice of special ecclesiastical taxation ceased, and the lower clergy merged in the general body of the Commons. (Hallam, Middle Ages, III., 137; Taswell-Langmead, p .250.) Thus the clergy ceased to be an estate of the realm, and now there are only two estates, namely, the Lords and the Commons, forming one Parliament in which the clergy are represented in common with the rest of the nation.

At common law the clergy were not qualified to vote at elections for the House of Commons, nor were they qualified to be elected members of that House; the reason being that they were of a distinct and separate estate, and that one estate could not take part in the political deliberations of another. By the Acts of 10 Anne c. 31, and 18 Geo. II. c. 18, clergymen who are not members of the House of Lords have been conceded the right to vote; and by 33 and 34 Vic. c. 91 (1870) clergymen may, by deed, renounce their clerical capacity and become qualified for election as members of the House of Commons and other public bodies.

§ 13. "And Temporal."

The Lords Temporal consist of all the peers of the realm, by whatever title of nobility distinguished. Bishops are not peers; they, with the peers, form the Lords of Parliament or the House of Lords as an integrated legislative chamber. The origin of this body has been traced to the Great Council (*Magnum Concilium*), consisting of the nobles, tenants-in-chief, principal landowners and prelates, known before the Norman

conquest as "Witena-gemot," and after that event as the "*Curia Regis*," which assembled to advise the King in matters of legislation and administration. The peerage of the present day is the descendant of the old Great Council of the King. (Hearn's Gov. of Eng. p. 144.)

The House of Lords now consists of members who hold their seats either—(1) by hereditary right, (2) by the creation of the reigning sovereign, (3) by virtue of their office, such as English Bishops, (4) by election for life, such as Irish peers, of whom there are twenty-eight, (5) by election for the duration of a Parliament, such as the Scotch representative peers, of whom there are sixteen. In 1830, the number of peers on the roll of Parliament was 401; in 1899, the number had increased to 591; about two-thirds of the hereditary peerages at present in existence were created during the present century. (Statesmen's Year Book, 1900, p. 7.)

§ 14. "And Commons."

Origin.—It would be difficult to condense into a brief note an adequate summary of the beginnings of that great and renowned parliamentary assembly whose name is thus officially given in the Imperial Act. The House of Commons was originally the legislative chamber in which were represented, not the common people of England, nor the English churls, nor the English plebeians, as those expressions are generally understood, but the various communities (*Communitates*) of the Kingdom. *Communitates* meant aggregations of persons residing in the same neighbourhood, entitled to the enjoyment of common rights, subject to common duties and burdens, having common interests; groups of population organized and localized; assemblages of persons liable to the same feudal obligations, and occupying the same relation to the King. Foremost in numerical strength among these *Communitates* were—(1) the communities of the counties, which included the knights of the shires, formerly the lesser barons and lesser Crown vassals; and (2) the communities of the cities, towns and boroughs, including the citizens and burgesses thereof. According to the theory of the Constitution, even in the middle ages, the maxim prevailed that "what touched all should be approved by all;" that no change should be made in a law affecting any class, order or community, and certainly that no tax could be imposed, without the consent of the group of persons immediately concerned. Hence the knights of the shires, when they became differentiated from the greater barons, who were summoned in person by special writ to attend the *Magnum Concilium*, began to meet, either in person or through their delegates, in an assembly of their own, to vote aids to the Crown and petition for redress of grievances. Similarly, the cities and boroughs, being called upon by the King to grant aids and subsidies, sent delegates to represent them and to do their business in a gathering of their own.

The growth of these two middle classes, and their gradual representation for the discharge of public functions, was at times actually encouraged by the Crown in order to facilitate the collection of revenue or to counterbalance the increasing influence of the barons and prelates; at other times the popular tendency was supported by the leaders of the nobility, in order to gain support in their contests against the Crown.

Election and Representation.—"The ideas of election and representation, both separately and in combination, had been familiar to the nation, in its legal and fiscal system, long before they were applied to the Constitution of the National Parliament. The English Kingship was always in theory, and to a great extent in practice, elective. The bishops and abbots were supposed to be elected by the clergy, of whom they were the representatives. In the local courts of the hundred and the shire, the reeve and four men attended as representatives from each township; and the twelve assessors of the sheriff represented the judicial opinion of the whole shire." (Taswell-Langmead, p. 229.) It must be remembered that the national Government was a mere skeleton, whilst county government was highly organized; so that the extension of the representative system to the Parliament meant the centralization of popular institutions.

The Great Council was not a representative, but a constituent body. All the King's immediate tenants—both the greater barons and the lesser barons, or knights—had a right to attend. This right is expressly recognized by Magna Charta, by which the King promised, when calling a Council for the granting of extraordinary feudal aids, to summon all tenants-in-chief—the greater barons (lay and spiritual) individually, and the others by writs addressed to the sheriff. This difference in the mode of summons—which had existed for some time previously—marks the inferior position of the lesser barons, or knights. As a matter of fact, owing to the difficulty of attendance, their right gradually became more formal than real; until the Great Council became practically an assembly of the greater barons. (Taswell-Langmead, p. 226.)

The financial necessities of the Crown, however, required that the knights should attend, in person or by deputy; and the representative system already existing in the counties was naturally resorted to for this purpose. The first instance of the extension of the representative system to the National Council was at the Council of St. Albans, in 1213, which was attended not only by the bishops and barons, but also by the reeve and four men from each township on the royal demesne. Four instances of county representation, by writs directing the sheriff of each county to send to the Council a certain number of "discreet knights of the shire," occur before Simon de Montfort's famous Parliament of 1265. (Taswell-Langmead, pp. 230-5.)

The knights of the shire, however, representing as they did the landed gentry, were only a portion of the commonalty. The towns had already risen to wealth, liberty, and importance; and the representation of the prosperous and progressive class of burghers was necessary as a basis for really popular institutions.

To Simon de Montfort, in the reign of Henry III., belongs the glory of taking a step which led to the systematic representation of the boroughs as well as the counties. In December, 1264, he laid the foundations of the House of Commons, by issuing writs directing the sheriffs to return not only two knights from each shire, but also two citizens from each city, and two burgesses from each borough. (Hearn's Govt. of Eng., p. 48.) This famous Parliament met at London on 20th January, 1265, to deal not merely with the granting of supplies, but with the business of the nation generally. (Gneist, Eng. Const., p. 270.)

At the battle of Evesham, which took place shortly afterwards, Simon de Montfort was killed by the Royalist troops, and the party of the barons was broken up, but the precedents established during his triumphant career were never obliterated. During this period the county freeholders were, for the first time, associated with the mercantile and trading community, in a body which was destined within less than 100 years to become organized in strength and individuality, and to assume its position as the popular chamber in a national Parliamentary system. The precedent of 1265, although it was not regularly followed for many years afterwards, distinctly foreshadows the dawning outlines of the House of Commons.

There was a transition period of 30 years before Edward I.'s "Model Parliament" in 1295, in which the three estates were represented, and which sat and voted in three bodies—the knights sitting with the greater barons, and the clergy and burgesses sitting separately. The last great stage in the evolution of the House of Commons was the gradual detachment of the knights from the greater barons, their union with the burgesses, and the consequent division of Parliament into two Houses; the House of Lords being the aristocratic and official chamber, and the House of Commons the representative chamber, consisting, as it does to this day, of representatives of the shires and representatives of the boroughs. The exact date of this development is uncertain, but it was certainly complete in the year 1347. (Taswell-Langmead, p. 262.) During the long reign of Edward III. (1327-77) the power of the Commons was consolidated, and they succeeded in establishing the three great principles that taxation without the consent of Parliament is illegal, that the concurrence of both Houses is necessary for

legislation, and that the Commons have a right to inquire into abuses of administration. Two events, in particular, occurred which marked the complete consolidation of the once separate communities, by their representation in a united House, as well as by the assimilation and unity of the taxpayers in the counties, cities, and towns; one was in 51 Edw. III. (1378), the appointment of a permanent Speaker, Sir Thomas Hungerford; and the other was the imposition of a poll-tax on every adult person in the kingdom, except beggars. (Hearn's Gov. of Eng. 432; Gneist, Eng. Parl., 171.)

The Statute of Gloucester.—The Act 9 Hen. IV. (1407) contains the first authoritative recognition and delimitation of the several functions of the King, Lords and Commons, and establishes the principle that the parliamentary bodies may deliberate apart from the King. "It shall be lawful for the Lords to treat among themselves, in the absence of the King, respecting the state of the Realm, and about the necessary means to help. And in like manner it shall be lawful for the Commons to advise among themselves in respect of the before-mentioned state, and means, &c. Saving always that the Lords, on their part, shall not report to the King any matter resolved on by the Commons, and assented to by the Lords, before the Lords and Commons have come to one opinion and concurrence in such matter, and then in the wonted way and form, to wit, through the mouth of the Speaker." (Gneist, Eng. Parl., p. 172.)

Qualification of Electors.—Laws relating to the qualification of electors are first met with during the reigns of Henry IV. and Henry VI. At first the deputies from the counties were nominated or appointed at general public meetings, held in connection with the County Courts, presided over and conducted by sheriffs, appointed by the King, and attended by all free men, or at least all freeholders. Proposals were put to these gatherings and carried by the assent and acclamation of those present, "termed the bystanders." This custom is said to have been a survival of the ancient method of doing public business, followed in those antique German assemblies described by Tacitus, in which the people of the community expressed by "acclamation" their approval of propositions submitted by their leaders. There is historical evidence that during the reigns of Edward I. and Edward II. all the freeholders of the counties, without regard to the tenure or value of their lands, were accustomed to vote at such meetings. The writs were directed to the sheriffs to hold the elections in "full county," when all the freeholders were in duty bound to attend.

By 7 Hen. IV. c. 15 (1405), a uniform and general franchise for the county was distinctly recognised; "all persons present at the County Court, as well as suitors duly summoned for any cause or otherwise," were required to attend to take part in a choice of members, and to contribute towards the wages of the chosen representatives, fixed at 4s. per day.

The first contraction of the county franchise is found in 8 Hen. VI. c. 7 (1429), which provided "that in future only freeholders of 40s. income shall take part in the elections." Shortly afterwards, by 10 Hen. VI. c. 2, it was provided that only 40s. freeholders "within the county" should be entitled to vote at county elections. By 23 Hen. VI. c. 14, it was enacted "that only notable knights and notable esquires and gentlemen of the county are to be elected, who might become knights (consequently possessed of £20 income from land), but not any yeomen thereunder." The reasons for these restrictive laws were thus stated in one of the above statutes: "that elections of the delegates have of late been made from among too large a number of people living in the same county, most of them having small fortunes, but fancying that each had the like right to vote as the knights and esquires, which may easily occasion murder and rebellion, strife and dispute, between the gentlemen and the rest of the people, if measures be not speedily taken to improve this state of things." (Gneist, Eng. Parl., p. 176.)

Those limitations in the county franchise lasted down to the Reform Act 2 and 3 Wm. IV. c. 45 (1832). With respect to the franchise for cities, towns, and boroughs, some difference of opinion exists, and the subject is somewhat obscured by the absence of

definite legislative provisions. The right to take part in elections in these communities seems to have depended upon charters, writs, customs, and municipal constitutions, in force in the respective places which had the right of returning members. It is believed by competent authorities that the old members for cities, towns, and boroughs were chosen by the free inhabitants and householders of those localities who were liable to borough rates (scot and lot). On the other hand Lord Holt was of opinion that only those were burgesses who held that description of freehold known as "burgage tenure," the original tenure under which freeholds in town, "formerly parts of the ancient demesne of the Crown," were held; under this system the right of voting was annexed to some existing tenement or house or to some spot of ground upon which a house had stood in ancient times. But it seems that, whatever was the original qualification, the control of elections in cities and towns eventually fell into the hands of Municipal Corporations, or wealthy landowners; hence the origin of so-called "rotten boroughs." The question as to who were, or ought to be, electors in boroughs, frequently became the subject of debates in the House of Commons. In 22 Ja. I. a resolution was passed to the effect that, where there was no charter or custom to the contrary, the election in boroughs was to be made by all the householders, and not by the freeholders only. The defects, abuses and anomalies were not attacked until most of them were swept away by the Reform Act, 1832.

By the Reform Act, 1832 (2 and 3 Wm. IV. c. 45), important changes were made, both in the qualifications of electors and in the delimitation of constituencies. "The number of English county constituencies was increased from 52 to 82; 56 boroughs, containing a population of less than 2,000 each, were totally disfranchised, and 31 other boroughs, of less than 4,000 each, were required to send one representative instead of two. On the other hand, 22 new boroughs acquired the right to return two members, and 24 to return one member. In Scotland the town members were increased from 13 to 23—making 53 in all; while the Irish representatives were increased from 100 to 103. The next great change in the constituency of the House of Commons was made by the Reform Act of 1867-68 (30 and 31 Vic. c. 102). By this Act England and Wales were allotted 493 members, and Scotland 60, while the number for Ireland remained unaltered, and household suffrage was conferred on boroughs in England and Scotland. A still greater reform was effected by the Representation of the People Act, 1884 (48 Vic. c. 3), and the Redistribution of Seats Act, 1885 (48 and 49 Vic. c. 23). The former introduced a 'service franchise,' extending to householders and lodgers in *counties* the suffrages which in 1867 had been conferred upon householders and lodgers in *boroughs*, and placed the three Kingdoms on a footing of equality as regards electoral qualifications; while the latter made a new division of the United Kingdom into county and borough constituencies, and raised the total number of members to 670, England receiving 6 new members, and Scotland 12." (Statesmen's Year Book, 1900, p. 7.)

§ 15. "And by the Authority of the Same."

These words clearly show that, although on the face of the Act the Queen figures as the chief legislator, the *Auctoritas* by which the Constitution has been created is blended and conjoined in the Queen in Parliament. This is the modern practice in connection with the political organization of colonies and in the grant to them of the institutions of self-government. In the early stages of English and British colonization, the Crown, without parliamentary sanction, expressed or implied, but in the exercise of its admitted prerogative, was accustomed to grant to newly settled, ceded, or conquered provinces, Patents and Charters, containing directly or indirectly authority to establish local Legislative Assemblies endowed with the power to pass laws for the peace, order and good government of such countries:—

"On obtaining a country, or colony, the Crown has sometimes thought fit, by particular express provisions under the Great Seal, to create and form the several parts of the Constitution of a new Government; and at other times has only granted general

powers to the Governor to frame such a Constitution, as he should think fit, with the advice of a Council, consisting of a certain number of the most competent inhabitants, subject to the approbation or disallowance of the Crown. In most instances there are three departments forming the colonial government, each of which deserves attention. 1st. The governor, who derives power from, and is substantially a mere servant or deputy of, the Crown, appointed by commission under the Great Seal. The criterion for his rules of conduct are the king's instructions, under the sign-manual. 2nd. The colonial councils, which derive their authority, both executive and legislative, from the king's instructions to the governor. 3rd. The representative assemblies chosen by certain classes of the colonial inhabitants. The right of granting this assembly is vested exclusively in the Crown, subject to after regulations by the local legislatures." (Petersdorff, Vol. v. p. 543.)

The constitutional right of the Crown, in exercise of its prerogatives, to grant Constitutions to colonies, has been recognized in a series of judicial decisions, some of which may be here cited in illustration of the system that once prevailed, under which the English, and afterwards the British, Parliament enjoyed no share in the organization and management of colonial settlements. The case of Kielley *v.* Carson (1842), 4 Moore's Privy Council 63, 7 Jurist 137, turned on the nature and constitution of the House of Assembly of Newfoundland, established in 1832 by virtue of a commission under the sign-manual of King William IV., appointing Sir Thomas Cochrane Governor of the colony, and authorizing him to convoke a Legislative Assembly; and on the question whether such Assembly had been granted power, or possessed inherent power, to commit a person to gaol for contempt, in attempting to interfere with one of its members out of doors. Baron Parke (Lord Wensleydale), delivering the judgment of the Judicial Committee, said:—

"To such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have on the one hand the same laws and the same rights, unless they have been altered by Parliament; and, on the other hand, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects; nor has it been disputed in the argument before us, and therefore we consider it as conceded, that the sovereign had not merely the right of appointing such magistrates and establishing such corporations and courts of justice as he might do by the common law at home, but also that of creating a local Legislative Assembly, with authority subordinate to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants. This latter power was exercised by the Crown in favour of the inhabitants of Newfoundland in the year 1832, by a commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department; and the whole question resolves itself into this, whether this power of adjudication upon and committing for a contempt was by virtue of the commission and the instructions legally given to the new Legislative Assembly of Newfoundland; for, under these alone can it have any existence, there being no usage or custom to support the exercise of any power whatever. In order to determine that question, we must first consider whether the Crown did in this case invest the local legislature with such privilege. If it did, a further question would arise, whether it had a power to do so by law If that power was incident as an essential attribute to a Legislative Assembly of a dependency of the British Crown, the concession on both sides, that the Crown had a right to establish such an assembly, puts an end to the case. But if it is not a legal incident, then it was not conferred on the Colonial Assembly unless the Crown had authority to give such a power, and actually did give it. Their Lordships give no opinion upon the important question whether, in a settled country such as Newfoundland, the Crown could, by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority not incidental to it of committing for a contempt, an authority materially interfering with the liberty of the subject, and much liable to abuse. They do not enter upon that question, because they are of opinion, upon the construction of the commission, and of its accompanying document, that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland; and if it did not pass as an incident by the creation of such a body, it was not granted at all." (7 Jurist, p. 139.)

In the case of Phillips *v.* Eyre (1870), L.R. 6 Q.B., p. 1, the plaintiff sued a former Governor of Jamaica to recover damages for assault and false imprisonment, alleged to have been directed by the defendant after the proclamation of martial law during the

suppression of rebellion in the Island. The defendant pleaded an indemnity, under an Act passed by the Legislature of Jamaica, and assented to by himself on behalf of the Crown, after the rebellion was over, legalizing every act done by the Governor in arresting the rebellion by force of arms. The Legislature of Jamaica, at that time, consisted of a Legislative Council and Legislative Assembly, established not by an Imperial Act, but by a Commission under the Great Seal accompanied by royal instructions. The case turned on the power of the Crown to create such a Legislature in a settled colony. In delivering the judgment of the Court of Appeal, Mr. Justice Willes said:—

"Doubts were suggested in this Court upon what was taken for granted in the argument and judgment in the Court below, namely, the power of the Crown to create a Legislative Assembly in a settled colony. Assuming, but by no means affirming that, as contended for by counsel for the plaintiff, the colony in question, though originally conquered from the Spaniards, is now to be deemed a settled as distinguished from a conquered or ceded one, we consider these doubts as to the power of the Crown and of the local Legislature to be unfounded. There is even greater reason for holding sacred the prerogative of the Crown to constitute a local Legislature in the case of a settled colony, where the inhabitants are entitled to be governed by English law, than in that of a conquered colony, where it is only by grace of the Crown that the privilege of self-government is allowed; though where once allowed it cannot be recalled. In colonies distant from the mother country to which writs to return members to the Imperial Parliament do not run, it is essential, both for the due government of the country in dealing with matters best understood upon the spot, and with emergencies which do not admit of delay, and also for giving subjects there resident the benefit of a voice, by their representatives, in the councils by which they are taxed and governed, that the Crown should have the power of creating a local Parliament. Accordingly, it is certain that the Crown has, in numerous instances, granted charters under which Houses of Assembly and Legislative Councils have been established for the government of colonies, whether conquered or settled, and that such Councils and Assemblies have, from time to time, made laws suited to the 'emergencies of the colony,' which, of course, include all measures necessary for the conservation of peace, order, and allegiance therein. In effect, the inhabitants have been allowed to reserve the power of self-government, through their representatives in the colony subject to the approval of the Crown and the control of the Imperial Legislature. This opinion was reflected upon in the argument, but it is in accordance with just principles of government, with the law laid down by the text-writers, including Mr. Justice Blackstone; and it has now been drawn into doubt for the first time. We are satisfied that it is sound law, and that a confirmed act of the local Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament." (Per Willes, J., Phillips *v.* Eyre, L.R., 1 Q.B., p. 1.)

"The first important deviation from this rule was in the case of the colony of Quebec, which by statute of 1774 received an improved form of local government. The precedent was followed, in the year 1791, by Mr. Pitt's famous Canada Act, which constituted the two provinces of Quebec and Ontario. It has been declared by high authority that the reason for the introduction of Parliamentary action into the government of Canada was the desire to concede to the Roman Catholic colonists certain rights inconsistent with the severe Conformity statutes then existing, and with which the Crown had no power to dispense. But the application of the principle about the same time to the government of India, and, soon after, to Australian affairs, make it more probable that the change was really due to the growing extensions of Parliamentary influence over all departments of State. Be this as it may, the practice of the present century has been, whilst leaving to conquered acquisitions as much as possible their previous forms of government, to confer local Constitutions by Act of Parliament upon possessions acquired by settlement The course of proceeding has been fairly uniform. First, there has been a purely despotic government, when the colony has been ruled as a military position by a Governor and a handful of officials appointed by the Home Government. Then there has been a Constitution, with a Legislative Council, partly appointed by the Governor and partly elective. Of this Council the Crown officials have always formed part, but the executive has been unassailable by the Legislature, and responsible only to the Colonial Office; possessions in these two stages being technically known as 'Crown Colonies.' In the third stage, there have generally been two Houses of Legislature, both elective, or one elective and one nominee, and the executive has consisted of officials chosen for their Parliamentary position, and liable to dismissal, like ministers in England, in consequence of an adverse vote of Legislature. This is the era of 'Responsible Government.'" (Jenks' Gov. of Victoria, pp. 10-11.)

Short Title.

1. This Act[16] may be cited as the Commonwealth[17] of Australia Constitution[18] Act.

Historical Note.—Clause 1 of the draft Bill framed by the Sydney Convention of 1891, and usually known as "The Commonwealth Bill of 1891," declared that "This Act shall be cited as The Constitution of the Commonwealth of Australia." In Committee, Mr. James Munro proposed "Federated States" in lieu of "Commonwealth." On a division, however, "Commonwealth" was retained by 26 votes to 13. (Conv. Deb., Syd. [1891], pp. 550-7.)

At the Adelaide Session of the Convention of 1897, the clause as framed in 1891 was adopted *verbatim*. In Committee, Mr. Symon proposed to omit the words "Commonwealth of," leaving simply "Australia;" but this was negatived. Mr. Walker proposed to substitute "Australasia" for "Australia," but this also was negatived. (Conv. Deb., Adel., pp. 616-9.) At the Sydney Session, a suggestion by the Legislative Council of New South Wales, to substitute "Dominion" for "Commonwealth" was negatived. An amendment by Mr. Barton, to omit "The Constitution of the Commonwealth of Australia," and substitute "The Commonwealth of Australia Constitution Act," was agreed to, in order to distinguish between the Act as a whole and the Constitution embodied in the Act. (Conv. Deb., Syd. [1897], pp. 224-5.)

§ 16. "This Act."

Outlines of the Act.—This Act, to constitute the Commonwealth, consists of nine clauses, to each of which is annexed a marginal note. The marginal notes, as already observed, do not form parts of the Act; they are provided merely as brief summaries. In these commentaries, the notes, printed, in the authorized edition of the Act, at the sides or against the Clauses and Sections, will be found placed at the head of or immediately over each Clause or Section. Clause 1 gives the short title of the Act; Clause 2 declares that it binds the Crown and extends to the Queen's successors; Clause 3 provides that the Queen may issue a proclamation appointing a day when the people of the federating colonies shall be united in a Federal Commonwealth; Clause 4 specifies when the Commonwealth is to be deemed legally established; Clause 5 provides for the legal operation of the Act and of the laws of the Commonwealth; Clause 6 defines "Commonwealth," "States," and "Original State;" Clause 7 repeals the Federal Council Act, 1885; Clause 8 applies the "Colonial Boundaries Act, 1895," to the Commonwealth; Clause 9 contains the Constitution of the Commonwealth.

§ 17. "Commonwealth."

Significance of the Term.—The term "Commonwealth," to designate the Australian colonies, united in a Federal Constitution, was first proposed by the Constitutional Committee of the Federal Convention held in Sydney in 1891. The suggestion emanated from Sir Henry Parkes, then Premier of New South Wales, and the convener of the Convention, in which it was eventually adopted, on a division, by a substantial majority of votes. The same name was accepted by the Federal Convention of 1897-8. In both Conventions other names were submitted for consideration, such as "United Australia," "Federated Australia," "The Australian Dominion," "The Federated States of Australia," &c., but the name Commonwealth was generally accepted, the only objections raised to it being that it was suggestive of republicanism, owing to its association with the Commonwealth of England, under Oliver Cromwell's Protectorate.

According to the derivation of the term from "common" and "weal," or "wealth" it signified common well-being or common good. From that radical connotation it came to mean the body politic, or the whole people of a state. Then it became

synonymous with state, realm, community, republic, nation; whilst some authorities have described it as synonymous with league, alliance, coalition, confederacy, and confederation. Webster says "a Commonwealth is a State consisting of a certain number of men united by compact, or tacit agreement under one form of government and one system of laws. It is applied more appropriately to governments which are considered free or popular, but rarely or improperly to absolute governments. Strictly, it means a government in which the general welfare is regarded rather than the welfare of any particular class." (Webster's Internat. Dictionary.) In this Act the word is used to describe the new political community created by the union of the people and of the colonies of Australia. Although it is capable of conveying the idea of a nation, like the American Commonwealth, it does not, in its application to Australia, aspire to convey that meaning except in a restricted and potential sense. At the same time it is distinctly intended to signify that the newly-organized political society, forming a conspicuously integral part of the British empire, is entitled to a more dignified status and recognition in the international arena than that assigned to the most distinguished of the colonies or to the most powerful of the provinces out of which it has been constructed.

Numerous passages occur in the works of Shakespeare and one in the New Testament illustrative of the early use of the word in the general sense of a state or community, irrespective of any special form of government, monarchical or republican. Thus we find:—

JESSICA . . and he says, you are no good member of the commonwealth.—"Merchant of Venice," Act III. Sc. V.

PRINCESS.—Here comes a member of the commonwealth.—"Love's Labour Lost," Act IV. Sc. I.

SICINIUS.—Your Coriolanus, sir, is not much missed,
But with his friends: the commonwealth doth stand
And so would do were he more angry at it.—"Coriolanus," Act IV. Sc. VI.

ARCHB.—Let us on,
And publish the occasion of our arms,
The commonwealth is sick of their own choice.—"King Henry IV." (Part II.), Act I. Sc. III.

CANT.—Hear him debate of commonwealth affairs,
You would say it hath been all in all his study.—"King Henry V.," Act I. Sc. I.

KING HENRY.—Uncles of Gloster and of Winchester
The special watchmen of our English weal.—"King Henry VI." (Part I.), Act III. Sc. I.

KING HENRY.—Believe me, lords, my tender years can tell
Civil dissension is a viperous worm,
That gnaws the bowels of the commonwealth.—*Idem.*

3RD SERV.—And ere that we will suffer such a prince,
So kind a father of the common-weal,
To be disgraced by an inkhorn mate,
We, and our wives and children, all will fight,
And have our bodies slaughtered by the foe.—*Idem.*

APEM.—If thou couldst please me with speaking to me, thou mightest have hit upon it here: the Commonwealth of Athens is become a forest of beasts.—"Timon of Athens," Act IV. Sc. III.

That at that time ye were without Christ, being aliens from the commonwealth of Israel, and strangers from the covenants of promise, having no hope, and without God in the world.—Eph. ii. xii.

The word commonwealth was used and applied in the same general sense by numerous other English writers in the 16th and 17th centuries. Lord Bacon, in his classical essay on the "Advancement of Learning" (1597), used the word in the sense in which it was employed by Shakespeare:—"And therefore Aristotle noteth well,

'that the nature of every thing is best seen in his smallest portions.' And for that cause he inquireth the nature of a commonwealth, first in the family, and the simple conjugations of man and wife, parent and child, master and servant, which are in every cottage. Even so likewise the nature of this great city of the world, and the policy thereof, must be first sought in mean concordances and small portions." (Bacon's Moral and Historical Works [Ward, Lock, and Co.], p. 57.) "Notwithstanding, for the more public part of government, which is laws, I think good to note only one deficience: which is, that all those which have written of laws, have written either as philosophers, or as lawyers, and none as statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars which give little light, because they are so high." (*Id.*, p. 147.) In Rawley's original preface to Bacon's unfinished work, "The New Atlantis," it is stated "His lordship thought also in this present fable to have composed a frame of laws, or the best state, or mould of a commonwealth." (Ward, Lock, and Co.'s Edition, p. 297.)

During the same period the kings and queens of England frequently used the word in their addresses to Parliament. James I. described himself as "the great servant of the Commonwealth." (G. B. Barton's Notes to the Draft Bill, 1891)

The term commonwealth came into special prominence during the revolutionary period of English history, between the execution of Charles I. in 1649 and the Restoration of 1660. On 19th March, 1649, Oliver Cromwell's Parliament established a republican form of government, in the following Ordinance:—"Be it declared and enacted by this Parliament and by the authority of the same that the people of England, and of all the dominions and territories thereunto belonging, are and shall be and are hereby constituted, made, established, and confirmed to be a Commonwealth or Free State, and shall from henceforth be governed as a Commonwealth and a Free State by the supreme authority of this nation, the representatives of the people in parliament, and by such as they shall constitute officers and ministers under them for the good of the people and without any king or House of Lords." Even during the existence of Cromwell's Protectorate, philosophical writers continued to use the expression in its primary general sense; thus Hobbes in his "Leviathan," published in 1651, wrote:—"And because the sovereignty is either in one man, or in an assembly of more than one, it is manifest there can be but three kinds of Commonwealth. When the representatives of the people is one man, then is the Commonwealth a monarchy; when an assembly of all that will come together, then it is a democracy, or popular Commonwealth; when an assembly of a part only, then it is called an aristocracy." (Molesworth's Ed. of Hobbes' Works, Vol. III., p. 171.)

John Harrington, in his treatise on Political Government, entitled "The Commonwealth of Oceana," and dedicated to the Lord Protector, used the term as an appropriate description of an Ideal State, not necessarily a republic. After Oliver Cromwell's death, John Milton, seeing that his system of Government was likely to be imperilled by the weak administration of Richard Cromwell, and believing that his advice might arrest the threatened reaction towards monarchy, published, in the early part of 1660, several treatises, including one on "A Ready and Easy Way to Establish a Free Commonwealth," in which he employed the word in a republican sense. "A Free Commonwealth, without single person or House of Lords, is by far the best government, if it can be had. Now is the opportunity, now the very season, wherein we may obtain a free Commonwealth, and establish it for ever in the land, without difficulty or much delay." (Cited Barton's Notes to the Draft Bill, 1891, p. 11.) "But the inevitable 29th May, 1660, came and Charles II. was restored." (Milton's Works, Gall and Inglis' Ed., p. 12.)

After the Restoration, the term commonwealth became for a time unpalatable to the bulk of English society, as it was supposed to imply a republican form of government. In his work on Civil Government, published after the Restoration, John Locke,

the philosopher, ignored the association of the word with Cromwell's republic and used it in its primitive sense as understood by Shakespeare, Bacon, Hobbes, and Harrington. "By the same Act, therefore, whereby any one unites his person, which was before free, to any Commonwealth, by the same he unites his possessions, which were before free, to it also; and they become, both of person and possessions, subject to the government and dominion of that Commonwealth, as long as it hath a being." (Cited Barton's Notes on the Draft Bill, 1891, p. 10.)

The name Commonwealth has since been frequently applied to the States of the American union. The Constitution of the State of Pennsylvania (1776) framed in popular Convention, begins thus:—"We the Representatives of the free men of Pennsylvania . . . do . . . ordain, declare, and establish the following declaration of rights and frame of government to be the Constitution of *this Commonwealth.*" The preambles of the Constitutions of the States of Vermont (1779) and Massachusetts (1780) are in the same form. Dr. Burgess, in his important work on "Political Science and Constitutional Law," published 1890, habitually describes the so-called American "States" as "commonwealths," and he similarly designates the so-called German "states" (Vol. I., pp. 201-10). On the other hand, some writers have used the name as applicable to and descriptive of the United States as a union of States. Dr. Bryce's well-known work on the American Constitution is entitled the "American Commonwealth," and in one passage he describes the union as "a Commonwealth of Commonwealths." (Bryce, American Commonwealth, 1st ed., Vol. I., p. 12.)

§ 18. "Constitution."

Definition.—A Constitution is a general law for the government of a political community, unamendable and unrepealable, except in the manner and on compliance with the conditions prescribed by the authority which created it. It deals with the sovereign power of Government and the various forms, organs, and agencies through which that power is brought into action and the relations, interdependence, and co-operation of those forms, organs, and agencies, in the performance of the work of government.

A General Law.—First, then, a Constitution is a general law or a collection of laws, capable of effective enforcement and binding on every member of the community, including the members of the Government in their private capacities. It is a law which should be couched in wide and general terms, avoiding minute specifications and details and thus leaving room for "unpredictable emergencies," and possible and desirable developments. In the history of a Constitution there grow in association with it, and springing from its generalities, certain customs and practices, which cannot be exactly termed laws, strictly so called. These customs and practices generally relate to matters which, by the letter of the Constitution, are left to the discretion of some member or branch of the sovereign body. In time, owing to political influences and considerations, these discretionary powers are exercised in a certain manner; and hence arise what have been described as the "understandings and conventions" of the Constitution, distinguishable from the positive law of the Constitution. The essence of a law is its capacity of being executed; it implies the existence of a force able to command obedience and to punish disobedience. As such, a law is clearly contrasted with a mere understanding, or a practice, which is capable of variation and modification, according to the changing conditions and requirements of human society. A Constitution is also different from a social compact between the members of the society which it concerns; if it were a mere compact it could be repudiated and violated at the caprice of any faction or group within the society. It differs equally from a treaty or league between separate and independent states, terminable at the will of any of those states.

Government.—Secondly, the law of the Constitution relates to the exercise of that sovereign power of Government which in every independent political community, occupying a defined territory, is vested either in a sovereign monarch or in a sovereign body, and which in a subordinate political community exercising delegated sovereign powers is vested in subordinate persons or bodies (see § 21, "Sovereignty"). Even an absolute monarch must ordinarily exercise his sovereign prerogatives according to certain well-understood rules and formal requisites, recognized by his predecessors and recommended by his counsellors. These rules and formalities, if compiled and classified, would compose the rudimentary "understandings and conventions" of a monarchical constitution. When the functions of government are divided among the members of a body, there must be some more specific rules appropriating certain classes of work to particular members of the governing body, determining the mode of appointment and succession of those members—such as Chief Magistrate, Legislators, and Judges—and the manner in which harmonious action may be maintained in the combined execution of the sovereign power. These rules would, if compiled and similarly classified, compose a more complex constitution, and so the greater the division, sub-division, and multiplication of governing agencies, and the greater the distribution of power, the more complex and elaborate a constitution becomes. Supreme governing power, as well as subordinate or delegated governing power, analyzed and classified, may be resolved into three departments or divisions—(1) The making and promulgation of laws prescribing the functions of governing agencies and regulating the legal rights and duties of the people within the jurisdiction of the government; (2) the administration of laws; and (3) the interpretation and determination of laws in cases where doubts arise as to their meaning or intention. In simple societies these three functions may be blended in one person, or one body, but in all maturely developed States they become differentiated, and divided amongst separate persons or separate bodies composing the sovereign authority as a whole. Hence arises the well-known tripartite division of government into the Legislative Department, the Executive Department, and the Judiciary Department. All constitutions which have been reduced to and expressed in the shape of written instruments, such as those of the United States, Belgium, France, Germany, and Switzerland, recognize this principle of division and distribution of power. The same distribution, indeed, is also observed in the British system of government, the Constitution of which, although it has not been reduced to the form of a single document or Act of Parliament, is as capable of being gathered from numerous Charters, Bills, Proclamations, Statutes, legal decisions, and official documents, extending from the time of King Alfred down to the reign of Queen Victoria, as the Constitutions of the countries referred to, which have been, in fact, largely constructed according to the British model.

At the time when the American Constitution was framed, Montesquieu was the great oracle of political philosophy, and he drew special attention to the tripartite division of political power as existing in England. "Contrasting the private as well as the public liberties of Englishmen with the despotism of continental Europe, he took the Constitution of England as his model, and ascribed its merits to the division of legislative, executive, and judicial functions, which he discovered in it, and to the system of checks and balances whereby its equilibrium seemed to be preserved; no general principle of politics laid such a hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom." (Bryce's Amer. Comm., vol. I., p. 26.) This tripartite classification does not necessarily imply that each of the three departments of government is independent of the others. Each of the three is endowed with a defined share in the work of government, but they are all parts of one governing machine and are exercising fractions of the aggregate of sovereign power; each acts within its respective legal sphere, but, to some extent, one may check and balance the other. Thus the legislature may exercise more or less control over the Executive. The Executive may advise, lead, or for a time

moderate the action of the legislature, as is done in the British system, through the agency of the Cabinet. In every well-designed Constitution the Judiciary, once appointed, is almost absolutely independent of the influence of either the Executive or the Legislature; but the primary appointment of the Judges generally rests with the Executive, and for gross misconduct in office they may be removed by the Executive: in some Constitutions they may be removed by the Executive at the request of the Legislature without any particular cause assigned.

Rights, Privileges, and Immunities.—A Constitution not only deals with this partition and delimitation of governing powers, with the mode in which those powers are exercised, and with the structure of the governing organs; it generally enumerates certain cardinal rules, principles, and maxims which are intended to be the *indiciae* of public policy that should guide or bind the Executive the Legislature, and the Judiciary Departments. Thus Magna Charta, the Petition of Rights, and the Bill of Rights, contain declarations of rights, privileges, and immunities, which are said to be the inalienable birthright and heritage of every British subject, protecting his liberty from unlawful impairment and his property from spoliation. These declarations undoubtedly bind the British Executive and the British Judiciary; they may guide but cannot bind the British Parliament, which may amend or repeal them at any time. A similar declaration of rights has been inserted in the Federal Constitution of the United States. In a supreme constitution of a federal character, dealing as it does with a general government and with provincial governments, with States as well as with individuals, provisions are necessarily inserted for the preservation not only of individual rights, but of what are known as "State Rights," against invasion and encroachment on the part of the general government, and for the preservation of "National Rights" against invasion and encroachment on the part of the States. In the American Constitution, as in the Constitution of the Commonwealth, these declarations bind alike the Executive, the Judiciary, and the Legislature, of each State, as well as those of the general government.

A Fundamental Law.—Next, the word Constitution connotes the idea of a fundamental law—a law of higher sanctity, and perhaps of greater efficacy and authority, than ordinary legislation. In all modern written Constitutions there is a tendency to establish the fundamental character of the instrument upon a firm legal basis by making the process of constitutional amendment more difficult and more complex than the process of ordinary legislation, and thus to affirm the principle that every alteration in the fundamental law is an act so solemn and momentous that it requires compliance with special formalities intended to prevent hasty and ill-advised changes, to ensure the fullest deliberation, to guard against surprises, and to protect the rights and interests of all classes of the community. A Constitution which thus makes the process of its own amendment more difficult than the process of ordinary legislation is what Professor Dicey calls a "rigid" Constitution. The degree of rigidity may vary widely; it may consist in the requirement of unusual majorities in the Legislature, or of ratification in a certain way by conventions, or by the electors, or it may involve other and more complicated processes. And even in an absolutely flexible Constitution such as that of Great Britain, where the most fundamental law can legally be altered or repealed as easily as the most trivial, the reverence for constitutional usage invests the laws which form the main fabric of the Constitution with a sanctity which makes the flexibility less absolute, in practice, than it seems.

In a unitarian or consolidated Constitution, like that of Great Britain, organic changes may be effected with greater facility and safety than in a federal Constitution such as that of the United States. In a consolidated State there may therefore be one supreme Legislature, having absolute and final jurisdiction over all matters, including the Constitution itself. But a federal Constitution deals with the conflicting views and interests of a community which is composed of a number of States, united under a general form of Government, each State having a local Constitution and local governing

organs, as well as local rights guaranteed by the supreme Constitution. In such a system a power of amendment is usually placed not in the legislatures of the several States nor solely in the central legislature of the federal community, but in some body, more or less complex, which represents both the nation and the States.

In the case of the British Constitution, and its unitarian form of government, the British Parliament is a supreme or sovereign legislature, and could, at any time, amend or repeal any part of the Constitution, of which it is partly, if not wholly, the author and creator, including the Bill of Rights. The Federal Congress of the United States, however, is not a supreme or sovereign legislature, but is only a legislature subordinate to the supreme Constitution created by the people of the United States and exercising limited and specific powers assigned to it by that supreme Constitution. Congress cannot amend that Constitution in any way whatsoever. Majorities of two-thirds in both the Senate and the House of Representatives may suggest an amendment; but it would not become law until it were ratified by majorities of the federal electors in three-fourths of the States acting through their several legislatures or conventions. This is one of the fundamental differences between a unitarian Constitution and a Constitution of a federal character. As a practical illustration of the foregoing definition and exposition of a Constitution, the following outlines of two typical Constitutions, one Federal, the other Unitarian, are submitted:—

OUTLINES OF THE BRITISH CONSTITUTION.

Part I.

Sovereignty.—Legally vested in the British Parliament—*i.e.*, Queen, Lords, and Commons—with a strong tendency to recognize the people represented by a majority of the electors as the body in which the ultimate political sovereignty resides; to be gathered from various Charters, Patents, Writs, Ordinances, Statutes, Acts, Proclamations, legal decisions, and established customs.

Part II.

Government.—Powers exercised by one set of Executive, Legislative, and Judicial Departments:—

(1) *The Executive Department.*—Presided over by the Queen, acting for the most part on the advice of Ministers of State responsible to Parliament. (The Queen's title—Act of Settlement, 12 and 13 Wm. III. c. 2.)

(2) *The Legislative Department.*—Power vested theoretically in the Queen, acting on the advice and with the consent of the Lords spiritual and temporal and the Commons; practically in the Queen in Parliament. *The Queen*—Her part in the convening, proroguing, dissolving Parliament; in recommending legislation; her right to assent to or disallow Bills passed by the Lords and Commons. *The Lords Spiritual and Temporal*—The House of Lords, composed of (1) hereditary Peers, (2) Elective Peers, *i.e.*, those who represent the peerage of Ireland and Scotland, and (3) peers of office, such as Bishops of the Church of England. Power of the House of Lords theoretically equal to that of the Commons with certain exceptions, such as control of the Executive and the alteration of Money Bills. Title of the House of Lords, immemorial customs, charters, writs, and Acts of Parliament. *The House of Commons*—Composed of Representatives elected by the people according to electoral laws passed from time to time. Power of the House of Commons in the initiation of legislation unrestricted, except for the constitutional principle that it may not originate a grant of money or a tax except upon receipt of a message from the Crown recommending the same. Control of Ministers. Title of the House of Commons—charters, writs, recognized and ratified by Acts of Parliament.

(3) *Judicial Department.*—Power vested in the Queen, but exercised by Judges appointed by the Crown during good behaviour, but subject to be removed on an Address from both Houses of Parliament. Jurisdiction—to interpret the common law and the law of Parliament, but not to question validity of the latter. Security of tenure—Act of Settlement, 12 and 13 Wm. III. c. 2, and subsequent legislation.

PART III.

RIGHTS, PRIVILEGES, AND IMMUNITIES.—Contained in numerous charters, confirmations of charters, and Acts of Parliament assented to by the Crown from the earliest period of English history, including Magna Charta (1215); the Petition of Rights (1627), 3 Char. I. c. 1; the Habeas Corpus Act (1640), 16 Char. I. c. 10; the Bill of Rights (1688), 1 Wm. and Mary c. 2; and the Act of Settlement (1700), 12 and 13 Wm. III. c. 2. The Bill of Rights is of special interest as declaring that certain recited rights are "the true ancient and indubitable rights and liberties of the people to be firmly and strictly holden and observed in all times to come."

PART IV.

COLONIES.—The Acts 18 Geo. III., c. 12, and 28 and 29 Vic. c. 63, are the charters of Colonial Independence. By the first it is promised that the British Parliament will not impose any duty, tax, or assessment whatever, payable in any part of His Majesty's colonies, provinces, plantations, in North America or in the West Indies. The latter Act is known as the Colonial Laws Validity Act, 1865, and provides that no colonial law shall be deemed to be void or inoperative on the ground of repugnancy to the law of England, unless it is repugnant to the provisions of an Imperial Act specially applicable to the colony in which such colonial law was passed.

PART V.

AMENDMENT.—No limitation upon the power of the British Parliament to alter the Constitution; it may legally be amended by the ordinary process of Legislation; but the House of Lords—the last stronghold of resistance to constitutional innovation—is under no constitutional obligation to yield to any demand of the House of Commons until the voice of that House has been confirmed by its constituents at a general election.

OUTLINES OF THE CONSTITUTION OF THE UNITED STATES.

PART I.

SOVEREIGNTY.—Legally vested in the electors of the States, organized within the Constitution as the amending power.

PART II.

GOVERNMENT.—Two co-ordinate sets of governing organs, national and State, acting within the spheres marked out for them by the Constitution. Each set of organs is independent of the other, but both are subject to the common sovereignty:

(*a*) *National Government.*—Can only act within the sphere of powers granted to it by the Constitution.

(1) *National Executive Department.*—Power vested in the President, chosen under the Constitution by the electors of the States. Some executive acts require assent of Senate.

(2) *National Legislative Department.*—Power vested in Congress; House of Representatives elected by people of States in proportion to population; Senate consisting of two Senators from each State, chosen by the Legislature of the State. President has a veto, which may be overridden by a two-thirds majority of each House.

(3) *National Judicial Department.*—Power vested in the Supreme Court of the United States, established by the Constitution, and other federal courts established by Congress under powers conferred by the Constitution.

(*b*) *State Governments.*—Can only act within the residuary sphere of powers which are neither prohibited to the State Governments nor exclusively given to the Federal Government. Within that sphere, the Government of each State is vested in the electors of the State organized within the Constitution of the State. Subject to the Federal Constitution and the Constitutions of the States:—

(1) *State Executive Departments.*—Power vested in State Governors appointed under State Constitutions.

(2) *State Legislative Departments.*—Power vested in State Legislatures, elected under State Constitutions.

(3) *State Judicial Departments.*—Power vested in State Courts established under State Constitutions.

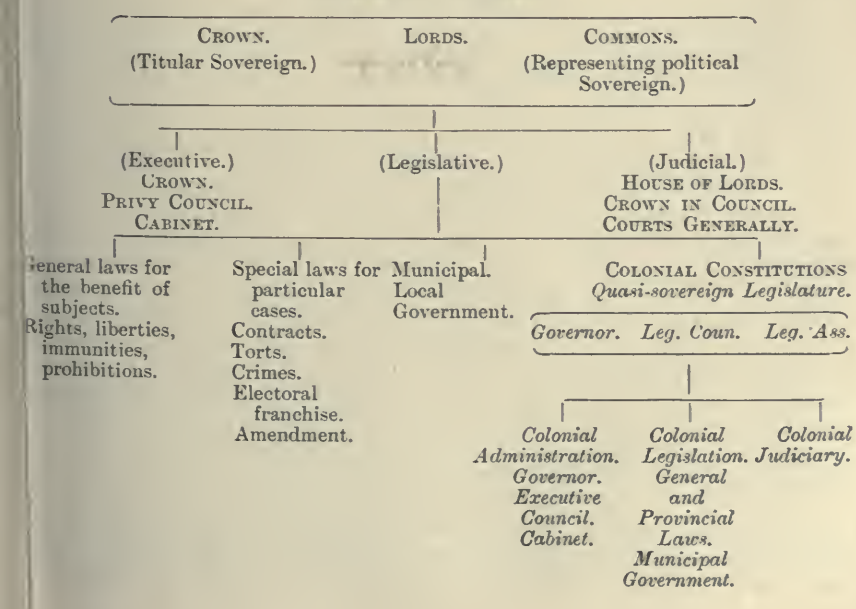
PART III.

RIGHTS, PRIVILEGES, AND IMMUNITIES.—Defined by the Constitution as amended from time to time. Subject to modification by the sovereign people, but secure against Federal and State Governments.

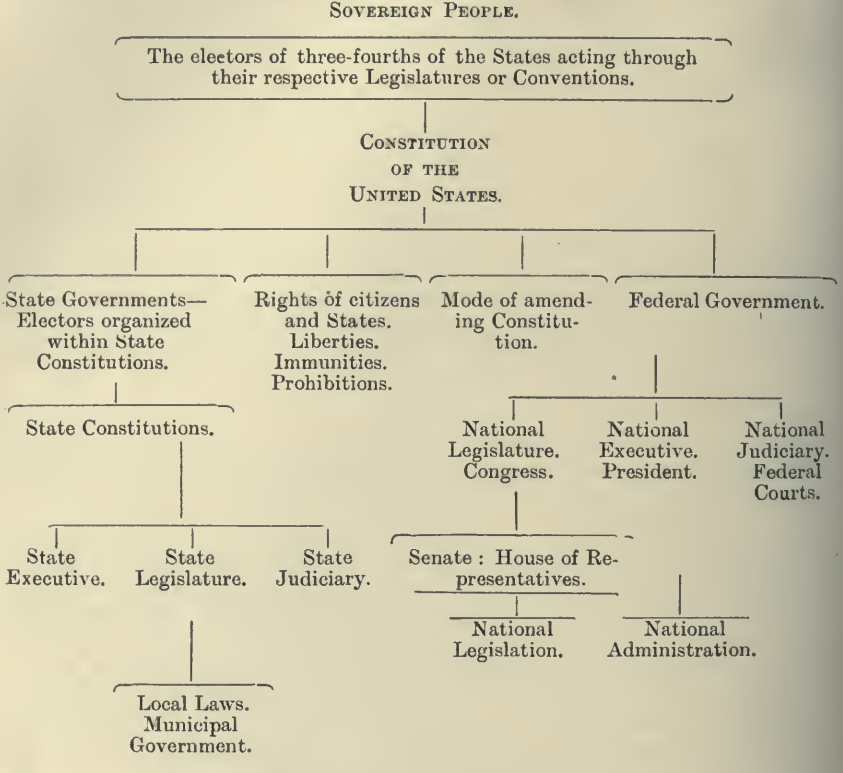
PART IV.

AMENDMENT.—The mode of amendment by the sovereign people prescribed by the Constitution requires:—(1) Initiation by two-thirds majority in each House of Congress, or (on the demand of the Legislatures of two-thirds of the States) by a Constitutional Convention; (2) ratification by Legislatures or Conventions in three-fourths of the States. An amendment depriving any State of its equal representation in the Senate requires the consent of that State. The process of amendment is itself subject to amendment in the prescribed mode.

CONSPECTUS OF THE BRITISH CONSTITUTION.



CONSPECTUS OF THE UNITED STATES CONSTITUTION.



Act to extend to the Queen's Successors.

2. The provisions of this Act referring to the Queen[19] shall extend to Her Majesty's heirs and successors[20] in the sovereignty[21] of the United Kingdom.

Canada.—The provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.—British North America Act, 1867, sec. 2.

Historical Note.—The clause as originally drawn in the Sydney Convention, 1891, was taken verbatim from the Canadian clause, *supra*. In Committee, on Mr. Rutledge's suggestion, the words "in the sovereignty" were substituted for "Kings and Queens." (Conv. Deb., Syd. [1891], p. 557.) As drawn at the Adelaide session, 1897, the clause ran :—"This Act shall bind the Crown and the Executive officers of the Commonwealth, and its provisions referring to Her Majesty the Queen shall extend," &c. Mr. Higgins moved the omission of the words "and the Executive officers of the Commonwealth," and this was agreed to. (Conv. Deb., Adel., pp. 619-20.) At the Sydney session, there was a short discussion on the words "This Act shall bind the Crown." (Conv. Deb., Syd. [1897], pp. 225-7.) At the Melbourne session, verbal amendments were made before the first report and after the fourth report.

In England, the Crown Law officers recommended the omission of the words "This Act shall bind the Crown" (Parl. Paper, May, 1900, p. 19). In the Bill as introduced into the Imperial Parliament this course was adopted, and the clause was worded "The provisions of this Act, *and of the Constitution set forth in the schedule to this Act*," etc —

the Constitution being then placed as a "schedule" to the Bill. When the original form of clause 9 was restored in Committee, and the word "schedule" omitted, the words in italics became inapplicable; and before the third reading they were omitted.

§ 19. "Referring to the Queen."

References to the Queen.—The direct references to the Queen in the Act and Constitution (elsewhere than in the enacting words) are as follows:—

Preamble (admission of other possessions of the Queen). Clause 3 (Queen may proclaim Commonwealth, &c.). Clause 5 (Queen's ships of war). Section 1 (Queen in Federal Parliament). Section 2 (Governor-General appointed by the Queen). Section 34 (subject of the Queen). Section 44 (Queen's Ministers for Commonwealth or State—officers or members of Queen's navy or army). Sections 57-60 (Queen's assent to Bills). Section 61 (Executive power vested in Queen). Section 64 (Queen's Ministers of State). Section 66 (salaries of Ministers). Sections 73-4 (Appeals to Queen-in-Council). Section 117 (subject of the Queen). Section 122 (territories). Section 126 (Deputy Governor-General). Section 128 (Queen's assent to constitutional amendments). Schedule (oath of allegiance).

Besides references to "the Queen," there are references to "the Crown" (*e.g.*, in the Preamble and sec. 44)—a term which in English law is usually used as an impersonal or abstract description of the occupant of the throne—commonly called the sovereign—whether King or Queen. Sometimes it is used in a wider and more popular sense as representing the majesty and sovereignty of the nation (see note on "Sovereignty," § 21).

Crown not Bound Unless Named.—It is a recognized canon in the construction of Statute law that in any case where the Crown would be ousted of an existing prerogative, it is not bound, affected, or reached unless named therein either expressly or by necessary implication. It is presumed that the legislature does not intend to deprive the Crown of any right of property unless it expresses that intention in explicit terms or makes the inference irresistible. (Maxwell on Statutes, p. 186; Broom's Legal Maxims [6th ed.], p. 68.) In conformity with this principle it has been held that the compulsory clauses of Acts authorizing land to be taken for railway purposes would not apply to a Crown property, because they were not made so applicable in express terms or by necessary inference; that, it being a prerogative of the Crown not to pay tolls or rates or other burthens on property, the Poor Act of 43 Elizabeth, authorizing the imposition of poor rates on every inhabitant or occupier of property in the parish, did not apply to the Crown or to its direct or immediate servants whose occupation is for the purposes of the Crown; *re* Cuckfield Board, 24 L.J. Ch. 583; Mersey Docks *v.* Cameron, 11 H.L. Cas. 443. Numerous Acts of Parliament have at various times abolished the writ of *certiorari*, but they have been held not to apply to the Crown, which still had its remedy by the prerogative writ. Where a local Act imposed wharfage dues, for the repairs and maintenance of a harbour, on certain articles, including stones, and, without expressly binding the Crown to make such payments, exempted it from liability in respect of coals imported for the use of the royal packets and from a toll over a bridge, the court refused to infer from the exemptions an intention to charge the Crown in respect of any other goods. (Weymouth *v.* Nugent, 34 L.J., M.C. 81.)

The rights of the Crown are not barred by any Statute of Limitations, unless it is expressly named therein; and this rule extends to cases where the right of the Crown is merely nominal. (Reg. *v.* Bayley, 4 Ir. Eq. R. 142.) *Quære*, whether, when an Act of Parliament transfers jurisdiction from one court to another, or grants an extension of the jurisdiction of an existing court, it is necessary, in order to make the Act binding on the Crown, that the Crown should be named therein. (London Corporation *v.* Att.-Gen., 1 H.L. Cas. 440; Dig. of Eng., Case Law v., p. 7-8.)

The Crown not being bound by the Statutes of Bankruptcy, the protection of a bankrupt from an extent is limited to actual attendance upon the commissioners, upon the common-law privilege of a witness or party, not extending through the intervals of adjournment by the statute. (*Ex parte* Temple, 2 Ves. and B. 391; Cranfurd *v.* Att.-

Gen., 7 Price, 2.) The Bankruptcy Act, 1883, sec. 150, enacting that, save as therein provided, the provisions of that Act relating to the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown, does not by virtue of the Judicature Act, 1875, s. 10, operate as an incorporation, in the Companies Act, 1862, of a similar provision so as, in a winding-up, to bar the Crown of its prerogative of priority of payment over all creditors. (*Re* Oriental Bank Corporation, 28 Ch. D. 643; Dig. of Eng. Case Law v., p. 8.)

The Crown, though not bound by 3 and 4 Will. 4, c. 55, s. 31, and 3 and 4 Vic., c. 105, s. 20, which give to creditors by judgment or recognizance a right to have a receiver appointed on petition, may take advantage of the Acts, but is not bound by the restrictions imposed on that right by 12 and 13 Vic., c. 95, s. 10. (Reg. *v.* Cruise, 2 Ir. Ch. R. 65.) The Statute of Frauds does not bind the Crown, but takes place only between party and party, for the king is not named. Lord Hardwicke, however, doubted this doctrine. (Addington *v.* Cann, 3 Atk. 154.) Crown property, as well as property devoted to or made subservient to the Queen's government, is exempt from poor rates, but property held upon trust to create or to improve docks and harbours in seaport towns, though having a public character, and though devoted to public purposes, is nevertheless subject to be rated to the relief of the poor. (Clyde Navigation Trustees *v.* Adamson, 4 Macq. H.L. 931; Dig. of Eng. Case Law v., p. 8.)

The Crown is bound by the two codes of Lower Canada; in the liquidation of a bank it can claim no priority of payment over the other creditors except what is allowed by these codes. (Exchange Bank of Canada *v.* Regina, 11 App. Cas. 157).

The Victorian Crown Liability and Remedies Act, 1865 (28 Vic. No. 241), does not affect the prerogatives of the Crown when suing in England. (*Re* Oriental Bank Co-operation, 28 Ch. D. 643.)

It was to prevent the operation of this maxim—that the Crown is not bound by a statute unless named therein—that the Convention inserted the words "This Act shall bind the Crown." Compare the phrase "This Act shall be binding on the Crown" (Imperial) Interpretation Act, 1889 (52 and 53 Vic. c. 63, sec. 30). This was objected to by the Imperial Crown Law officers as possibly affecting not only the prerogative right of the Queen-in-Council to hear appeals, but also a wide range of other prerogatives; and the words were consequently omitted (see Historical Note).

Notwithstanding the omission of these words, there are many provisions of the Constitution which affect the Crown by express reference or by necessary implication. Not only the words "the Queen," "the Crown," "the Governor-General," but also the words "the Commonwealth," and "a State," occurring frequently throughout the Constitution, are references to the Crown which may affect the prerogative to a considerable extent. It is therefore advisable to discuss the nature of the prerogative, and the chief ways in which it may be affected by the Constitution.

Prerogatives.—These are the residuary fractions and remnants of the sovereign power which, unimpaired by legislation and revolution, remain vested in the Crown. They are the products and survivals of the Common Law and are not the creatures of statutes. Statute law tends gradually to invade and diminish the domain of prerogative. Among the examples of prerogatives the following may be enumerated:—

(1.) The exercise of the ordinary Executive authority by the Crown, through Ministers of State; subject to certain legal and customary restraints such as the control of the House of Commons by virtue of its power to refuse supplies.
(2.) Dissolution and Prorogation of Parliament.
(3.) The administration of Justice in the name of the Crown, through judges and counsel appointed by the Crown.
(4.) The pardon of offenders.
(5.) Command of the Army and Navy.
(6.) Foreign affairs; peace and war.
(7.) Accrediting and receiving Ambassadors.
(8.) Entering into treaties with foreign nations.
(9.) Recognition of foreign States.
(10.) Appropriating prizes of war.

(11.) Sharing legislation ; right to veto.
(12.) Allegiance ; right of the Crown to the allegiance and service of its subjects.
(13.) Ecclesiastical authority with respect to the Church of England.
(14.) Control over titles, honours, precedence, franchises, &c., coining money, superintendence over infants, lunatics, and idiots.
(15.) Special remedies against the subject, such as intrusion, *quo warranto*, distress, *escheat*, extent.
(16.) Lordship of the soil.

A number of these prerogatives have become obsolete through desuetude, although they have never been swept away by Act of Parliament. Others of them have been cut down and reduced to matters of form, or denuded of most of their former vigour and activity.

Prerogatives Limited by the Constitution.—In the course of these Notes attention will be drawn to clauses and sections which apparently contract the prerogatives of the Crown ; foremost amongst them may be here generally indicated four of special importance :—

(1.) Section 1 of the Constitution, providing that the legislative power shall be vested in a Federal Parliament consisting of the Queen, the Senate, and the House of Representatives.
(2.) Section 59, restricting the period within which the Queen may disallow laws assented to by the Governor-General.
(3.) Section 62, creating an Executive Council to advise the Governor-General as the Queen's Representative.
(4.) Section 74, limiting the right of appeal to the Queen in Council.

Prerogatives Confirmed by the Constitution.—Certain well-known and long-established powers of the Crown instead of being negatived are confirmed by the Constitution, such as :—

(1.) Section 5.—The Governor-General may convene, prorogue, and dissolve the Federal Parliament.
(2.) Section 62.—The Governor-General may choose and summon members of the Executive Council to advise him.
(3.) Section 64.—The Governor-General may appoint officers to administer such Departments of State as the Governor-General in Council may establish.
(4.) Section 68.—The Governor-General shall be the Commander-in-Chief of the naval and military forces of the Commonwealth.

No doubt most or the whole of these and other powers vested in the Governor-General will, in accordance with what have been elsewhere referred to as the "Understandings and Conventions of the Constitutions," § 18, be exercised by the Queen's Representative in a Constitutional manner, that is, on the advice of responsible Ministers. (See § 271, "Executive Government.")

§ 20. "Her Majesty's Heirs and Successors."

The Succession to the Crown was, after the revolution of 1688, settled by the Bill of Rights, I. Wm. and Mary (2nd Sess.), c. 2. The throne being declared vacant by the abdication of James II., the Crown was settled on King William III., Prince of Orange, grandson of Charles I., and nephew and son-in-law of the deposed monarch, and on Queen Mary, eldest daughter of James II. and wife of William III., for their joint lives ; then on the survivor of them ; then on the issue of Queen Mary ; upon failure of such issue it was limited to Princess Anne of Denmark, King James' second daughter, and her issue ; and lastly, on the failure of that, to the issue of King William. Towards the end of King William's reign, when it became probable that neither he nor Princess

Anne would leave issue to inherit the Crown, it became necessary to make other legislative provision for the succession, which was done by 12 and 13 William III. c. 2, commonly known as the Act of Settlement (1702). The first section of this Act declared that, after his Majesty King William III. and the Princess Anne of Denmark, and in default of issue of the said Princess Anne and of his Majesty respectively, the Princess Sophia, Electress of Hanover, grand-daughter of King James I., should be next in succession to the Imperial Crown and dignity "of the said realm of England, France, and Ireland, with the dominions and territories thereunto belonging," and that after the decease of his Majesty William III. and her Royal Highness the Princess Anne, and in default of issue of the Princess Anne and of his Majesty respectively, the Crown and Regal Government of the "said Kingdom of England, France, and Ireland and of the dominions thereunto belonging, with the Royal State and dignity of the said realm and all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, shall remain and continue to the said Most Excellent Princess Sophia and the heirs of her body being Protestants." The fourth and last section of the Act recites that "whereas the laws of England are the birthright of the people thereof, and all the Kings and Queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same; the said Lords Spiritual and Temporal and Commons do therefore further humbly pray. That all the laws and statutes of this realm for securing the Established Religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed; and the same are by his Majesty by and with the advice and consent of the said Lords Spiritual and Temporal and Commons and by the authority of the same ratified and confirmed accordingly."

Both William III., and Queen Anne after him, died without leaving issue; the Princess Sophia predeceased Queen Anne. The inheritance, therefore, descended to her son and heir, who became King George I. From him it descended to King George II., from whom it descended to George III.; then to George IV., who was succeeded by his brother, William IV.; and after him it descended to his niece Princess Victoria, our present Gracious Queen, daughter of Edward, Duke of Kent. (Stephen's Comment., vol. 2. p. 451.)

§ 21. "Sovereignty of the United Kingdom."

Sovereignty.—A clear conception of the meaning of "sovereignty" is the key to all political science. The relation of the Commonwealth to the Empire, and the relation of the Federal and State Governments of the Commonwealth to one another, can hardly be appreciated apart from a sound study of the principle of sovereignty. The speculations of such philosophers as Hobbes, Locke, and Rousseau, the learning of Blackstone and Bentham, the critical analysis of Austin, the historical researches of Maine, and the labours of such modern writers as Holland, Dicey, Leslie Stephen, Burgess, and many others, have all contributed, from many sides, to throw light on the central idea which the word sovereignty represents; and of recent years the interchange of thought between English and American writers, and a comparative study of their widely different institutions, has done much to clear away doubts and difficulties. In this work only a brief note can be devoted to this vast subject.

Before attempting any definition of sovereignty, it is advisable to call attention to the necessity of avoiding confusion between three distinct uses of the word:—(1) Legal sovereignty—as when we speak of the sovereignty of the British Parliament; (2) political sovereignty—as when we speak of the sovereignty of the people; (3) titular sovereignty—as when we speak of the sovereignty of the Queen. As the primary meaning of the word is the legal one, it is best to begin from that standpoint.

(1.) Legal Sovereignty.—Sovereignty, then, is an attribute, and the most essential attribute, of a State—that is, of an independent political community. It is defined by Burgess (Pol. Science, I. 52) as "original, absolute, unlimited, universal power over the individual subject and over all associations of subjects." The legal sovereign is that person, or determinate body of persons, which possesses, in a State, a power which in point of law is absolute and unlimited. Such a body is the British Parliament; such a body are the electors of the United States organized under the Constitutional provision for the amendment of the Constitution. Legally speaking, such a body of persons is the State itself; the State is the sovereign, and the sovereign is the State.

Corresponding to this view of legal sovereignty as power, we may define political sovereignty as the will which lies behind the power. Political sovereignty is thus also an attribute of the State; it is the corporate will—or what Rousseau called the "general will"—of the community. And from this definition of political sovereignty as the "general will" of the community, we may in turn deduce legal sovereignty as the legal expression, or embodiment, or manifestation, of that will.

Sovereignty, therefore, resides in the State, but it is principally manifested through the Government, its creature. Every competent organ of government, legislative, judicial, or executive—Parliaments, courts, constitutional assemblies, electorates in their legislative capacity, Kings, Presidents, Governors, Executive Councils—are organs through which the sovereign power is exercised. In one sense the aggregate of these bodies within a State, as exercising the sum-total of sovereign power, may be considered as depositaries of sovereignty; but in another and a truer sense sovereignty is located in the ultimate legislative organ—the supreme organic unity which in the last resort controls all the others.

Can sovereignty be legally limited? The above definitions negative the possibility; but they are not universally concurred in. The historical school point to communities in which no sovereign can be discovered; and Dicey (Law of the Constitution, p. 135) fails to see why it should be inconceivable that the framers of a Constitution should have deliberately omitted to provide means of altering it. Most writers, however, agree that sovereignty cannot be limited even by a direct prohibition in the fundamental instrument, but that such a prohibition is inconsistent with the very conception of a State, and must be disregarded. (See Burgess, Pol. Science, I. pp. 51-2; W. W. Willoughby, The Nature of the State, p. 214.)

True political science seems to point to the conclusion that sovereignty is incapable of legal limitation, either from without or within. A sovereign body cannot be legally controlled by another body, for then that which controls would be sovereign. Nor can it be legally controlled by a prohibition, express or implied, in a written document; for then the written document would be sovereign—though it can have neither will nor power. Either the organization which framed the Constitution can be legally convoked again—in which case it is the sovereign; or it cannot—in which case its prohibition, directed against the State, is without sanction and without effect.

As sovereignty is incapable of legal limitation from without, so it is unable to bind itself. With a sovereign there is no such thing as "irrevocable laws." The sovereign power which makes a law can alter or repeal it. It is true that sometimes a sovereign body may pass a law and declare it to be so sacred and organic that it shall last for ever, such as the Act for the union of England and Scotland. Such a declaration of intention or policy would have great weight with, but could not legally bind, succeeding Parliaments. As a matter of fact that Act of Union has already been amended in certain particulars, which were originally declared to be fundamental and unchangeable conditions of the union. So the Act for the union of Great Britain and Ireland has been amended by the disestablishment of the Irish Church.

Influences on Sovereignty.—But although there can be no legal control or limitation of the sovereign authority, there are many practical and effective influences

at work in every well-ordered society, which prevents the sovereign power from being exercised with unrestricted, reckless, and irresponsible omnipotence, and which tend to chasten and temper, if not curtail, the exercise of supreme authority, whether it be vested in an absolute monarch, or in a king in parliament, or in a complex body such as a three-fourth majority of the Legislatures of the United States. Among those influences some are internal, to be found in the character, organization, and historical antecedents of the sovereign person or body; but the most powerful are the external surroundings and circumstances which guide and direct the mode of calling into action the sovereign will, such as the right of petition for redress of grievances; the right of public criticism; the right of the public to combine and remonstrate against oppression and wrong-doing, and above all the knowledge possessed by sovereign rulers that if they persist, for any protracted period, in attempting to govern contrary to reason and justice, and contrary to the wishes, interests, and instincts of the bulk of their people, they will lose popular support, encounter popular resistance, and run the risk of rebellion and revolution; as actually happened in England during the reign of James II. These moderating forces, proceeding from the environments of a sovereign, or of a sovereign body, tend no doubt to reduce the dogma of unrestricted, uncontrolled sovereignty to a legal fiction. Legally the Sultan of Turkey could abolish Mohammedanism and introduce Christianity into his dominions, but he would not and dare not do so. Legally the Czar of Russia could revoke the edict for the emancipation of the serfs, but he would not and dare not do so. Legally the Queen in the British Parliament could tax the Colonies, as was done in the reign of George III., but they would not dream of such a policy, much less attempt it. Similarly, two-thirds of Congress could propose, and three-fourths of the legislatures of the States could ratify, a constitutional law re-establishing slavery in America. But the moral influences to which legal sovereignty is subject, emanating from considerations of expediency, justice, and humanity, would frown down and destroy any such proposals.

Formal Restraints.—Important among the internal restraints upon sovereignty are those which relate to the legal organization and structure of the sovereign body. Just as the sovereign body may be restrained by its moral character and environments, so it may be restrained by its legally determined structure or procedure. Thus there is a formal restraint on the sovereignty of the British Parliament in the necessity for the concurrence of Queen, Lords, and Commons. There is a formal, and most effectual, restraint on the sovereign amending power of the United States in the requirement of ratification by three-fourths of the States. There is a formal restraint on the quasi-sovereignty of the Commonwealth in the requirement of ratification by a majority of the people and also by a majority of the States—and also, in some cases, by every State affected. These formal restraints are, strictly speaking, restraints on the mode of exercise of sovereignty, not on the sovereignty itself. Nevertheless, they may attain any degree of stringency, from requiring the concurrence of special majorities, to requiring the complete unanimity of every member of a complex body. Thus the formal limitation may amount *practically* to an almost absolute prohibition of amendment; and the sovereign power may be, as the American sovereign is, "a despot hard to rouse," "a monarch who slumbers and sleeps." (Dicey, Law of the Constitution, p. 137; and see Sidgwick, Elements of Politics, Appendix.)

(2.) Political Sovereignty.—Political sovereignty has been incidentally defined in our discussion of legal sovereignty. As a legal conception, a sovereign is one whose commands, whether just or unjust, wise or unwise, politic or impolitic, the courts will enforce. With political sovereignty the courts have nothing to do. They cannot recognize the "general will" of the political sovereign, but only the manifestation of that will as declared by the legal sovereign.

"That body is 'politically' sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps,

in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British Government. The matter indeed may be carried a little further, and we may assert that the arrangements of the Constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the Courts will take no notice of the will of the electors." (Dicey's Law of the Constitution, p. 66.)

"Adopting the language of most of the writers who have treated of the British Constitution, I commonly suppose that the present parliament, or the parliament for the time being, is possessed of the sovereignty; or I commonly suppose that the King and the Lords, with the members of the Commons' house, form a tripartite body which is sovereign or supreme. But, speaking accurately, the members of the Commons' house are merely trustees for the body by which they are elected and appointed; and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions 'delegation' and 'representation.' It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed; to suppose, for example, that the Commons empower their representatives in Parliament to relinquish their share in the sovereignty to the King and the Lords." (Austin's Jurisprudence, vol. I., p. 253.)

It is quite true, as Dicey, in another passage, points out, that no English judge ever conceded, or under the present Constitution could concede, that Parliament in any legal sense is a trustee for the electors. Equally, as a matter of law, some jurists have contended that the Queen is the supreme administrator and supreme legislator, acting by and with the advice of ministers in matters of administration, and by and with the advice and consent of Parliament in matters of legislation. That is true in theory and as a constitutional form. Legal fictions are useful and potent solvents in the transformation of ideas. The legal sovereignty of Parliament is undoubted; but the sovereignty of Parliament, a principle of transcendent force and importance which superseded the sovereignty of royalty, is in reality, if not in name, rapidly tending to become a fiction, like that of regal sovereignty, which for a time it supplanted; it is gradually giving way before the idea of the sovereignty of the electoral body, or the sovereignty of the people represented by the electors. At present the idea of political sovereignty is prominent. Men commonly speak to-day in the language of politics, rather than in the language of jurisprudence. And the tendency to confuse legal and political sovereignty is increased by the fact that in some countries—for instance, Switzerland, and even the United States—the two are to a great extent identical. Wherever the ultimate legal sovereign is not a representative, but a constituent body—wherever the people themselves enact the supreme law—the political sovereign and the legal sovereign are the same. For good or for evil, the movement in favour of the *Referendum*—which finds a place in this Constitution as a means for the alteration of the organic law—tends in this direction.

(3.) Titular Sovereignty.—"This term is used to designate the king, or queen, of the United Kingdom; often also in the phrase 'Our Sovereign Lord the King,' or 'Our Sovereign Lady the Queen,' in Acts of Parliament and proclamations. There is implied in it the theory that the king is the possessor of sovereignty, or the powers of supreme government, as a monarch, in the strictest sense of jurists and constitutional writers; and in that sense it has long ceased to be a correct designation. The king is neither 'sovereign' nor 'monarch,' but, this notwithstanding, he hardly is mentioned oftener by his appropriate title of 'king' than by those inappropriate and affected names." (Austin's Jurisprudence, Campbell's ed., Note, p. 242.)

Delegated Sovereignty.—In all the constitutional Acts passed by the British Parliament conferring the right of self-government on British colonies, it is expressed or implied that the sovereignty is vested in the Queen. This form of expression is in accordance with traditional theory and usage, and it has been continued as a matter of courtesy, notwithstanding the fact that the form is at variance with the reality and the substance; as elsewhere pointed out (Note, § 11) the Queen shares with the Houses of

the British Parliament in the sovereignty of the British Empire. The office of legislation, like the judicial and executive functions of sovereignty, may be delegated by the sovereign principal to subordinate persons or bodies, such as colonial governors and colonial parliaments. Within the limits of their constitutional Acts and charters, such governors and parliaments may exercise all the ordinary authority of a sovereign, in the same way as the Queen in the British Parliament, subject only to the same moral checks and restraints which have been already enumerated. (Dicey, Law of the Constitution, p. 95.)

The constitutional Acts of the colonies of Great Britain are illustrations of this delegation of sovereign power. Most of these colonies possess Statutory Constitutions, conferring on their respective legislatures, together with the Queen, represented by a governor, authority to legislate for the peace, order, and welfare of the people within their respective territories. The Constitution of the Dominion of Canada is a conspicuous example of this delegation. The Constitution of the Australian Commonwealth is an even more notable instance of the same process. But colonies, dominions, or commonwealths, having such a system of government, substantially free and practically independent, are still subject to the original sovereign body, the Queen in the British Parliament. That power, though dormant, is not extinguished or abandoned by the delegation. There is merely an implied compact not to interfere with those communities as long as they govern themselves according to the terms of their respective Constitutions. (Markby's Elements of Law, pp. 3, 4, 20.)

Proclamation of Commonwealth.

3. It shall be lawful for the Queen, with the advice of the Privy Council[22], to declare by Proclamation[24] that, on and after a day therein appointed[25], not being later than one year after the passing of this Act[23], the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united[26] in a Federal Commonwealth[27] under the name of the Commonwealth of Australia. But the Queen may, at any time after the Proclamation, appoint a Governor-General[28] for the Commonwealth.

CANADA.—It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion under that name accordingly.—B.N.A. Act, sec. 3.

HISTORICAL NOTE.—Clause 3 of the Commonwealth Bill of 1891 was as follows:—

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than six months after the passing of this Act, the colonies of [*here name the Colonies which have adopted the Constitution*] . . . shall be united in one Federal Commonwealth under the Constitution hereby established, and under the name of the Commonwealth of Australia; and on and after that day the said colonies shall be united in one Federal Commonwealth under that name." (Conv. Deb., Syd. [1891], p. 557.)

At the Adelaide Session, the clause was introduced in the same form, except that it was provided that the colonies "shall be united in a Federal Constitution under the name of the Commonwealth of Australia, and on and after that day the Commonwealth shall be established under that name." On the motion of Mr. Isaacs, the clause was amended to read that "the people of" the colonies should be united. A further amendment by

Mr. Isaacs that they should be united "by"—not "in"—a Federal Constitution, was negatived. (Conv. Deb., Adel., pp. 620-1.) At the Sydney session, on Mr. O'Connor's motion, "one year" was substituted for "six months." (Conv. Deb., Syd. [1897], pp. 227-8.)

At the Melbourne session, a proposal by Mr. Symon, to omit "the Commonwealth of," was negatived by 21 votes to 19 (Conv. Deb., Melb., pp. 1746-50); and after the second report the same amendment, again moved by Mr. Symon, was negatived by 25 votes to 18. Mr. Reid proposed to add words enabling the Queen, at any time after the proclamation, to appoint a Governor-General, who might, before the Commonwealth was established, summon members of the Federal Executive Council and appoint other necessary officers; but Mr. Barton thought this went too far, and suggested the words:—"The Queen may, at any time after the making of the proclamation, appoint a Governor-General for the Commonwealth." This was agreed to. (Conv. Deb., Melb., pp. 1920-2.) Drafting amendments were made after the fourth report.

In the Imperial Parliament, the names of the federating colonies were filled in, with the provision for including Western Australia in the Proclamation if the Queen were satisfied that the people of Western Australia had agreed to the Constitution. (See Historical Introduction, p. 242, *supra*.)

§ 22. "Privy Council."

This body was originally one of the most important councils of the Crown, variously called the *Concilium Regis*, the Ordinary Council, the Continual Council, and the Secret or Privy Council (*Privatum Concilium*). It acquired the last-named designation during the reign of Henry VI. (1422-1461). It was a council of confidential advisers, who were in constant attendance upon the king and assisted him in the decision of all questions of public policy and in the administration of the business of the kingdom. It represented the unity of the executive government. It consisted of nobles and other eminent persons in whom the king had confidence. Sir Edward Coke described it as an honourable and revered assembly of the king (4 Institutes, 53). Lord Hale described it as the *Concilium in concilio*, referring to the fact that the members of that council, being peers, were also members of the *Magnum Concilium* for which, in consultation with the king, they prepared the business. It was foreshadowed in the reign of Henry III. and assumed a definite organization during the long period covered by the successive reigns of the three Edwards. It was one of the three groups into which the *Magnum Concilium* was originally divided and which afterwards became fused into the House of Lords. These groups were—(1) The Lords Spiritual; (2) the Lords Temporal; and (3) the official and bureaucratic element immediately associated with the king in the government of the realm. (Gneist, English Const., pp. 349-351.)

In the middle ages the number of members of the Privy Council was limited to about fifteen. During the reign of Henry IV. (1401) the Council was composed of nine peers, three bishops, six knights and one untitled person. During the reign of Charles II. (1660-1685) the number of members had so increased as to make the body unwieldly "and unfit for the secrecy and dispatch which are necessary in many great affairs." A plan of reconstruction proposed by Sir William Temple was adopted. According to this the number of Privy Councillors was restricted to thirty, of whom fifteen were to be ministers and principal officers of state, and the remaining fifteen included ten lords and five commoners chosen by the king. During the same reign the germ of the modern Cabinet appeared in the custom which then began of consulting only a select or confidential committee of the Council in reference to important parliamentary and executive business. After that reign the numerical strength of the Privy Council, notwithstanding Temple's plan, went on increasing. At the present time there is practically no limit to the number of persons who may be appointed members of the Council. There are now more than 200 Privy Councillors who may be classified as

follows :—(1) Members of the Royal Family and noblemen of the highest rank ; (2) statesmen who hold or have held high political office ; (3) the Speaker and members of the diplomatic service who have attained the rank of ambassadors ; (4) great officers of state departments on their retirement after long and distinguished service ; (5) the Lord Chancellor and other judges of the superior courts ; (6) ecclesiastical dignitaries ; (7) the Commander-in-Chief and the Master-General of the Ordnances ; (8) colonial ministers who have rendered conspicuous service to the Empire. These eminent personages are styled collectively "The Lords and others of Her Majesty's Most Honourable Privy Council," and they are each entitled to be addressed as "The Right Honourable." In modern practice this numerical and talented complexity of the Council has not been found inconvenient, as no Privy Councillors, except those occupying for the time being official positions, political or judicial, are summoned to advise the Crown, either in matters of state or in matters of law. (Stephen's Comm., 4th ed., vol. 2, p. 467.)

The Political Committee.—The true Privy Council of the present day, and the one referred to in the above clause, is the Cabinet. The Cabinet has been defined as the political committee of the Privy Council, especially organized for the purpose of advising the Crown, directing all public departments, and deciding all important questions of administration, subject only to the approval of the House of Commons. (Hearn's Government of England, p. 197.)

The Judicial Committee.—In Colonial causes the Privy Council had, from time immemorial, both original and appellate jurisdiction.

"Whenever a question arises between two provinces out of the realm as concerning the extent of their charters and the like, the King in his Council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so, likewise, when any person claims an island or a province, in the nature of a feudal principality, by grant from the King or his ancestors, the determination of that right belongs to the sovereign in council ; as was the case of the Earl of Derby, with regard to the Isle of Man, in the reign of Queen Elizabeth ; and the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the Island of St. Vincent, in 1764. And to the same supreme tribunal there is, besides, in causes of a certain amount, an *appeal* in the last resort from the sentence of every court of justice throughout the colonies and dependencies of the realm. Practically, however, all the judicial authority of the privy council is now exercised by a *committee* of privy councillors, called the Judicial Committee of the Privy Council, who hear the allegations and proofs, and make their report to Her Majesty in council, by whom the judgment is finally given." (Stephen's Comm., 4th ed., vol. 2, p. 470-1.)

The statutory jurisdiction of the Privy Council was first regulated in 1833 by the Act 3 and 4 William IV. c. 41, passed for the better administration of justice in the judicial branch of the Council. Under that law the Judicial Committee of the Council was definitely constituted. This tribunal was composed of the Lord President for the time being of the Council, the Lord Chancellor, and such Privy Councillors as held or had held office as Lord Keeper of the Great Seal, Chief Justice or judge of the Court of Queen's Bench or Common Pleas, Chief Baron or Baron of the Court of Exchequer, the Master of the Rolls, the Vice-Chancellor, the Judges of the Prerogative and Admiralty Courts, and the Chief Judge of the Court in Bankruptcy. This Act was amended and extended by 6 and 7 Vic. c. 38 (1843) ; 7 and 8 Vic. c. 69 (1844) ; 14 and 15 Vic. c. 83 (1851) ; 44 and 45 Vic. c. 3 (1881) ; 50 and 51 Vic. c. 70 (1887) ; which contain a variety of regulations prescribing the manner of conducting appeals from the colonies. At common law, since modified by statute, the Privy Council had jurisdiction to entertain appeals from the Lord Chancellor in matters of lunacy and idiocy, and in appeals from the ecclesiastical and maritime courts, and in matters of patent and copyright. See note, "Appeal to Queen in Council," § 310, *infra*.

The Erection of the Commonwealth.—Three distinct stages in the erection of the Commonwealth are contemplated by this clause :—(1) The passing of the Imperial Act, (2) the issue of the Queen's proclamation appointing a day within one year after the passing of the Act, (3) the day when the people of the concurring colonies are

united. These events and successive stages are not chronologically narrated in the clause. It will be conducive to clearness to consider them in the order of time in which they occur.

§ 23. "The Passing of this Act."

Before the Act 33 Geo. III. c. 13 (1793) every Act in which no particular time of commencement was specified operated and took effect from the first day of that session of Parliament in which it was passed. (Panter *v.* Attorney-General, 6 Brown's Cases in Parliament, 486.) An Act which was to take effect from and after the passing of the Act operated by legal relation from the first day of the session. (Latless *v.* Holmes, 4 T.R. 660.) But now, by 33 Geo. III. c. 13, where the commencement of an Act is not provided for in the Act, the date endorsed on the Act, stating when it has passed and received the Royal assent, is the date of its commencement. The Royal assent may be given during the course of the session, in which the two Houses of Parliament concur in it, or at the end of the session. The practice is to endorse on the first page of the Act, immediately after the introductory title, the date of the Royal assent. The Royal assent to an Imperial Act is given by the Queen in person or by commission; if by commission it is only given to such bills as may be specified in the schedule thereto.

This Act received the Royal assent on 9th July, 1900, which day is therefore the date of "the passing of this Act." But, although that date marks the commencement of the Act, the Commonwealth is not established, nor does the Constitution take effect, until the Queen has made a proclamation under the Act and the day fixed by that proclamation for the establishment of the Commonwealth has arrived. The only immediate consequences of the passing of the Act were—(1) That the Queen in Council was empowered to issue a proclamation appointing a day, not later than one year after the passing of the Act for the establishment of the Commonwealth (see § 24, "Proclamation"), and (2) that the Parliaments of the several colonies might proceed to pass preliminary electoral laws and to make arrangements for the election of the first Federal Parliament. In the Canadian Constitution it is expressly provided that the "subsequent provisions" are not to commence or have affect until after the day appointed in the Queen's proclamation for the establishment of the union.

§ 24. "Proclamation."

A royal proclamation is a formal announcement of an executive Act; such as a summons to or dissolution or prorogation of Parliament; a declaration of peace or war; an admonition to the people to keep the law or a notification of enforcement of the provisions of a statute, the operation of which is left to the discretion of the Queen in Council. The object of a royal proclamation is only to make known the existing law or declare its enforcement; it can neither make or unmake the law. (*Ex p.* Chavasse, *re* Grazebrook, 34 L. J. Bk., 17) A proclamation is a resolution of the Queen in Council, which, as we have already seen, means the Cabinet. The document by which it is promulgated passes under the Great Seal. (Anson, Law and Custom of the Constitution, Vol. II., p. 45.) It is announced through the official Government Gazette.

The proclamation referred to in this clause is one which it is in the discretion of the Queen, acting on constitutional advice, to issue subject only to the condition that the date fixed therein must be not later than one year after the passing of the Act.

§ 25. "A Day therein Appointed."

Where an Imperial Act of Parliament is expressed to come into operation on a particular day, it is construed as coming into operation immediately on the expiration of the previous day. Thus if the day appointed is the 1st January, the day begins at midnight, marking the end of 31st December. (Tomlinson *v.* Bullock, 4 Q.B.D. 230.) This principle will apply to the day appointed in the Queen's proclamation. An expression

of time in an Imperial Act, in the case of Great Britain, means Greenwich mean time Definition of Time Act, 1880 (43 and 44 Vic., c. 9); Interpretation Act, 1889 (52 and 53 Vic., c. 63). On the day appointed by the proclamation, the following events are declared to happen, viz. :—

(1.) The people of the colonies are united.
(2.) The Commonwealth is established.
(3.) The Constitution takes effect.
(4.) The electoral and other procedure laws passed by the Parliaments of the federating colonies between "the passing of the Act" and "the day appointed" come into operation.

§ 26. "The People . . . shall be United."

The formative words in this clause are more forcible, striking, and significant than those of the corresponding parts of the Constitutions of the United States and of Canada; they indicate the fundamental principle of the whole plan of government, which is neither a loose confederacy nor a complete unification, but a union of the people considered as citizens of various communities whose individuality remains unimpaired, except to the extent to which they make transfers to the Commonwealth. In the Constitution of the United States a union of the people of the States is referred to in the preamble, and there only, in the form of a recital that the people have ordained and established the Constitution in order to form a more perfect union. In the body of the Constitution it is nowhere stated that the people of the States are or shall be united. This was one of the ambiguities of the American instrument which helped to give rise to the doctrine of nullification and secession, and, at last, to the Civil War. (See § 6, "Nullification and Secession.")

In the Canadian Constitution nothing is said about the union of the people; it is provided that on the day appointed in the Queen's proclamation "the provinces . . . shall form and be one Dominion;" the people are ignored; the corporate entities of the union alone are specified as its component parts. The individual human units, the vital forces, the population of the provinces, are not even remotely alluded to. The vagueness of one and the deficiency of the other Constitution have not been allowed to disfigure the design of the Constitution of the Commonwealth. The union of the people of the colonies is doubly asserted and assured; first in the preamble, where it is recited that "the people have agreed to unite," and secondly in this clause, in which it is emphatically stated with mandatory force that on the day appointed they "shall be united."

Western Australia.—The condition necessary for the establishment of Western Australia as an Original State—that the Queen should be "satisfied that the people of Western Australia have agreed thereto"—was fulfilled by the affirmative vote in that colony on the Constitution, followed by addresses to the Queen passed by both Houses of the West Australian Parliament. (See Historical Introduction, p. 250, *supra*.)

§ 27. "In a Federal Commonwealth."

The word "federal" occurs fifteen times in the Act, exclusive of references to the Federal Council of Australasia Act, 1885 :—

(1.) Federal Commonwealth, Preamble and Clause 3.
(2.) Federal Parliament, sec. 1.
(3.) Federal Executive Council, secs. 62, 63, 64.
(4.) Federal Supreme Court, sec. 71.
(5.) Federal Courts, sec. 71.
(6.) Federal Court, secs. 73—ii.; 77—i. and ii.
(7.) Federal Jurisdiction, secs. 71, 73—ii., 77—iii., and 79.

The Federal idea, therefore, pervades and largely dominates the structure of the newly-created community, its parliamentary executive and judiciary departments.

"Federal" generally means "having the attributes of a Federation." By usage, however, the term Federal has acquired several distinct and separate meanings, and is capable of as many different applications. In this Act, for example, the term Federal is used first in the preamble, and next in clause 3, as qualitative of the Commonwealth, considered as a political community or state; in various sections of the Constitution it is employed as descriptive of the organs of the central government. This use, in an Act of Parliament, of one term in reference to two conceptions so entirely different as state and government, is illustrative of the evolution of ideas associated with Federalism. In the history of Federation the word seems to have passed through several distinct stages or phases, each characterized by a peculiar use and meaning. At the present time the several shades of thought which the word, according to usage and authority, is capable of connoting are often blended and confused. These meanings may be here roughly generalized as a preliminary to a separate analysis :—

(1.) As descriptive of a union of States, linked together in one political system.
(2.) As descriptive of the new State formed by such a union.
(3.) As descriptive of a dual system of government, central and provincial.
(4.) As descriptive of the central governing organs in such a dual system of government.

The first, and oldest, of these meanings directs attention emphatically to the preservation of the identity of the States; the second implies a division of sovereignty—a State composed of States; the third asserts that the duality is a matter of government, not of sovereignty; whilst the fourth asserts nothing, but is merely a convenient form of nomenclature.

(1.) A Union of States.—The primary and fundamental meaning of a federation from the Latin *fœdus*, a league, a treaty, a compact; akin to *fides*, faith) is its capacity and intention to link together a number of co-equal societies or States, so as to form one common political system and to regulate and co-ordinate their relations to one another; in other words a Federation is a union of States, subject to the preservation of state entity and state individuality within defined limits. Such a union as that of the United States called into existence a central government to deal with the general affairs of the union, but there was some discussion and doubt among publicists whether, as its resultant, it established a new State. The phrase "federal union," or the abstract noun "Federation," described the bond of union between the "United States," but was silent as to whether the States so united formed a single composite State. It was contended that the union fell short of the attributes of a perfect State; that the original sovereignty of the component States remained unimpaired except to the extent of the power transferred to the union—a doctrine which was the battle ground of parties in America for many years before the Civil War. This was the sense in which the word "federal" is used in the *Federalist*, and in the early constitutional history of the United States.

(2.) A Federal State.—In a secondary sense, the word "federal" is applied to the composite state, or political community, formed by a federal union of States. It thus describes, not the bond of union between the federating States, but the new State resulting from that bond. It implies that the union has created a new State, without destroying the old States; that the duality is in the essence of the State itself that there is a divided sovereignty, and a double citizenship. This is the sense in which Freeman, Dicey, and Bryce speak of a "Federal State;" and it is the sense in which the phrase "a Federal Commonwealth" is used in this section and in the preamble. The word "Federation," which was primarily synonymous with the abstract "federal union," is now frequently used as synonym for the concrete "Federal State."

(3.) A Dual System of Government.—In recent years it has been argued that the word "federal" is inappropriately and inexactly used when applied to a State or

community ; that there is no such thing as a federal State ; that if there is a State at all it must be a national State ; that any political union short of the principal attribute of statehood and nationhood, viz : sovereignty, is a mere Confederacy ; and that "federal" can only be legitimately used as descriptive of the partition and distribution of powers which is peculiar to a federal system. Federal, it is said, is properly applied to denote a dual but co-ordinate system of government, under one Constitution and subject to a common sovereignty, in which one State employs two separate and largely independent governmental organizations in the work of government; the whole governing system, central and general, as well as provincial and local, constituting the federal government; the central and general government being one branch, and the provincial and local governments forming the other branch of the governing organization. (Burgess, Political Sci., I., p. 79; II., p. 18.) Hence, according to this view, the expression "Federal Government" means not the central and general government alone, not the provincial and local governments alone, but the governing system, central and general, as well as provincial and local, as parts of one whole government under one Constitution.

(4.) Central Government of a Dual System.—The term "federal" is often used as descriptive of the organs of the central and general government, such as the Federal Parliament, the Federal Executive, and the Federal Supreme Court. In this sense the word is in common use in the United States as synonymous with national. This use of the word has no important bearing on federal history or theory.

Federal and Confederate.—But in whichever of the above meanings the adjective "federal" is used, in modern usage it is distinguishable from the adjective "confederate." "Federal" is used of a type of union, or government, or State, in which the general and local governments are co-ordinate within their respective spheres, and both act directly on the citizens. "Confederate" is applied to a type of union, or government, known as a confederacy, in which the central government is incomplete—usually having only legislative powers—and its laws and ordinances are directed to the States, not to the citizens. Such a union is little more than a league or treaty between independent States, and does not create a new State, nor even, in the complete sense of the word, a new government; but merely provides a representative organization for the purpose of promulgating decrees and making requisitions upon the members of the league. It has no power to enforce its decrees or requisitions. This was the fundamental infirmity of the Confederacy of the United States which existed before the adoption of the Federal Constitution.

Federal and National.—The word "national" is frequently used in contrast with the word "federal;" but the distinction between the two varies greatly according to the meaning in which the word "federal" is used. A discussion of the two words may be best introduced by a reference to American usage.

United States.—In the Convention which framed the Constitution of the United States, the resolutions adopted after full discussion showed that it was intended to prepare a national plan of union and a national plan of government. In order, however, to conciliate opposition and to avoid arousing the prejudices and fears of small States, the use of the word "national" was eschewed. The word "federal" occurs in several of the constitutional resolutions adopted by the Convention, and such expressions as "perfect union," "within this union," "laws of the union," "United States," are to be found in the Constitution; yet strange to say the word "federal" does not appear in any part of the document, although it is generally recognized that that Constitution is the model of all modern federal governments.

From its adoption until the great Civil War, judicial, political and academical writers usually abstained from employing the word "national" and substituted for it "federal." (Foster's Commentaries, vol. I., p. 91.) Since the Civil War the expression "National Government" has come into general use in the United States "We still ordinarily speak of federal practice in the federal courts. But as appears by the con-

gressional resolution quoted at the beginning of this section, as well as in the debates in the Convention, the phrase 'federal' is not inconsistent with 'national.'" (*Id.*, p. 92.)

Canada.—In the Preamble to the British North America Act, 1867, it is recited that the provinces have expressed their desire to be "federally united in one Dominion under the Crown." This is the only passage in that Constitution in which there is any express allusion to the Federal idea.

Different Meanings.—The words "federal" and "national," therefore, may be used either as mutually exclusive, or as partially overlapping. The first meaning of "federal," given above, either excludes or at least ignores any national element in federalism; it was the sense in which the word was used by the authors of the *Federalist* and by early American writers before the truly national character of the American Union was fully recognized and avowed. In that sense, therefore, "federal" denotes the organic relation of the States to the Union; whilst a community is described as national in so far as its tendency is to unite individuals in one political State, and as its government exercises direct power over individuals.

On the other hand, the second and third meanings recognize a national element in federalism itself; they affirm a duality, either of sovereign power or of government, and recognize that national organization in matters of national concern is as much a part of federalism as provincial organization in matters of provincial concern. This is the more modern scope of the word, and accords not only with later English and American usage, but with current usage in Australia. In this sense, the word national, when used in contrast with federal, refers only to the extension of the national element into the provincial area. In order to make clear these distinct conceptions of the scope of federalism, we proceed to analyse the federal and national elements in the Constitution, according to both definitions; first adopting the primary meaning of federal as describing a linking together of States, and then adopting the newer meaning as describing a dual system of government.

(1.) Federal and National Elements: Primary Sense.—Using "federal" in its primary sense, the general difference between the federal and national elements of the Constitution of the Commonwealth may be thus defined. Those provisions are federal which recognize the States as distinct but co-equal societies, uniting them as parts of, but not completely consolidated and absorbed in, the Commonwealth; which regard the people as inhabitants of States, separate and independent, within their respective spheres; which guarantee the preservation of State territory and State autonomy within defined limits; which undertake to protect every State against foreign invasion and domestic violence; which secure certain specific political rights to the States; which impose certain obligations and prohibitions on the States; and which require the assent of the States, considered as separate entities, to all the legislation of the Commonwealth. Those provisions are national which unite the people of the Commonwealth as individual units and constitute them members of a common political group, without reference to the State in which they reside; which secure to the residents of all the States equality of rights without disability or discrimination throughout the Commonwealth—or what in America is called a "common citizenship;" which regard the people as the principal source of supreme authority within the Commonwealth, requiring their representation in a special legislative chamber charged with certain dominant powers; and above all which provide that the laws of the Commonwealth shall operate directly upon, and demand personal obedience from, the people in their personal and private capacities, and which provide special tribunals maintained by the Commonwealth for the interpretation and enforcement of its laws.

The combined operation of the federal and national principles of the Constitution is illustrated in the manner in which it was prepared, viz., by a Convention in which the people of each colony were equally represented; and in the method by which it was afterwards submitted to the people of each colony for ratification or rejection. The

Federal Convention was not a body composed of delegates elected by the people of Australia, as individuals, forming one entire community. The people of four colonies, voting as provincial citizens, elected their representatives to the Convention to take part in the framing of the Constitution. The people of six colonies, voting as provincial citizens, subsequently ratified the Constitution. On the other hand, there is, in part, a recognition of the national principle, by the Constitution being founded on the will of the people, and not on the mandate of the provincial legislatures. The manner in which the Constitution was submitted to the authority of the people is strongly suggestive of a consolidating and nationalizing tendency. (Wilson in the Pennsylvania Convention; Elliot's Debates, 2nd ed., vol. II., p. 461.) It is obvious that the colonial legislatures were not constitutionally entitled to surrender to the proposed Commonwealth part of the legislative powers vested in them by Imperial Acts, and that not even the Imperial Parliament would be disposed to revolutionize the Constitution of the Australian colonies, without being assured by the strongest possible evidence and the best available demonstration, that the people of those colonies had freely and voluntarily agreed to the reform and readjustment of the system under which they had lived so long.

There is, at the same time, a conspicuous recognition of the federal principle in the fact that the people of each colony voted for or against the Constitution as provincial voters, a majority being required in each colony to carry the Constitution in that colony. As, in the ratification of the Constitution of the United States, each State convention acted and claimed to act only for and in the name of the people of that State (Foster's Commentaries, vol. I., p. 95); so, in the ratification of the Constitution of the Commonwealth, there was an independent referendum in each colony, in order to ascertain and give legal voice to the will of the people of that colony, without regard to the will of the people of the other colonies. The Constitution was, therefore, not adopted by the people of the Commonwealth, that was to be, voting *en masse* or at large or in their aggregate capacity, but by the people of the future States voting in each State as inhabitants thereof. The Constitution was framed by a combined power exercised by the people of each colony; in the first instance through their representatives in the Convention, limited in their sanctions, and in the last resort by the people of each colony voting at the referendum held in each colony. Had the Constitution emanated from the people, regardless of their provincial distribution, and had the colonies been referred to and used merely as convenient electoral districts by which the public expression could be ascertained, the popular vote throughout the union would have been the only rule for its adoption. (Madison, in The Federalist, No. xxxix., pp. 237 and 238; Foster's Commentaries, vol. I., p. 106.) If a general vote had been accepted as the test, the Constitution would have been triumphantly adopted on 3rd June, 1898, when the voting was—

Yes	...	...	...	216,332
Noes	...	...	...	107,497
Majority	...	...		108,835

The vote of the people, however, was limited to the respective States in which they resided, and in some cases artificial statutory majorities were required, so that there was an expression of popular suffrage and State sanction united in the method in which the adoption of the Constitution was secured. (See the judgment of Mr. Justice McLean in Worcester *v.* Georgia, 6 Peters, 515-569; see also Ware *v.* Hylton, 3 Dallas, 199, Chisholm *v.* Georgia, 2 Dallas, 419.)

Federal Structure of the Commonwealth.—The Commonwealth as a political society has been created by the union of the States and the people thereof. That the States are united is proved by the words in clause 6, which provide that the States are "parts of the Commonwealth;" that they are welded into the very structure and essence of the Commonwealth; that they are inseparable from it and as enduring and indestructible as the Commonwealth itself; forming the buttress and support of the entire constitu

tional fabric. This is a federal feature which peculiarly illustrates the original and primary meaning of the term, as importing a corporate union. The Commonwealth, however, is not constituted merely by a union of States; it is something more than that; it is also a union of people.

Federal Structure of the Parliament.—As the Commonwealth itself is partly federal and partly national in its structure, so also is its central legislative organ the Parliament. Each original State is equally represented in the Senate; the right of State representation is embedded in the Constitution and does not depend on inference or implication. The Senate derives its power from the States, as political and co-ordinate societies, represented according to the rule of equality. (Madison, in The Federalist, No. xxxix., pp. 237-8.) In this manner the States become interwoven and inwrought into the very essence and substance of the Commonwealth, constituting the corporate units of the partnership as distinguished from its personal units, the people. Thus the Commonwealth is buttressed by the States and vitalized by the people.

National Structure of the Parliament.—The House of Representatives is the national branch of the Federal Parliament, in which the people of the Commonwealth are represented in proportion to their numbers. This great Chamber will give direct expression and force to the national principle. As such, its operation and tendency will be in the direction of unification and consolidation of the people into one integrated whole, irrespective of State boundaries, State rights, or State interests. If there were only two chambers in which the people were represented in proportion to their numbers, this would undoubtedly have tended towards the establishment of a unified form of government, in which the States, as political entities, would have been absolutely unrecognized, and would have been liable, in the course of time, to effacement. The Convention was entrusted with no such duty; under the Enabling Acts, by which it was called into existence, its mandate was to draft a Constitution in which the federal, as well as the national elements, were recognized.

State Rights—Federal.—The sections which guarantee equal representation in the Senate and a minimum representation in the House of Representatives; which enable the Governors of States to issue writs for the election of Senators and to certify their election to the Governor-General; which require the Governor of a State concerned to be notified of vacancies in the Senate; which continue State Constitutions except so far as they are inconsistent with the Constitution of the Commonwealth and its laws; which continue the power of State Parliaments except to the extent to which it has been withdrawn from them or vested in the Commonwealth; which continue State laws in force until provisions inconsistent therewith are legally made by the Federal Parliament; which preserve to each State the right to have direct communication with the Queen on all State questions; are examples of State rights secured by provisions of a Federal character.

State Inhibitions—Federal.—Of a similarly Federal character, although imposing disabilities, instead of conferring rights, are various sections forbidding the States from granting bonuses and bounties for trade purposes after a certain time; from making railway rates which operate as preferences and discriminations; from raising or maintaining naval and military forces; and from coining money.

Nationalism in the Executive.—The Executive government created by the Swiss Constitution is a peculiar blend of the federal and national elements. In its mode of election by the Federal Assembly, composed of the National Council and Council of States, sitting and voting together in joint session, the Swiss executive is the choice of a blended body in which the majority of the nation is likely to predominate; but the restriction that not more than one member of the executive can be chosen from the same canton renders the executive largely federal in its composition and spirit. The executive of the United States is likewise partly federal and partly national in its

formation. The immediate election of the President is vested in the people; but the people do not vote *en masse*, but in groups as States; votes are allotted to them in a compound ratio which considers them partly as distinct and co-equal societies, and partly as unequal members of the same society. In a certain event the election is made by that branch of the legislature which consists of the National representatives; but in so choosing the President the votes are taken by States, the representation from each State having one vote; in this way they again act as so many distinct and co-equal bodies politic. It thus appears that the executive government of the United States is of a mixed character, presenting at least as many federal as national features. (Madison, in The Federalist, No. xxxix., pp. 237-8; Foster's Comm., I., p. 106.)

The Executive of the Commonwealth is, in the Constitution, styled a "Federal Executive." There is reason to believe that the word federal is there used in a sense approximating to "National," already explained as one of the several meanings of the term. In the appointment and composition of the executive of the Commonwealth no hard and fast rules are laid down. Nominally the ministers of the Commonwealth will be chosen and appointed by the Governor-General; but his choice will be, in practice, confined to those statesmen who are able to command the confidence and secure the support of the House of Representatives, and who at the same time will be able to maintain the harmony and co-operation of the two Houses in the work of carrying on the business of the country.

Nationalism in the Judicial System.—The Constitution is National so far as it makes the laws of the Commonwealth binding on the people, Courts and Judges of every State; so far as the High Court has jurisdiction (sec. 73—ii.) to hear and determine appeals from State courts on questions of State laws; so far as the High Court has original jurisdiction (sec. 75) in certain classes of matters; so far as the Parliament has power to make laws (sec. 76) conferring original jurisdiction on the High Court in certain other classes of matters; so far as the Federal Parliament has power (sec. 77 iii.) to nationalize State courts by investing them with Federal jurisdiction.

Federalism in the Judicial System.—The Constitution is federal so far as it preserves the operation of State laws, not inconsistent with Commonwealth laws; so far as the State courts have exclusively original and primary jurisdiction to entertain matters in which State laws are involved; so far as it provides that the trial, on indictment, of an offence against any law of the Commonwealth shall be held in the State where the offence was committed (sec. 80).

Amendment—Federal and National.—"If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly national nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by States, not by citizens, it departs from the national and advances towards the federal character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the federal and partakes of the national character." (Madison, in The Federalist, No. xxxix., p. 237-8; Foster's Comm., I., p. 106.)

Composite Character of the Constitution.—In the primary sense of the word "federal," therefore, the Constitution of the Commonwealth is a remarkable compound of the federal and national elements. It is not wholly National, it is not wholly Federal, but a compound of both. In the sources from which the ordinary powers of government are drawn, people and States, it is partly federal and partly national; in

the operation of its laws on individuals it is national and not federal; in the appointment and tenure of its Executive it is national and not federal; in the wide jurisdiction of its judiciary it is more national than federal; in its guarantee of State rights it is federal; in its imposition of disabilities on States it is federal; and finally in the authoritative mode of carrying amendments by requiring a majority of all votes, as well as majorities of the people voting in the majority of States, it is partly federal and partly national. (Madison, in The Federalist, No. xxxix.; Lodge's ed., p. 239.)

(2.) Federal and National: Newer Sense.—We may now analyse the federal and national elements of the Constitution in the more modern sense; describing as federal those features in which the structure of the central organs of government, and the distribution of powers between the central and local governments, recognize the duality of national and provincial interests; and describing as national those features in which this duality of interest is not recognized.

Structure of the Federal Parliament.—The structure of the two Houses of Parliament is completely federal—the House of Representatives embodying the national aspect, and the Senate the provincial aspect, of the federal duality. But in the exclusive powers of the House of Representatives with regard to the initiation and amendment of money bills there is a predominating national element; and this is still further emphasized in the "deadlock clause" (sec. 57), which is designed to ensure that a decisive and determined majority in the national chamber shall be able to overcome the resistance of a majority in the provincial chamber.

Structure of the Federal Executive and Judiciary.—The other two departments show, in their composition, no sign of the federal duality. It has indeed been argued that the political necessity of securing the assent of both Houses to government legislation will place the Executive practically under a double control; but even if this were so, it would affect legislative policy rather than the execution of the laws. In fact, so far as the structure of the organs of government goes, the federal element has its stronghold in the legislative organ. In the making of laws, even within the sphere entrusted to the national legislature, it was felt that provincial interests should be represented; but the execution and interpretation of those laws, when made, was recognized to be a national matter alone.

Powers of the Federal Parliament.—It is in the distribution of legislative powers between the Federal Parliament and the State Parliaments that the fundamentally federal basis of the Constitution is most apparent; yet even here there is a distinct predominance of the national element. Looking down the sub-sections of sec. 51, we find that in many of them the principle of duality is expressly recognized, and the exclusive domestic jurisdiction of the States expressly reserved. For instance, the trade and commerce power is confined to inter-State and foreign trade and commerce, and it is hedged in (Chap. IV.) with a number of minute restrictions to prevent injustice or discrimination as between States. The federal power of imposing taxation and granting bounties is similiarly hedged about with conditions for the protection of the States. In sub-sec. x., the power over fisheries is confined to waters beyond territorial limits—the territorial rights of the States being thus reserved. In sub-secs. xiii. and xiv., the powers as to Banking and Insurance also contain a reservation of State rights. In sub-sec. xxxv., power to deal with conciliation and arbitration is only given in the case of inter-State industrial disputes, and so on. In all these cases, the duality of interest is recognized in the very gift of the power to the Federal Parliament, and the distribution of power is thus essentially federal. But in most of the sub-sections this nice analysis is not found. The advantages of uniform legislation, especially in matters relating to commerce, have prevailed over the sentiment of local independence; and we find that if a subject has, on the whole, a national aspect, it is handed over unconditionally to the national legislature. Thus posts and telegraphs, defences, quarantine, currency, weights and measures, bills of exchange and promissory notes, bankruptcy and insolvency, copyrights, patents, and trade-marks, naturalization and aliens, trading

and financial corporations, marriage and divorce, and other subjects, are made unconditionally national. No State reserves any rights with respect to its internal posts and telegraphs, or of marriages between its own citizens; on all these subjects the distinction between internal and inter-State jurisdiction is abolished. These subjects are not federalized, but nationalized—or at least, the power to nationalize them is given to the Federal Parliament.

Powers of the Federal Executive.—The executive power is of course co-extensive with the legislative power. It extends to the execution of the laws made by the Parliament. Consequently it combines federal and national features in exactly the same way.

Powers of the Federal Judiciary.—The original jurisdiction of the federal courts is based entirely on the dual principle of distribution of powers. It embraces at the outset five classes of matters, of a specially federal character, and can only be extended by the Parliament to four other classes of matters of a federal character. In all other matters the original jurisdiction of the State courts is exclusive.

The appellate jurisdiction of the High Court, on the other hand, is completely national—and is in fact the most national element in the whole Constitution. It extends—subject only to partial limitation by the Federal Parliament—to cases of every description decided by the Supreme Courts of the States, whether of federal concern or not. The High Court is, in fact, not a federal court of appeal, but a national court of appeal.

The Amending Power.—Lastly, with regard to the power of amendment, the Constitution is federal. In the initiation of amendments the dual principle is recognized in the power given to either House—the House representing the Nation, or the House representing the States—to submit a proposal to the Referendum. And at the Referendum, the dual principle is further recognized by the power of veto given both to a majority of the people and to a majority of the States.

Composite Character of the Constitution.—It thus appears that even according to the more modern meaning of the word "federal"—which recognizes the national as well as the provincial elements of federalism—the Constitution may be described as partly federal and partly national. That is to say, it contains not only those national elements which appertain to a pure Federation, but also some further national elements which appertain rather to a Unification. This is especially the case with regard to the wide extent of some of its legislative powers, and with regard to the unlimited appellate jurisdiction of the High Court.

The Evolution of Nationalism.—Whilst the life of the Commonwealth will begin with a clear differentiation of function and status, as between it and its corporate units, the States, it does not follow that the outlines and objects of that differentiation will be distinctly and permanently preserved. There will be, at the outset, a clear demarcation of spheres, a clear delimitation of powers separating the Central Government from the State Governments; but the initial law must not be regarded as expressing a relationship as unchanging as the laws of the Medes and Persians. The Constitution will be capable of change and evolution, arising from the altered conditions of the people whom it is designed to govern. It will be a living organism, animated and dominated by the pulsations of vital forces inherent in every community. It must not be considered as expressing finality in form or principle. If it attempted to restrict the potentialities of future growth and expansion, it would stand self-condemned, as antagonistic to reason, and blind to the lessons and experience of the past. It does not do so. For some years the national principles may be weak or dormant—the occasion may not arise to call them into marked activity. Nations are made only by great occasions, not by paper constitutions. But the energy will be there, and in the fulness of time, when the opportunity comes, the nation will arise like a bridegroom coming forth from his chamber, like a strong man to run a race. This change will not

necessarily imply any conflict with the States, because the people of the States, who are also the people of the nation, will throb with the new life, and will be disposed to yield to the irresistible pressure of nationhood. In the adaptability of the Constitution, and (should need arise) in the power of amending the Constitution—the facilities for which are far greater than in the United States—there is ample room for the growth and development of such tendencies as may assert themselves in the present or the distant future of the Commonwealth. The Constitution will come into operation under the fair and well-distributed influence of two forces. One of those forces will be the centralizing attraction of the Commonwealth, and its tendency to detract from the power and dignity of its corporate units the States. The other will be the centrifugal disposition of the States. They will desire to retain their constitutional status unimpaired—to assert State rights and State interests in the Senate—to subordinate Commonwealth policy, and restrict encroachment and invasion by the Central Government on the provincial spheres. In this struggle and competition for supremacy it would, without the aid and enlightenment of experience in other countries, be difficult to conjecture whether in the end the State or the national principle would conquer. Securely entrenched in the Senate behind the ramparts of equal representation, it might be argued that the States would in the end "boss" the Federal legislative machine, and either clog it altogether, or mould its decrees to suit the views of a majority of States, regardless of the interests of the people of the Commonwealth as a whole.

That, however, has not been the experience of the Federal Republic of the United States of America, from which we have copied the principle of equal State representation and the recognition of the States as integral parts of the Federal Union. Mr. Bryce says that—except during the slavery struggle, when the Senate happened to be under the control of the slave-holders, and when it asserted State rights and State sovereignty—the Senate has never been the stronghold of small States, for American politics have never turned on the antagonism between two sets of Commonwealths, but rather on the conflicts of parties. The national spirit which was growing as a silent force, after a long battle with the doctrine of State sovereignty, eventually emerged safely and soared victoriously over all opposition. The latent ambiguity in that Constitution as to whether the United States formed a compact dissoluble at will, or whether it was an indestructible union of indestructible States, was for ever swept away by the Civil War; it was that ambiguity alone which gave rise to the doctrine of secession and nullification which caused the war. After the war there yet remained the question whether the national element would, as a silent force, acting without any express amendment, prove more potent and assertive than the State element.

A few years before 1889, when Mr. Bryce published his book, the American Protestant-Episcopal Church, at its annual Convention, introduced, among the short sentence prayers, one suggested by an eminent New England divine, in these words:—"O Lord, bless our nation." Next day the prayer was brought up for re-consideration, when so many objections were raised by the laity to the word nation as importing a recognition of national unity that it was dropped, and instead there were adopted the words, "O Lord, bless the United States." (Amer. Comm., I., p. 12.)

The True Ideal of Federalism.—The drift of the development of the American Constitution is indicated in the following extracts from an essay entitled "The Ideal American Commonwealth," written by Dr. Burgess and published in the "Political Science Quarterly Review," vol. 10:—

"I do not think that it need be feared that the doctrine of the sovereignty of the several states will again seriously threaten this development. The Civil War fixed the principle of our polity, that the nation alone is the sovereign, that the nation alone is the real state. We do still hear, indeed, the phrase 'sovereignty of the states within their respective spheres:' but this only signifies that we have not yet invented the new forms of expression to fit the new order of things. All that we can now mean by the old phrase is: that realm of autonomy reserved to the states by the sovereignty of the nation declared through the constitution" (pp. 408, 410).

"The language of the constitution of 1787 may be construed, and I think should be construed, as changing a confederacy of sovereignties into a national state with federal government, that is with a system of government in which the powers are distributed by the national constitution, either expressly or impliedly, specifically or generally, between two sets of government organs, largely independent of each other. Yet, on the other hand, it may be construed with much show of logic as having simply substituted the people of the several states for their legislatures, that is for the organic bodies in the confederate constitution of 1781. . . . But I think this theory is now wholly erroneous. It will not fit facts of our history since 1860. Those facts can be explained only upon the theory that federalism with us now means a national state, with two sets of governmental organs, largely independent of each other, but each deriving its powers and authorities ultimately from a common source, namely, the sovereignty of the nation. And this conception of a governmental system I claim to be purely an American product. It is, however, the true ideal of federalism, and all other nations must, I believe, ultimately come to it. It reconciles the imperialism of the Romans, the local autonomy of the Greeks, and the individual liberty of the Teutons, and preserves what is genuine and enduring in each." (*Id.* 416.)

§ 28. "Appoint a Governor-General."

"Formerly each colonial governor was appointed by special letters-patent under the Great Seal which defined his tenure of office and the scope of his powers and duties. As the preparation and issue of these formal and authoritative instruments usually takes considerable time, it became the practice, prior to the year 1875, to issue a minor commission, under the royal sign-manual and signet, to a newly appointed governor, empowering him, meanwhile, to act under the commission and instructions given to his predecessor in office. But doubts having been raised in certain cases, whether these minor commissions effectually authorized the holder to perform all the duties and functions appertaining to his office, it was in 1875 deemed expedient by Her Majesty's government, under the advice of the law officers of the Crown, to issue, on behalf of each colony of the empire, letters-patent constituting permanently the office of governor therein; and providing that all future incumbents of this office should be appointed by special commission under the royal sign-manual and signet to fulfil the duties of the same, under the general authority and directions of the letters-patent aforesaid, and of the permanent instructions to be issued in connection therewith. But, before introducing this change, a circular despatch, dated October 20, 1875, was addressed to all colonial governors, enclosing a copy of the proposed new forms, and inviting suggestions to be submitted by the governor, after consultation with his responsible ministers, for such alterations as might appear to them to be specially advisable in the case of the particular colony." (Todd's Parliamentary Government in the Colonies, p. 77-8.)

The results of the interchange of views between the Colonial Secretary, Earl Carnarvon, and the government of the Dominion of Canada, was that it was resolved to make a considerable modification in the manner of constituting the office of the Queen's representative in British Colonies and possessions, and in the manner of filling the office and instructing the incumbent of the office in the method of discharging his duties. It was decided to constitute the office in each colony and possession by letters-patent under the Great Seal of the United Kingdom, so drawn as to be of general application to future incumbents of the office and to make permanent provision for the execution of its duties. Accompanying the letters-patent instituting the office there was to be a code of instructions passed under the royal sign-manual and signet, addressed to the governor for the time being or in his absence to the officer administering the government. Appointments were to be made to the governorship as vacancies arose by a commission under the royal sign-manual and signet. At the instance of the Government of the Dominion, alterations were made in the instructions accompanying the letters-patent constituting the office of Governor-General of Canada.

The principal mandates in the old instructions were these:—(1) Relating to the exercise of the prerogative of mercy by the Governor with or without the advice of his ministers, (2) giving directions concerning the meetings of the Executive or Privy Council, (3) authorizing the Governor in certain contingencies to act in opposition to the advice of his ministers, and (4) prescribing the classes of Bills to be reserved for Imperial consideration.

The new practice was not inaugurated in Canada, nor were the alterations in the instructions promulgated, until the Marquis of Lorne was appointed to the office of Governor-General of Canada, in succession to Lord Dufferin, when three new instruments were drawn up, viz. :—Letters-patent, dated 5th October, 1878 ; instructions bearing even date ; and Lord Lorne's commission, bearing date 7th October, 1878.

Commencement of Act.

4. The Commonwealth shall be established[29], and the Constitution of the Commonwealth shall take effect[30], on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws[31], to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

UNITED STATES.—The Ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.—Const., Art. VII.

CANADA.—The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation ; and in the same Provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act. —B.N.A. Act, sec. 4.

HISTORICAL NOTE.—Clause 4 of the Commonwealth Bill of 1891 was as follows :—

"Unless where it is otherwise expressed or implied, this Act shall commence and have effect on and from the day so appointed in the Queen's proclamation ; and the name 'The Commonwealth of Australia' or 'The Commonwealth' shall be taken to mean the Commonwealth of Australia as constituted under this Act."

This clause, with the omission of the second word "where," was adopted at the Adelaide Session, 1897. Mr. Carruthers suggested that the introductory words were vague ; and Mr. Kingston proposed to substitute "Except in regard to section 3, which shall come into operation at the passing of the Act." This was negatived. (Conv. Deb., Adel., pp. 621-5.) At the Sydney Session, following the suggestions of the Legislatures of New South Wales and Tasmania, the words "unless it is otherwise expressed or implied, this Act" were omitted, and the words "The Constitution of the Commonwealth" were substituted. A provision was then added that "The Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had been established at the passing of this Act." (Conv. Deb., Syd. [1897], pp. 228-31.) At the Melbourne Session, verbal amendments were made before the first report and after the fourth report.

§ 29. "Shall be Established."

Clause 3 says that the people of the Commonwealth shall be united on and after the day appointed in the Queen's Proclamation. Clause 4 contains a detailed enumeration and elaboration of the legal results of the Union so accomplished. The first immediate and necessary result is that the Commonwealth is established. The constitutional definition of the Commonwealth will be analysed later on. Meanwhile, attention may be drawn to the significance of the word "Established." The same verb is used in the preamble to the constitution of the United States, where it is recited that in order to form a more perfect union the people "do ordain and establish this Constitution."

The word "Established" is used in the enacting passages of several State Constitutions, such as those of Pennsylvania, Vermont, and Massachusetts. (See § 17, "Commonwealth," *supra*.) In some of the constitutional Acts passed by the British

Parliament authorizing the formation of colonies, the words "erect" and "establish" are used as synonymous terms. The Act 9 Geo. IV. c. 83, sec. 1 (1828), provided that it should be lawful for the King by charters or letters patent under the Great Seal to "erect and establish" courts of judicature in New South Wales and Van Diemen's Land. The Act 3 and 4 Vic. c. 62, sec. 2 (1840), authorized the Queen by letters patent to "erect" into a separate colony or colonies any islands being dependencies of the colony of New South Wales; and by section 3, in case Her Majesty should establish any such new colony or colonies, Legislative Councils might be "established" therein.

The Act 5 and 6 Vic. c. 76, sec. 51, enabled the Queen by letters patent to erect into a separate colony or colonies any territories of the colony of New South Wales lying northward of 26° south latitude. By section 34 of 13 and 14 Vic., c. 59, that provision was amended so as to enable the Queen to detach territories of New South Wales lying northward of 30° of south latitude and to "erect" them into a separate colony or colonies or to include the same in any colony or colonies to be "established" under 3 and 4 Vic. c. 62, sec. 2.

In the first section of the notable Act 13 and 14 Vic. c. 59, the provision occurs that the territories comprised in the district of Port Phillip should be "erected" into and thenceforth form a separate colony to be known as the colony of Victoria. In the second section of the same Act the words occur "that upon the issuing of such writs for the first election of members of the Legislative Council of the said colony of Victoria such colony shall be deemed to be established." From these precedents it appears that the word "Established" is the one commonly used to denote the creation of a new State or community.

§ 30. "Shall take Effect."

Another consequence and necessary incident of the Union is that the Constitution shall on the day so appointed "take effect" or come into operation. Here we reach the third and final stage in the progress of political organization contemplated by the Act. It clearly appears that the Constitution is something distinct from the Commonwealth. The Commonwealth is the community united by the Imperial Act. The Constitution provides the necessary machinery for the government of that community so as to secure its continuity, safety and development. The provision of Clause 3 that the Queen may appoint a Governor-General for the Commonwealth at any time after the issue of the Proclamation, and before the actual establishment of the Commonwealth and before the Constitution "takes effect," is somewhat incongruous and looks like an interpolation out of harmony with the sequence of the other initiatory stages. It enables the Queen to appoint a Governor-General, not for an actual existent Commonwealth, not to fill an office created by a constitution actually in force, but for the Commonwealth that is to be, and in order to fill an office that does not yet exist.

§ 31. "May make any such Laws."

At any time after the passing of the Act, and therefore before as well as after the day appointed by the Proclamation, the Parliament of each of the federating colonies may proceed to exercise certain powers intended by the Constitution to be conferred upon them. The Constitution, by which these powers are defined, does not take effect until the day appointed by the Proclamation. In anticipation of that day the Act authorizes the Parliaments to exercise the powers referred to, but the laws when passed in the exercise of those powers do not come into force until the arrival of the day appointed by the Proclamation. Turning to the Constitution we find that the laws referred to by this clause comprise the following:—

(1.) Laws prescribing the method of choosing the Senators for a State.—Sec. 9.

(2.) Laws for determining the times and places of election of Senators for a State.—Sec. 10.

3.) Laws for determining the divisions in each State for which Members of the House of Representatives may be chosen, and the number of Members to be chosen for each division.—Sec. 29.

(4) Laws of the Parliament of Queensland for determining the divisions in that State for which Senators may be chosen, and the number of Senators to be chosen for each division.—Sec. 7.

Operation of the Constitution and Laws.

5. This Act[32], and all laws[33] made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people[34] of every State and of every part of the Commonwealth[35], notwithstanding anything in the laws of any State[36]; and the laws of the Commonwealth[37] shall be in force on all British ships[38], the Queen's ships of war excepted[40], whose first port of clearance[39] and whose port of destination are in the Commonwealth.

UNITED STATES.—This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.—Const., Art. VI., sec. 2.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.—Amendment X.

SWITZERLAND.—The Cantons are sovereign, so far as their sovereignty is not limited by the Federal Constitution; and, as such, they exercise all the rights which are not delegated to the federal government.—Const., Art. 3.

GERMANY.— . . and the laws of the Empire shall take precedence of those of each individual State.—Const., Art. 2.

HISTORICAL NOTE.—Clause 7 of the Commonwealth Bill of 1891 was as follows: –

"The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all treaties made by the Commonwealth, shall, according to their tenor, be binding on the courts, judges, and people of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding; and the laws and treaties of the Commonwealth shall be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth."

This clause was based in part upon sec. 20 of the Federal Council of Australasia Act, 1885 (48 and 49 Vic. c. 60), which was as follows:—

"All Acts of the Council, on being assented to in manner hereinbefore provided, shall have the force of law in all Her Majesty's possessions in Australasia in respect to which this Act is in operation, or in the several colonies to which they shall extend, as the case may be, and on board of all British ships, other than Her Majesty's ships of war, whose last port of clearance or port of destination is in any such possession or colony."

The provision as to British ships in the Federal Council Act was not included in the draft of that Act framed at the Sydney Conference in 1883, but was inserted by the Imperial draftsmen.

At the Sydney Convention, 1891, there was some discussion as to this provision. (Conv. Deb., Syd., 1891, pp. 558-60.) At the Adelaide session, 1897, the clause as adopted in 1891 was introduced *verbatim*. The provision as to British ships was again discussed. It was thought to be much too wide, and was even criticized as "sheer nonsense," but being sanctioned by the Federal Council Act, it was not altered. (Conv. Deb., Adel., pp. 626-8.) At the Sydney session, a suggestion by the Legislative

Council of New South Wales, to omit the words "and treaties made by the Commonwealth," was agreed to. Mr. Reid moved to omit the whole provision as to British ships; but this was thought to be going too far, and he withdrew it. The words "and treaties" were omitted; the words "excepting Her Majesty's ships and vessels of war" were inserted; and the final words were altered to read: "whose first port of clearance and whose port of destination are in the Commonwealth." (Conv. Deb., Syd., 1897, pp. 239-53) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

When the Commonwealth Bill was first under the consideration of the Imperial Government in England, it was proposed by the Law Officers of the Crown that this clause should be amended by omitting the words "in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth," and by adding the words: "and the Laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act, 1865." (See House of Coms. Pap., May, 1900, p. 19; Historical Introduction, p. 229, *supra.*) In the Bill as introduced into the House of Commons the clause was restored to the shape in which it was originally passed by the Convention, with the addition of a new paragraph relating to the prerogative of appeal, which was afterwards omitted in Committee. (See Historical Introduction, pp. 242, 248, *supra.*)

§ 32. "This Act."

The expression "This Act" occurs in Clauses 1, 2, 3, 4, 5, 6, and 8. The Act consists of Clauses 1 to 9 inclusive, and Clause 9 enacts the Constitution; so that the Constitution is unquestionably a part of the Act. In the Commonwealth Bill as introduced into the Imperial Parliament, the Constitution was, at the suggestion of the Crown Law Officers, annexed as a schedule to the Bill; but in Committee the original form of the Bill was restored. (See Hist. Note to Clause 2.) In the construction of the words "This Act" the question will ever be open to argument as to whether the preamble is part of the Act and to what extent it may be used to explain, enlarge, or contract the meaning of words in the Constitution. (See Note § 2 "Preamble.")

§ 33. "And all Laws."

No difficulty is suggested by the words, "and all laws made by the Parliament of the Commonwealth under the Constitution." The words "under the Constitution" are words of limitation and qualification. They are equivalent to the words in the corresponding section of the Constitution of the United States "in pursuance thereof." *Supra.* Not all enactments purporting to be laws made by the Parliament are binding: but laws made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges, and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection. (Norton *v.* Shelby County, 118 U.S. 425; see note § 447 "Power of the Parliament of a Colony.") The Act itself is binding without limitation or qualification because it is passed by the sovereign Parliament, but the laws passed by the Parliament of the Commonwealth, a subordinate Parliament, must be within the limits of the delegation of powers or they will be null and void. To be valid and binding they must be within the domain of jurisdiction mapped out and delimited in express terms, or by necessary implication, in the Constitution itself. What is not so granted to the Parliament of the Commonwealth is denied to it. What is not so granted is either reserved to the States, as expressed in their respective Constitutions, or remains vested but dormant in the people of the Commonwealth. The possible area of enlargement of Commonwealth power, by an amendment of the Constitution, will be considered under Chapter VIII.

"Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if

they go beyond the limits of such authority. There is an apparent absurdity in comparing the legislature of the United States to an English railway company or a school board, but the comparison is just. Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Great Eastern Railway Company can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the Constitution, is invalid; a law passed by the Great Eastern Railway Company in excess of the powers given by Act of Parliament, or, in other words, by the legal constitution of the company, is also invalid; a law passed by Congress is called an 'Act' of Congress, and if *ultra vires* is described as 'unconstitutional;' a law passed by the Great Eastern Railway Company is called a 'by-law,' and if *ultra vires* is called, not 'unconstitutional,' but 'invalid.' Differences, however, of words must not conceal from us essential similarity in things. Acts of Congress, or of the Legislative Assembly of New York or of Massachusetts, are at bottom simply 'by-laws,' depending for their validity upon their being within the powers given to Congress or to the State legislatures by the Constitution. The by-laws of the Great Eastern Railway Company, imposing fines upon passengers who travel over their line without a ticket, are laws, but they are laws depending for their validity upon their being within the powers conferred upon the company by Act of Parliament, *i.e.*, by the company's constitution. Congress and the Great Eastern Railway Company are in truth each of them nothing more than subordinate law-making bodies." (Dicey's Law of the Constitution, p. 137.)

"Every Act of Congress, and every Act of the legislatures of the States, and every part of the Constitution of any State, which are repugnant to the Constitution of the United States, are necessarily void. This is a clear and settled principle of (our) constitutional jurisprudence." (Kent's Commentaries, I., p. 314.)

"The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the State legislatures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a by-law made by the Great Eastern Railway Company or any other Railway Company. The American judge must in giving judgment obey the terms of the Constitution, just as his English brother must in giving judgment obey every Act of Parliament bearing on the case." (Dicey, Law of the Constitution, p. 146.)

In Canada the Dominion Parliament has power to make laws in relation to all matters not coming within the classes of subjects exclusively assigned to the legislatures of the Provinces.

"There exists, however, one marked distinction in principle between the Constitution of the United States and the Constitution of the Canadian Dominion. The Constitution of the United States in substance reserves to the separate States all powers not expressly conferred upon the national government. The Canadian Constitution in substance confers upon the Dominion government all powers not assigned exclusively to the Provinces. In this matter the Swiss Constitution follows that of the United States." (Dicey, Law of the Const., p. 139.)

This characteristic of the Canadian Constitution tends greatly to strengthen the power of the Dominion at the expense of the Provinces, and so helps, in common with other features, to make it approximate to a unitarian rather than a federal form.

The Colonial Laws Validity Act.—A detailed reference may be here appropriately made to a subject which was not specifically discussed during the progress of the Commonwealth Bill through the Federal Convention, but which was raised by the Law Officers of the Imperial Government whilst the Bill was under consideration in England, namely, the applicability of the Colonial Laws Validity Act, 1865, to the Constitution of the Commonwealth. Can the Federal Parliament, legislating in reference to subjects assigned to it, enact laws repugnant to Imperial legislation applicable to the colonies, in force at the establishment of the Commonwealth, or passed subsequently?

It was a rule of common law that a colonial legislature was subordinate to the English and afterwards to the British Parliament; that it could not pass laws in conflict with the laws of England expressly applicable to the colonies. This rule was confirmed by Statute. It was declared by sec. 9 of 7 and 8 Wm. III. c. 22 (1696) that all laws, by-laws, usages, and customs which should be in practice in any of the American plantations, repugnant to any law made or to be made in the Kingdom, "so far as such laws

shall relate to and mention the said plantations," were null and void. (*Supra*, p. 1.) This section was subsequently re-enacted, in substantially the same words, by 3 and 4 Wm. IV. c. 59, sec. 56 (1833). The commissions and instructions of colonial governors used to require that ordinances passed by the Governor in Council should not be repugnant to the law of England.

The extent of this prohibition was very uncertain, and doubts frequently arose as to what constituted a repugnancy. See, for instance, the Imperial Act, 1 Wm IV. c. 20 (1831) passed to remove doubts which had arisen in Lower Canada. A vague limitation was even supposed to exist, that the laws of a Crown colony must not be repugnant to the common law. (See Tarring, Law relating to Colonies, 2nd ed., 144; Stephen, Hist. of Crim. Law, ii., 58.)

This vague and sweeping rule of invalidity was ultimately superseded by the Colonial Laws Validity Act, 28 and 29 Vic. c. 63. Sec. 2 of that Act declares that any colonial law which is in any respect repugnant to an Act of the Imperial Parliament *extending to the colony* (which is defined to mean "applicable to such colony by the express words or necessary intendment of any Act of Parliament") or repugnant to any order or regulation made under any such Act, shall be read subject to such Act, order, or regulation, and shall, *to the extent of such repugnancy, but not otherwise*, be absolutely void. Sec. 3 provides that no colonial law shall be void on the ground of repugnancy to the law of England unless it is repugnant to some such Act of Parliament, order, or regulation as aforesaid.

When this Act was passed, it was not regarded as a curtailment of legislative power in the colonies; it took away no power previously enjoyed; it was, in fact, looked upon as one of the charters of colonial legislative independence, next in importance to the famous Declaratory Act, 18 Geo. III. c. 12, in which the British Parliament, profiting by the lessons of the American rebellion, renounced its intention to again tax the colonies. It removed all doubts as to the powers of colonial Legislatures to alter or repeal the general mass of English law, such as the law of primogeniture, inheritance, &c., not made operative, by Statute, throughout the Empire. The Colonial Laws Validity Act was, therefore, an enabling Act, not a restrictive or disabling Act. This proposition may be best illustrated and confirmed by a reference to authorities.

The Imperial Copyright Act 5 and 6 Vic. c. 45 (1842) is by express words declared to extend "to every part of the British dominions." In the celebrated copyright case of Low *v* Routledge, L.R. 1 Ch. 42 (1865), it was contended that the Imperial Act was not in force in Canada, because Canada had a representative Legislature of its own, and was not directly governed by legislation from England; that consequently it was not included in the general words of the Act. This contention was not sustained. In delivering the judgment of the Court of Appeal, Lord Justice Turner said the Imperial Copyright Act was in force in Canada; and consequently rights acquired under an Imperial Act in force throughout the Empire could not be affected by the law of a colony inconsistent therewith. This case was decided in 1865, before the passing of the Colonial Laws Validity Act.

Shortly after the grant of a new constitution and responsible government to Victoria, the Parliament of that colony passed an Act, No. 8, to amend the law of evidence. It purported to repeal the provisions of the Imperial Acts, 54 Geo. III. c. 15, 5 and 6 Will. IV. c. 62, and 14 and 15 Vic. c. 99, s. 11, so far as they applied to Victoria. The Secretary of State for the Colonies afterwards drew attention to the fact that it was beyond the competence of a colonial Legislature to repeal an Imperial Act applicable to the colonies. An Act was then passed by the British Parliament repealing the Acts of Geo. III. and Will. IV. so far as Victoria was concerned, and also enabling the Legislatures of other colonies to repeal those Acts if they thought proper. (22 and 23 Vic. c. 12.) The Victorian Parliament repealed its own Act, No. 8, and passed a new one, in which it was recognized and declared that the section of the Act 14 and 15 Vic. c.

99, s. 11, which it had abortively attempted to repeal, was in force in Victoria. (Hearn's "Government of England," 2nd ed., p. 597.)

These two precedents show that even before the passing of the Colonial Laws Validity Act it was recognized in law as well as in practice that a colonial Legislature could not repeal an Imperial Act applicable to the colonies, whether that Act was in force before or came into force after the constitution of such colonial Legislature. That Act limits rather than enlarges the doctrine of repugnancy; it enlarges rather than limits the power of colonial Legislatures (1) by repealing the common law rule that every colonial law repugnant to English law is void, and confining nullity for repugnancy to cases where statutes are expressly intended to apply to the colonies, and (2) by restricting the nullity to the inconsistent provisions only, and not allowing a particular variance to invalidate the whole colonial Act.

Attention may be now drawn to cases which have occurred, and contentions raised, since the passing of the Validity Act. In the case of Smiles *v.* Belford (1877), 1 Ont. Appeals, 436, the author of the well-known work, "Thrift," published in England, brought a suit in Canada to restrain the reprint of his work in Canada. The work had been copyrighted in England under 5 and 6 Vic. c. 45 (1842), which we have seen is in force throughout the British dominions, but it had not been copyrighted in Canada under the Canadian Copyright Act 35 Vic. c. 88. It was argued for the defendant that the Canadian Act repealed the Imperial Act, notwithstanding the Colonial Laws Validity Act. Proudfoot, V.C., overruled this contention. In the Court of Appeal (Ontario), the judges were unanimous in the opinion that the Federal Parliament had no authority to pass any law opposed to statutes which the Imperial Parliament had made applicable to the whole Empire.

In *ex parte* Renaud, 14 N. Bruns. 273, 2 Cart. 447 (1873), Chief Justice Ritchie referred to the Colonial Laws Validity Act as a clear statutory recognition of the supreme legislative control of the British Parliament over colonial Legislatures. So the same learned judge decided in the City of Fredricton *v.* The Queen, 3 S.C.R. (Can.) 529 (1880) that the power of legislation conferred on the Dominion Parliament and the provincial Legislatures, respectively, by the British North America Act, 1867, was subject to the sovereignty of the British Parliament.

In the case of the Merchants' Bank of Halifax *v.* Gillespie, 10 S.C.R. (Can.) 312 (1885), the validity of the Dominion Winding-up Act, 45 Vic. c. 23, which was apparently in conflict with the Imperial Joint Stock Acts of 1862 and 1867, was considered. Justices Strong and Henry expressed the opinion that the Dominion Act would have been *ultra vires* if it had purported to deal with a company incorporated under English laws, thus supporting the view that the Dominion Parliament had no authority to enact laws repugnant to an Imperial Act extending to Canada, whether such Act was passed before or after the creation of the Dominion. (Lefroy, Leg. Power, p. 210.)

A dictum somewhat in conflict with these decisions, to the effect that the Parliament of Canada had power to pass laws repealing Imperial Acts in force prior to federation and extending to the colonies, was expressed by Draper, C.J., in Regina *v.* Taylor, 36 Upper Canada Q. B. 183 (1875). But the opinion of that learned judge was based on the special wording of sec. 91 of the B.N.A. Act, which gives the Dominion Parliament "exclusive legislative authority" to make laws in certain cases. The word "exclusive" he considered as meaning exclusive of the British Parliament, and hence it was a renunciation of its right to legislate in matters exclusively assigned to the Canadian Parliament. This dictum, it will be noticed, turns on the word "exclusive," which does not occur in sec. 51 of the Commonwealth Bill, defining the principal powers of the Federal Parliament. The opinion of Draper, C.J., was seriously doubted by the Ontario Court of Appeal in the later case of Smiles *v.* Belford, in which Moss, J., said: "I believe his lordship did not deliberately entertain the opinion which these

expressions have been taken to intend. He simply threw out the suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial Parliament." In a British Columbia case, Tai Sing *v.* Macguire, 1 Brit. Col. (Irving), p. 107 (1878), Gray, J., said: "It was difficult to see the foundation for the conclusion arrived at by Draper, C.J." In Regina *v.* College of Physicians, 44 Upper Can. Q. B 564, 1 Cart., p. 761 (1879), the Court of Queen's Bench of Ontario held that the British Medical Act (1868) applied to Canada, and that the provincial Legislatures could not pass a law repugnant to the Imperial Act, which declared that any person registered thereunder as a duly qualified medical practitioner should be entitled to register and practice in any part of the British dominions.

The Canadian case, Riel *v.* The Queen, 10 App. Ca. 675 (1885), illustrates the conditions under which a colonial Legislature may alter an Imperial Act operative within the colony. The Amending British North America Act, 34 and 35 Vic. c. 28 (1871), authorized the Parliament of Canada to make laws for the administration, peace, order and good government of any territory not included in a province. In the exercise of this power it passed the Act 43 Vic. No. 25, providing, *inter alia*, a summary procedure for the trial of criminal offences, including treason, committed in the North-west Territory. This summary trial for treason was alleged to be inconsistent with the Act 7 and 8 Wm. III. c. 3 (1696) and the Hudson's Bay Act, 31 and 32 Vic c. 105 (1868), under which a person charged in the territory with treason was entitled to trial by a judge and jury of twelve men with a right of challenging thirty-five. Riel was convicted under the new law. He applied for leave to appeal to the Privy Council, on the ground that the Parliament of Canada had no authority to abolish, in the North-west Territory, trial by jury in treason cases, and that the local Act was not necessary for the peace, order, and good government of the territory. The Privy Council held that the Canadian Act was properly passed in the exercise of the power conferred by the Imperial Act of 1871, and that the words of that statute authorized the utmost discretion of enactment for the object aimed at, and the widest departure from the criminal procedure as known in England.

On the 27th March, 1889, during a debate in the Canadian Parliament on the constitutionality of the Quebec Jesuits Bill, Sir John Thompson, Minister of Justice, raised for the first time, in the political arena, the doctrine that the Canadian Legislatures, federal and provincial, had legal authority to repeal or amend Imperial Acts passed prior to the B.N.A. Act, 1867, and relating to subjects within the exclusive jurisdiction of those Legislatures. The only relevant legal authority which he cited in support of the doctrine was that of Riel *v.* The Queen, *supra*. A reference to the report of that case shows that the validity of the Canadian Act was affirmed because it was authorized by the special and expressed terms of the Imperial Act of 1871.

Sir John Thompson afterwards renewed the same contention in connection with Canadian Copyright Bills; it was not acquiesced in, but strongly objected to by the Imperial law officers, and by at least two Secretaries of State. (Lefroy, Leg. Power, p. 223.)

The result of this review of authority may now be summed up. The great mass of legal decision in Canada and England, and official opinion in England, is to the effect that a colonial representative legislature cannot, even within the jurisdiction assigned to it, repeal or alter an Imperial Act operative throughout the Empire, whether the Act is in force before or passed after the creation of the colonial Legislature; to enable it to amend the terms of Imperial statutes generally in force it must have special and express authority.

These were the principles of Constitutional Government which were no doubt kept in view by the framers of the Commonwealth Bill. It was not thought necessary to declare that the Constitution should be read in conjunction with the Colonial Laws Validity Act. It was assumed, as a matter of course, that that would be done.

When clause 5 was under consideration in the Sydney Convention an amendment, formulated by the Legislative Council of South Australia, was submitted, adding the words "in addition to the laws of Great Britain," and making the last part of the clause to read—"in addition to the laws of Great Britain the laws of the Commonwealth shall be in force on all British ships." The amendment, it was considered, was vague, confusing, and unnecessary. Mr. R. E. O'Connor suggested that the clause might be made clearer by inserting the words "the laws of the Commonwealth in so far as the same are not repugnant to any Imperial Act relating to shipping or navigation." Mr. Isaacs suggested that even that addition was unnecessary, as the laws of the Commonwealth would be subject to the Imperial laws relating to repugnancy, the Imperial laws being paramount. Mr. O'Connor was of opinion that the Colonial Laws Validity Act would apply only to the legislation of the various States, and that "it would not apply to this Act at all;" but eventually the South Australian amendment was rejected, and Mr. O'Connor did not press his suggestion. (Conv. Deb., Sydney, p. 252.)

When the Bill was sent to England the question was raised, and a doubt expressed by the Law Officers of the Crown as to the application of the Colonial Laws Validity Act to Acts passed by the Federal Parliament. In support of the doubt attention was drawn to Mr. O'Connor's dictum, also to the definition of "colony" and "colonial legislature," as given in sec. 1 of the Colonial Laws Validity Act, and to the definition of "colony" as given in Clause 6 of the Commonwealth Bill. The Imperial authorities had always held that the Parliament of the Dominion of Canada was "a colonial legislature," as defined by the said Act; yet it was now submitted that the definition of "colony" in the Commonwealth Bill might raise a doubt whether "the Commonwealth" was a "colony" within the meaning of the Colonial Laws Validity Act, and consequently whether laws passed by the Federal Parliament would be laws passed by "a Colonial Legislature" as defined by that Act. It was, therefore, proposed to remove doubts by adding a paragraph to Clause 6 declaring that "the laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act, 1865." It was pointed out in the first Imperial Memorandum that Mr. O'Connor's dictum showed that there was room for misapprehension, which it was desirable to remove. It was important in the interests of the Commonwealth, as well as of the rest of the Empire, that there should be no doubt as to the validity of Commonwealth laws, or as to the supremacy of Imperial legislation. The Memorandum proceeded to argue that there was room for such misapprehension not only from the language of Clause 6 of the covering clauses, but also from sec. 51, sub-sec. xxxviii., of the Constitution, which conferred on the Commonwealth Parliament "the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia." Sub-sec. xxix. of the same section of the Constitution, moreover, empowered the Commonwealth Parliament to legislate in regard to "external affairs," and, consequently, under these provisions it might be claimed that the Parliament of the Commonwealth had power to pass legislation inconsistent with Imperial legislation dealing with such subjects as those dealt with by the Foreign Enlistment Act. The responsibility to foreign Powers for such legislation would rest, not on Australia, but on the Government of the United Kingdom, as representing the whole Empire; and in the absence of any definition or limitation of the privilege claimed by these provisions for the Commonwealth Parliament, Her Majesty's Government would fail in their duty if they left any room for doubt as to the paramount authority of Imperial legislation. (See House of Com. Pap. May, 1900, p. 23.)

The Australian Delegates maintained that the doubt raised by the Imperial Law Officers was unfounded, and that there was no necessity for any amendment. They were of opinion that the meaning of the Bill was clear, without any such legislative explanation. The doubt expressed by the law advisers of the Crown arose, as they

explained, from the presence in Clause 6 of the words "Colony shall mean any Colony or Province." It was submitted that this definition was framed simply for the purpose of clearly including South Australia in the Bill, and could in no wise exclude the definition of "Colony" in the Colonial Laws Validity Act from applying to the Commonwealth in relation to its laws.

"The definition in the Commonwealth Bill arises from the fact that South Australia has from time to time been variously designated in legislation as a Colony and as a Province. For instance, in the Imperial Statutes 4 and 5 Wm. IV. c. 95 and 1 and 2 Vic. c. 60, the designation is 'Province;' in 5 and 6 Vic. c. 61 'Colony' and 'Province' are both used for the same purpose. In 4 and 5 Vic. c. 13, in 13 and 14 Vic. c. 59, and in all Imperial Acts relating to South Australia since the passage by the local Legislature of the Constitution Act (18 and 19 Vic. No. 2) the term 'Colony' is used. But in the Act last mentioned, and in all other local legislation since its passage, South Australia has uniformly been referred to as a 'Province.' Apart from legislation, the Letters-patent, Commissions and Instructions, issued in connection with the offices of Governor, Lieutenant-Governor, and Administrator of the Government for South Australia, have all employed the word 'Colony' alone to designate that possession, while the Regulations and other official documents under or in consequence of local Acts have as regularly referred to South Australia as a 'Province.' It was merely for the purpose of avoiding the constant repetition of the distinction between the words 'Colony,' as applied to the other states, and 'Province,' as applied to South Australia, that the definition in question was placed in the Bill. Inasmuch as Imperial legislation has so generally referred to South Australia as a Colony, it may be that excessive caution has been used by the draughtsmen in this instance. If after this explanation any doubt remains, the Delegates are of opinion that the real point of objection is in the definition itself as introducing that doubt, and if the definition is unnecessary it would not seem to be convenient to counteract any doubt by amendment elsewhere in the Bill. The Commonwealth appears to the Delegates to be clearly a 'Colony,' and the Federal Parliament to be a 'Legislature' within the meaning of the Colonial Laws Validity Act, and they cannot think that the larger meaning given to the word 'Colony' in Clause VI. to save words, can be held to take away the protection of the Act of 1865 from any law passed by the Federal Parliament. But the Interpretation Act of 1889 (52 and 53 Vic. c. 63) might itself be cited in support of the same contention. That Act prescribes that 'unless the contrary intention appears, the expression "Colony" in any Act passed since the 1st January, 1890, is to mean any part of Her Majesty's Dominions, exclusive of the British Islands and of British India.' The Interpretation Act goes on to require that where parts of such Dominions are under both a central and a local legislature, all parts under the Central Legislature shall, for the purposes of the definition, be deemed to be one Colony. It might be argued that this definition secures the application of the Validity Act to Colonial Statutes passed since the end of 1889, and if this be so it would be strange if the occurrence in Clause 6 of the few words quoted were held to deprive the laws of the Parliament of the Commonwealth of Australia of the same protection. It may further be observed that the Constitution of Canada contains no words similar to those proposed to be here inserted, even though that Constitution was enacted prior to 1889; yet it will not be denied that the Colonial Laws Validity Act applies to Dominion Statutes. What then is there which excludes its application to the Statutes of the Commonwealth?" (See House Coms. Pap. May, 1900, pp. 14, 15.)

On the question whether, if an amendment were made, it should be placed in the Covering Clauses or in the Schedule, the Delegates agreed in the opinion that a declaratory enactment of this kind would be looked for rather in the Covering Clauses than in the Schedule. But a separate enactment appeared to be a better vehicle for such a declaration than the measure itself.

The amendment declaring that "the laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act, 1865," appeared in Clause 6 of the Bill introduced into the House of Commons. As a result of subsequent negotiations, however, the Imperial Government decided to omit these words, and also to omit the definition of "colony," and in Committee this was done. It may be assumed, therefore, that the Crown Law Officers were satisfied that the Colonial Laws Validity Act is applicable to the Constitution as it stands.

§ 34. "Shall be Binding on the Courts, Judges and People."

The importance of these words, as indicating one of the fundamental principles of the Constitution, should be specially noted. They make Clause 5 of the Commonwealth Constitution Act substantially similar in scope and intention to article VI. sec. 2 of the Constitution of the United States, *supra*. Under this clause, the Act, the Constitution, and laws of the Commonwealth made in pursuance of its powers, will be the supreme law of the land, binding on the Courts, Judges, and people of every State, notwithstanding anything to the contrary in the laws of any State. The latter words operate as a rescission of all State laws incompatible with the Act, with the Constitution, and with such laws as may be passed by the Parliament of the Commonwealth in the exercise of its Constitutional rights. Therefore, by this clause, coupled with sections 106 to 109, all the laws of a State, constitutional as well as ordinary, will be in effect repealed so far as they are repugnant to the supreme law. All the laws of any State, so far as not inconsistent with the supreme law, will remain in force until altered by the proper authority.

The pre-eminent significance of this direct action of the federal laws on the Courts, Judges, and people, is that it forms a distinctly national feature of the Constitution and differentiates it from the weakness and imperfection of a confederate system of government. The constitutional value of these words will be better appreciated by comparing this Constitution with the Articles of Confederation of the American States (1781), from which they are absent.

Those articles established a league of States organized in a Congress in which each State had an equal voice. The Congress was endowed with certain legislative powers, but it lacked any means of enforcing obedience to its mandates. Not only was there no federal executive or judiciary worthy of the name, but the laws of the Congress were directed to the States as political entities and not to private individuals. Congress could not pass a single law binding on the Courts, Judges, or people of the States. It could only recommend the States to pass local Acts giving effect to its laws or requisitions. (Fiske, Critical Period of American History, p. 99.) One of the greatest triumphs of the American Constitution (1787) was that it gave expression to the original and noble conception of a dual system of government operating at one and the same time upon the same individuals, harmonious with each other, but each supreme in its own sphere (*id.* 239). This dual system gave rise to two groups or classes of laws—State laws and Federal laws—both equally binding on individuals and enforceable by appropriate procedure. Thereby the federal principle of the Union of States, which was the basis of the Articles of Confederation, was preserved and conjoined with the national principle that the laws of the Union should be binding on the people of the Union, interpreted by the judges of the Union, and enforced by the Executive of the Union.

"In all communities there must be one supreme power and one only. A confederacy is a mere compact, resting on the good faith of the parties; a national, supreme government must have a complete and compulsive operation." (Gouverneur Morris, in the Federal Convention, 30th May, 1787. Bancroft's History of the United States, vol. 2, p. 15.)

"In the nature of things punishment cannot be executed on the States collectively; therefore such a government is necessary as can operate directly on individuals." (George Mason, *id.*, p. 15.)

"The difference between a federal and a national government, as it relates to the operation of the government, is supposed to consist in this, that in the former the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities." (Madison, in The Federalist, xxxix., p. 237, cited Foster on the Constitution, vol. I., p. 196.)

As of the laws of Congress and the Constitution of the United States, so of the laws of the Federal Parliament and the Constitution of the Commonwealth, it may be

said that their authority extends over the whole territory of the Union, acting upon the States and the people of the States. Whilst the Federal Government is limited in the number of its powers, within the scope of those powers it is supreme. No State Government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which the Constitution has committed to it. (Tennessee *v.* Davis, 100 U.S. 257.)

§ 35. "And of Every Part of the Commonwealth."

Territorial Limits.—The Constitution and laws of the Commonwealth are in force within the territorial limits of the Commonwealth. By the law of nations the territorial limits of a country are allowed to extend into every part of the open sea within one marine league from the coast, measured from low water mark. This coastal margin is called "territorial waters," or the "three-mile limit." (See Note, Territorial Waters, *infra.*) By a later part of this clause the Constitution and the laws of the Commonwealth are conceded an extra-territorial force on British ships. (See Note, § 38 "British Ships.")

But there may be "parts of the Commonwealth" which are not States. The territorial limits of the Commonwealth will not be necessarily co-terminous with the boundaries of the States and their territorial waters added; they will also embrace any other regions, with their adjacent territorial waters, which for the time being may not be included within the boundaries of a State, but which may be acquired by the Commonwealth in any of the ways authorized by the Constitution. Thus the seat of government, when determined by the Parliament and made federal territory, will no longer be part of the State of New South Wales, but will be a part of the Commonwealth. Again, the Queen might place British New Guinea under the control of the Commonwealth; she might detach a part of the vast area of Western Australia from that State and hand it over to the Commonwealth; she might do the same with the Northern Territory of South Australia; Tasmania might agree to surrender King's Island to the Commonwealth. Upon acceptance by the Commonwealth in each of these cases, the territory so surrendered to or placed under the authority of the Commonwealth would even before its erection into a State, or States, become a part of the Commonwealth, and the Constitution and laws of the Commonwealth would be as binding on the people there as on those of a State.

Extra-Territorial Operation of Laws.—A Colony, Dominion, or Federation, under the British Crown, has no jurisdiction to make laws operative beyond its territorial limits, unless such power is specially granted by Imperial Statute. "In this respect independent States are in the same position, at least with regard to the subjects of other independent States and their property, as those colonies of Great Britain which possess plenary powers of legislation and self-government. Both are restricted as to acts of legislation by territorial limits, those limits being fixed in the one case by an Imperial Statute, and in the other case by the established principles of international law. The first of the three celebrated axioms of Huberus lays down the rule for independent States in distinct terms: '*Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ omnesque ei subjectos obligant, nec ultra.*'" (Per Higinbotham, J., in Regina *v.* Call, *ex p.* Murphy [1881], 7 V.L.R. [L.], p. 121.)

There are only two provisions in the Constitution Act explicitly relating to the extra-territorial operation of laws. The first is in Clause 5, which makes the laws of the Commonwealth in force on British ships voyaging solely between ports of the Commonwealth (see Note, § 38, "British ships"); the second is in sec. 51 x., which empowers the Federal Parliament to legislate as to "fisheries in Australian waters beyond territorial limits." The legislative powers given by sec. 51—xxix., as to "external affairs," and by sec. 51—xxxviii., as to powers previously exercisable by the

Imperial Parliament or by the Federal Council, do not necessarily imply extra-territorial operation, and it is therefore submitted that they do not sanction any such operation.

"No State can by its laws directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not; a different system, which would recognize in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them." (Felix, Droit International Privé, s. 10.)

"The Legislature of a colony may authorize the exclusion from its territory of a person charged with an offence in another colony, or that he be punished unless he leaves the territory, or his detention; but it cannot authorize the sending him in custody out of its territory into another colony." (Ray *v.* McMackin, 1 V.L.R. [L.], p. 272.)

"In Phillips *v.* Eyre, L.R. 6 Q.B., p. 1., it was distinctly enunciated that the superior Courts in England will regard Acts of colonial Legislatures in the same way as they regard Acts of foreign countries legislating with respect to their inhabitants within the limits of their authority. Any attempt to exercise jurisdiction beyond the boundaries of their own territory, domestic or distant, by either one or the other, is treated as being beyond the powers of their Legislatures." (Per Barry, J., in Ray *v.* McMackin, 1 V.L.R. [L.], p. 280.)

"On Dec. 17, 1869, the Secretary of State for the Colonies notified the Governor-General of Canada, in regard to certain Acts passed by the Dominion Parliament in the previous session of Parliament, that Her Majesty would not be advised to exercise her power of disallowance with respect thereto; but that he observed that the third section of 'an Act respecting perjury' assumed to affix a criminal character to acts committed beyond the limits of the Dominion. 'As such a provision is beyond the legislative power of the Canadian Parliament,' the Colonial Secretary requested the Governor-General to bring this point to the notice of his Ministers, with a view to the amendment of the Act in this particular. Accordingly, in the ensuing session of the Dominion Parliament, an Act was passed to correct this error." (Todd, Parl. Gov. in the Col., p. 145.)

The Criminal Law Amendment Act, 1883, sec. 54, of New South Wales, enacts that "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years:" It was held by the Privy Council that those words must be intended to apply to persons actually within the jurisdiction of the Legislature, and consequently that the Courts of the colony had no jurisdiction to try the appellant for the offence of bigamy alleged to have been committed in the United States of America. (Macleod *v.* Att.-Gen. for New South Wales [1891], A.C. 455; Digest of English Case Law, vol. 3, p. 486.)

In the case of *Re* Victoria Steam Navigation Board, *ex parte* Allan, decided by the Full Court of Victoria, consisting of Stawell, C.J., and Stephen and Higinbotham, JJ., in 1881, the Court (Higinbotham, J., dissenting) were of the opinion that the Passengers, Harbours, and Navigation Statute, 1865, did not give the Steam Navigation Board any jurisdiction to enquire into charges of incompetency of a master, occurring at Cape Jaffa outside Victorian waters, and that the Imperial Merchant Shipping Act, 1854, sec. 242, sub-sec. 5, and Merchant Shipping Amendment Act, 1862, sec. 23, did not confer on it any extra-territorial jurisdiction. The summons to prohibit the enforcement of the suspension of a master's certificate was allowed, with costs. (*Ex parte* Allen, 7 V.L.R. 248, 3 A.L.T., p. 1.) But now see Merchant Shipping Act, 1894, s. 478.

The British Parliament, being a sovereign legislature, may pass laws binding on its subjects all over the world; but, according to the principles of international law, it ought not to legislate for foreigners out of its dominions and beyond the jurisdiction of the Crown. (Lopez *v.* Burslem, 4 Moo. P.C., 300: the Zollverein, 1 Swab. Adm., 96.) The British Parliament has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas or for foreigners beyond the frontiers of the Empire. (Reg. *v.* Keyn, 2 Ex. D 220.) Should the British Parliament in violation of those principles attempt to render foreigners subject to its laws with reference to offences committed beyond its territorial limits, it would be incumbent on the Courts of the Empire to enforce those enactments, leaving it to the Imperial Government to settle the question of international law with the governments of the nations concerned. But the laws of the Commonwealth being those of a subordinate and non-sovereign legislature would be examinable by the Courts, and if it appeared that they purported to legislate for matters outside the limits of the Commonwealth they would be pronounced *ultra vires* and null and void.

Territorial Waters.—Some further explanation of the rule of the "three mile limit" by Mr. Hall may be here added :—

"Of the marginal seas, and enclosed waters, which were regarded at the beginning of the present century as being susceptible of appropriation, the case of the first is the simplest. In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard. In fact also such a belt is always appropriated, because states reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the state upon land; they would be exposed without recognised means of redress to the intended or accidental effects of violence directed against themselves or other persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose state consequently could not be made responsible for their deeds. Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters. Their precise extent however is not so certain. Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence way be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question, whether the three mile limit has ever been unequivocally settled; but, in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and perhaps it may be said without impropriety that a state has the right to extend its territorial waters from time to time at its will with the increased range of guns; though it would undoubtedly be more satisfactory that an arrangement upon the subject should be come to by common agreement." (Hall's International Law, § 41.)

"Bluntschli thinks that, considering the range of modern artillery, the three-mile zone is too narrow. Phillimore and Fiore express the same opinion, but think that an alteration can only be made by treaty. It appears to have been suggested by the American government to that of England in 1864 that territorial waters should be considered to extend to a distance of five miles from shore." (*Id.*)

§ 36. "The Laws of Any State."

The laws of the States will comprise the following classes :—

(i.) Imperial Acts relating to the Constitution and government of the colonies when they become States :

(ii.) Imperial Acts relating to matters of ordinary legislation expressly applicable to the colonies when they become States :

(iii.) The Common law so far as applicable and not modified by colonial or State legislation :

(iv.) Laws of the realm of England made applicable to some colonies by the general terms of the Act of 9 George IV. c. 83, and not since repealed or amended by colonial legislation :

(v.) Acts relating to constitutional matters as well as to matters of ordinary legislation passed by the colonial or State legislatures in the exercise of Statutory authority conferred by Imperial law.

All these laws will remain in full force and effect until they become inconsistent with—(1) The Commonwealth of Australia Constitution Act, or (2) some Act amending the Constitution, or (3) laws to be made thereunder by the Parliament of the Commonwealth. By the Constitution of the colonies their legislatures have power to make laws in and for those colonies respectively in all cases whatsoever. When those

colonies become States their large powers will by degrees be considerably cut down, although they will be compensated for the loss of direct authority by their representation in the Federal Parliament. The jurisdiction of that Parliament will over-lap and in time will considerably contract the realm of State jurisdiction. As the federal legislation within the area of enumerated powers acquires activity and increases in volume, the State laws within that area will be gradually displaced by federal laws, but until they are so displaced through repugnancy they will retain their original vitality and be binding on the people of their respective States.

§ 37. "The Laws of the Commonwealth."

This is a more suitable and comprehensive expression than the one which appears at the beginning of this clause, viz., "this Act and all laws made by the Parliament of the Commonwealth." The laws of the Commonwealth will consist of the following classes :—

(I.) The Commonwealth of Australia Constitution Act.
(II.) Alterations of the Constitution pursuant to the provisions of Chapter VIII.
(III.) Laws made by the Parliament of the Commonwealth under the Constitution.

It will be noticed that the second group of laws as above classified will not be laws made by the Parliament; they may be laws proposed either by one or both of the Federal Chambers, subject to certain conditions, and afterwards approved by the qualified electors of the Commonwealth and assented to by the Governor-General or by the Queen.

§ 38. "British Ships."

The rights, duties, and liabilities of British ships whilst at home or abroad have been settled by a long series of legal decisions interpreting and enforcing the common law, as well as by the codified provisions of the Merchant Shipping Act, 1894, some parts of which are in force throughout the British empire. One of the fundamental principles of British shipping law is that British merchant ships sailing upon the high seas are considered parts of the territory of the British empire and come within the rule of extra-territoriality. It is a principle of the Common Law and of the law of nations that a ship on the high seas is a part of the territory of the State to which she belongs, and therefore an English ship is deemed to be a part of England. (Per Blackburn, J., Marshall *v.* Murgatroyd, L.R. 6 Q.B. 31.)

Klüber says "that upon the ocean every ship is considered extra-territorial in regard to all foreign nations. A merchant vessel ought to be considered as a floating colony of its State." (*Droit des Gens*, part 2, Tit. 1, c. 2, § 299.)

Hall and other writers on international law describe Klüber's theory as a fiction, but they all agree that a ship at sea should be subject to the jurisdiction of the State under whose flag she sails; that such a doctrine is most reasonable and advantageous; and that if ships were amenable to no tribunal the sea would become a place where every crime might be committed with impunity. (Twiss' Law of Nations in Time of War, p. 172.) A merchant vessel in non-territorial waters is therefore subject to the sovereignty of that country only to which she belongs, and all acts done on board her whilst on such waters are cognizable only by the courts of her own State unless they be acts of piracy. This rule extends to cases in which, after a crime has been committed by or upon a native of a country other than that to which the ship belongs, she enters a port of that State with the criminal on board. (Hall's International Law, p. 186.) In foreign territorial waters, however, a merchant vessel is under the territorial jurisdiction, and its officers and crew are subject to the local laws prevailing in such waters.

Criminal Jurisdiction on the High Seas.—All persons on board a ship are within the jurisdiction of the nation whose flag the ship flies, in the same manner as if they were within the territory of that nation. The criminal jurisdiction of the Admiralty of

England extends over British ships, not only on the high seas, but also on rivers below the bridges where the tide ebbs and flows and where great ships go, though at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction if invoked. (Per Blackburn, J., in Reg. *v.* Anderson [1886] L.R. 1 C.C. 161-4.) There will be jurisdiction at common law if a British ship be on the high seas, *infra primos pontes*, or in a tidal river where great ships come and go. (Reg. *v.* Armstrong [1875] 13 Cox, C.C. 185.) The offence need not be consummated or wholly completed on board such ship to give jurisdiction (*id.*) A larceny of bonds was committed by some person unknown on board a British ocean-going merchant ship lying in an open river, moored to the quay at Rotterdam, in Holland, at a distance of 18 miles from the sea, but within the ebb and flow of the tide. A person who afterwards was found in England in possession of the stolen property was there convicted of receiving the bonds. (Reg. *v.* Carr [1882] 10 Q.B.D. 76.) The surviving crew of an English yacht, cast away in a storm on the high seas, who were obliged to take to an open boat, and who were, they alleged, constrained by hunger to kill and eat a boy, one of their number, were tried in England and found guilty of murder. (Reg. *v.* Dudley [1884] 14 Q.B.D. 273.) A hulk retaining the general appointments of a ship registered as a British ship, though only used as a floating warehouse, is a British ship. (Reg. *v.* Armstrong, 13 Cox, C.C. 185.)

Jurisdiction of Colonial Courts.—The jurisdiction to try persons for offences committed on the high seas, within the jurisdiction of the Admiralty, was in 1849 conferred on colonial courts by the Act 12 and 13 Vic. c. 96, sec. 1. This provides that colonial courts should have the same jurisdiction for trying such offences, and should be empowered to take all such proceedings for bringing persons charged therewith to trial, and for and auxiliary to and consequent upon the trial, as by the law of the colony might have been taken if the offence had been committed upon any waters within the limits of the colony.

Later Imperial Legislation.—By the Merchant Shipping Act, 1867 (30 and 31 Vic. c. 124, s. 11.) it was enacted that if any British subject commits any offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in her Majesty's dominions which would have cognizance of such offence, if committed on board a British ship, within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case, as if the offence had been so committed.

The Merchant Shipping Act, 1894, sec. 686, re-enacts in substance the provisions of previous legislation giving jurisdiction, in the case of any offence committed by a British subject on board any British ship on the high seas, or in any foreign port or harbour, or by a person not a British subject on board any British ship on the high seas, to any court in her Majesty's dominions within the jurisdiction of which that person is found. Sec. 687 further provides that all offences against property or person committed at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman or apprentice who at the time of the offence is, or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature and liable to the same punishment as if committed within the jurisdiction of the Admiralty of England.

Foreigners on British Ships.—A foreigner who, whilst on board a British ship upon the high seas, commits an offence against British law, is amenable to such law, and it makes no difference whether he has gone on board voluntarily or has been taken and detained there against his will. (Reg. *v.* Lopez; Reg. *v.* Sattler, 27 L.J. M.C. 48.)

A foreigner was convicted of manslaughter on board a British ship in the river Garonne, in France, 35 miles from the sea, but within the ebb and flow of the tide. (Reg. *v.* Anderson, L.R. 1. C.C. 161.) A foreigner on board a British ship is entitled to the same protection as if he were on English soil. (Reg. *v.* Leslie, 8 Cox, C.C., 269; 29 L.J. M.C. 97.)

Jurisdiction over Foreign Ships.—A German vessel, under the command and immediate direction of a German subject, collided with a British steamer navigating the English Channel at a point within two miles and a half from Dover Beach, with the result that the British ship sank and a British subject on board was drowned. The captain of the German ship was tried and found guilty of manslaughter at the Central Criminal Court. It was held by the majority of the Court of Criminal Appeal, that the Central Criminal Court had no jurisdiction to try the case. (Reg. *v.* Keyn, The Franconia, 2 Ex. D. 63; 46 L.J., M.C. 17.) But now by the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vic. c. 73 s. 2) an offence committed by any person, whether a British subject or not, on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly. By s. 7 of this Act "Territorial waters of Her Majesty's dominions" means any part of the open sea within one marine league of the coast measured from low water mark.

Ownership of British Ships.—Under the provisions of the Merchant Shipping Act, 1894, no person can own a British ship except a natural born or naturalized subject of the Queen, or a denizen by letters of Denization, or a corporate body established under and subject to the law of some part of the British dominions. Every such ship must be registered, and every transfer must be by registered bill of sale. If a ship belonging to British subjects be not registered she is not recognized as a British ship, and is then not entitled to the benefit or protection enjoyed by British ships, or to sail under the British flag, or to assume the British national character.

British Merchant Ships and Colonial Laws.—It will now be convenient to consider some of the obligations and liabilities of British merchant ships in the Territorial waters, under the law as it existed before, and under the law as it will be after the establishment of the Commonwealth. The jurisdiction of colonial legislatures over British ships whilst within the colonial ports, harbours, rivers and adjacent territorial waters, extends to such subjects as the following:—The governance and preservation of ports, the regulation of shipping and navigation, the mooring of vessels, the management of wharves and piers, the organization of marine boards and of courts of marine inquiry, pilots and pilotage, lights and signals, prevention of accidents on ships, inspection of ships, equipment and survey of ships, carriage of dangerous goods, storage of cargoes, misconduct of passengers, misconduct of crew, health and safety of passengers, landing of passengers, investigations respecting casualties, and inquiries into complaints of incompetency and misconduct on the part of mariners.

Colonial Courts to Enforce Imperial Shipping Laws.—By the Merchant Shipping Act, 1854 (17 and 18 Vic. c. 104) and by the amending Merchant Shipping Act, 1862 (25 and 26 Vic. c. 63) legislation was adopted in order to increase the efficiency of, and enlarge the supervision over, the mercantile marine of England. Higher qualifications for mates and masters were exacted, and means were adopted by which incompetency and misconduct might be promptly brought before the Board of Trade, by whom certificates to mates and masters were issued. It was further provided that the legislature of any British possession should be able to make laws for the appointment of a court or tribunal to inquire into charges of incompetency or misconduct on the part of masters and mates of ships, and to cancel or suspend the certificates of offenders subject to the review of the Board of Trade. In 1865 the Victorian Parliament passed the Passengers Harbour and Navigation Act, sec. 77 of which enacted that the Steam Navigation Board should be constituted a court or tribunal authorized to exercise such powers as are mentioned in or conferred by the 242nd section of the Merchant Shipping Act, 1854, and the 23rd section of the Merchant Shipping Act, 1862. Similar Boards were established by other colonial legislatures.

The extra-territorial jurisdiction of Australian courts of inquiry created by local legislation in the exercise of statutory power conferred by the above Imperial Acts

was considered in the case of *Re* Victoria Steam Navigation Board, *ex parte* Allan, in which the Supreme Court held that the Victorian Board had no jurisdiction to deal with a master holding a certificate issued by the Board of Trade, on a charge of negligence resulting in a collision off Cape Jaffa, South Australia; that it could only inquire into misconduct which had taken place within the jurisdiction of the Board, viz., within the territorial waters of the colony in which the Board was constituted (3 A.L.T. 1, 7 V.L.R. [L] 248, June, 1881). In consequence of this decision there was a demand for further Imperial legislation enlarging the authority of marine boards, and in August, 1882, the Act (45 and 46 Vic. c. 76) was passed, which is now re-enacted in sec. 478 of the Merchant Shipping Act, 1894 (57 and 58 Vic. c. 60). This section expressly empowers the legislature of any British possession to authorize any court or tribunal to make inquiries as to shipwrecks or other casualties affecting ships, or as to charges of incompetency or misconduct on the part of masters, mates or engineers of ships, in the following cases:—

(*a*) Where a shipwreck or casualty occurs to a British ship on or near the coasts of the British possession or to a British ship in the course of a voyage to a port within the British possession:

(*b*) Where a shipwreck or casualty occurs in any part of the world to a British ship registered in the British possession:

(*c*) Where some of the crew of a British ship which have been wrecked or to which a casualty has occurred, and who are competent witnesses to the facts, are found in the British possession:

(*d*) Where the incompetency or misconduct has occurred on board a British ship on or near the coasts of the British possession, or on board a British ship in the course of a voyage to a port within the British possession:

(*e*) Where the incompetency or misconduct has occurred on board a British ship registered in the British possession:

(*f*) When the master, mate, or engineer of a British ship who is charged with incompetency or misconduct on board that British ship is found in the British possession.

A British ship during its voyage on the high seas from any British port to Australia was, before the establishment of the Commonwealth, and still is, subject solely to British Civil and Criminal Law. Upon its entry into the territorial waters, that is within the three mile limit of any colony, say Western Australia, it still remained subject to British Merchant Shipping Acts, but in addition thereto it became subject to the local laws of Western Australia, Civil and Criminal, including local navigation and shipping regulations, so far as those laws and regulations were not contrary to British Merchant Shipping Acts. On leaving the ports of Western Australia and passing beyond the three mile limit, the British ship ceased to be subject to West Australian laws, and became once more subject only to Imperial laws. Upon the same ship entering the territorial waters of South Australia it, in like manner, came under the local laws of South Australia, Civil and Criminal, including local navigation and shipping regulations, so far as those laws and regulations were not repugnant to the Merchant Shipping Acts. On clearing the ports of Adelaide and resuming its voyage on the high seas, the British ship again came and continued solely under British laws until it reached the Victorian waters, where it once more came under local laws as in the cases of the other colonies mentioned; and so on from one Australian port to another.

Under the Constitution of the Commonwealth British ships will still be under Imperial shipping laws, and local shipping laws not contrary to Imperial laws, but, instead of encountering five or six different sets of local laws relating to navigation and shipping in five or six different Australian ports, they will—when the Federal Parliament has legislated on the subject—find one uniform federal law relating to navigation and shipping operating in every port within the limits of the Commonwealth. In journeying along the high seas between federal ports, and outside the three mile limit, British ships whose first port of clearance is outside the Commonwealth will not be subject to Commonwealth law, but will, as before, remain solely under British law; and British

ships whose port of destination is outside the Commonwealth will also not be subject to Commonwealth law.

The Parliament of the Commonwealth has, under sections 51 and 98 of the Constitution, power to make laws relating to navigation and shipping. That power is restricted to making laws applicable to the Commonwealth and operative within the three-mile limit all round the ocean boundary of the Commonwealth. In order to make a Commonwealth law applicable to and operative on ships going from one part of the Commonwealth to another, and in so doing passing over the high seas outside the three mile limit, it was necessary to extend the power given by section 98. This is done by clause 5 of the Act; without which the laws of the Commonwealth would only be operative within the three mile limit. By that clause the laws of the Commonwealth are in force on British ships on the high seas outside the three mile limits if they are on a voyage which both begins and ends within the Commonwealth. (Mr. R. E. O'Connor's speech in the Legislative Council of N.S.W., Parliamentary Debates, 1897, p. 3017. Mr. E. Barton's speech in the Legislative Council, N.S.W., *idem.*, p. 3081.)

British Ships Within the Commonwealth.—Clause 5 provides that the laws of the Commonwealth shall be in force on all British merchant ships whose first port of clearance and whose port of destination are within the Commonwealth. There are two classes of British ships which come within the meaning of this clause: (1) Intercolonial vessels exclusively engaged in the Australian trade; (2) ocean going vessels arriving on the Australian coast and temporarily staying and engaging in trade between the ports of the Commonwealth; in so doing beginning and completing new voyages. For the purposes of this clause, ships which come within the conditions specified will be considered as within the jurisdiction of the Commonwealth from the beginning to the end of their respective voyages, even though during the course of their voyages they travel across the high seas hundreds or even thousands of miles beyond the limits of the Commonwealth. The first port of clearance of a ship bound by the laws of the Commonwealth must be within the Commonwealth, and its port of destination must be within the Commonwealth. The combination of these two conditions is required; they mark the beginning and end of a continuous voyage. For example, a steamer starts from her headquarters—say Melbourne; thence she proceeds to Tasmania, thence to New Zealand, thence to Samoa, thence to Fiji, thence to New Caledonia, thence to Brisbane, thence to Sydney, thence to Melbourne. During the whole of this voyage the laws of the Commonwealth would be in force in such a vessel. In the course of her journey she would traverse regions far beyond the limits of the Commonwealth; yet by the application and extension of the principle of extra-territoriality—described by some jurists as a fiction, though a very useful one—the ship is deemed to be a part of the Commonwealth floating on the high seas.

If it be asked what kinds of Commonwealth laws could reasonably be brought into operation on board a Commonwealth ship sailing a thousand miles away from Australia, attention may be drawn to those laws relating to shipping and navigation which have hitherto been within the competency of the various Australian legislatures, but which under the Commonwealth will be vested in the Federal Parliament Attention may be also drawn to some of the other powers conferred on the Federal Parliament, such as those relating to trade and commerce, weights and measures, fisheries beyond territorial limits, the service and execution of civil and criminal process, and the enforcement of the judgments of the Courts of the States; also immigration and emigration, influx of criminals, external affairs, the relations of the Commonwealth with the isles of the Pacific, and the naval and military defences of the Commonwealth. It might be extremely advisable, and in fact absolutely necessary, that the laws of the Commonwealth, in reference to matters such as these, should follow a Commonwealth ship and operate upon it wherever it went.

Proposed Imperial Amendment.—When the Commonwealth Bill was under the consideration of the Imperial Government in March, 1900, the Law Officers of the Crown

proposed the omission of the words of Clause 5, "in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." (See Historical Introduction, p. 229, *supra*.) It was suggested that there was no constitutional, or practical, necessity for the appearance of those words in the Bill. It seemed to be thought that all that was desired was a grant of power to the Commonwealth to control the coasting trade. This power, it was pointed out, the Federal Parliament would have under section 736 of the Merchant Shipping Act, 1894, which is not confined in its operation to the coasting trade while in territorial waters. Moreover, the words, "first port of clearance" and "port of destination" in the clause in question were not free from ambiguity, and embarrassing questions might be raised as to the law applicable to a ship clearing from one Australian port for another after coming to Australia from a port in some other part of Her Majesty's dominions.

In reply to this objection the Australian Delegates drew attention to section 20 of the Federal Council Act, 1885 (see *supra*). It was observed that the provision of Clause 5 of the Draft Bill was much more restricted than that made by the Act of 1885. Under the present measure the provision was made to apply to cases in which a British ship begins and concludes her voyage within the limits of the Commonwealth. But section 20 of the Federal Council Act applied to every British ship which commenced her voyage in any one of the colonies concerned, and also to every British ship which concluded her voyage in any one of them. In the former case the Federal Council Law would apply to a British ship on the whole of her voyage from Australia to a port beyond the Commonwealth; in the latter case to a British ship on the whole of her voyage from any point beyond the Commonwealth to Australia. In the present measure, so wide an application was not for a moment desired to be given to any law of the Commonwealth; yet it was now sought to further restrict, in the hands of a much more competent legislature, a power which 15 years ago the Imperial Parliament did not consider too wide for a much inferior body: a body neither elective nor bi-cameral, and lacking both a responsible executive and a Treasury. Dealing with the suggestion that the matter was sufficiently provided for by section 736 of the Merchant Shipping Act, 1894, the Delegates argued that if that view were correct then the phrase objected to was at worst a redundancy and therefore harmless. Section 736 gave power to the Legislature of any English possession to make laws regulating its coasting trade under certain conditions. It was true that the term "British Possession," whether as defined in the Act of 1869 or in the Interpretation Act of 1889, which preceded the present Merchant Shipping Act, would include such a Possession as the Commonwealth of Australia, which under the Interpretation Act would be deemed to be one British Possession including all parts under the Central Legislature. The expression "coasting trade" was not defined in any of the Acts cited; it may be taken to include the trade of vessels plying merely between the ports of a Possession within territorial limits. But the provision in the Commonwealth Bill, to which exception had been taken, would apply to such ships, on a voyage solely between two ports of the Commonwealth, even outside the three-mile territorial limit; the beneficial effect therefore would be, that a vessel on such a voyage would not be exposed to the anomaly of being subject to one set of laws at 2¾ miles from the coast, and to another set of laws at 3¼ miles from the coast. That this should be prevented was surely not too much to ask. Moreover, the provision in the Bill removed a further anomaly by protecting a vessel which passed from the territorial waters of one colony into those of another from being subjected to a change of laws in that very operation, and by applying to her the uniform laws of the Commonwealth during the whole of her passage between Commonwealth ports. While, then, the power was less than that conceded to the Federal Council, and never abused, it was larger than that conceded by the Merchant Shipping Act, but larger only for the most beneficial purposes. The reasonableness of the right claimed appeared the more clearly when it was considered that one of the most useful purposes of the Constitution was the facilitation of trade between the several colonies to

an extent not hitherto possible, with a clear tendency towards obliterating in respect of commerce those arbitrary lines between colony and colony, which in the past have been productive of so much friction and hindrance. (House of Com. Pap., May 1900, p. 15.)

The Colonial Secretary, in answer to this contention, admitted that the words of section 20 of the Federal Council Act were very wide, perhaps unduly so, and if the powers thereby conferred had been freely exercised he thought grave difficulties would certainly have arisen. The analogy of the Federal Council Act was, however, in his opinion incomplete, inasmuch as it was contemplated that all British possessions in Australia might be represented in the Federal Council, "whereas the operation of this Bill is at present confined to five Australian colonies." (See House Coms. Pap., May, 1900, p. 24.)

The Imperial Government, however, did not insist in the proposed omission of the words relating to British ships. Although those words were omitted in the first draft of proposed amendments submitted to the Delegates, they were restored in the Bill as actually introduced in the House of Commons. (See House Coms. Paps., May, 1900, p. 19.)

§ 39. "First Port of Clearance."

If a British vessel began a voyage from any port outside the Commonwealth, then the port whence she started on her voyage would be the "First Port of Clearance," and consequently she would be exempt from the operation of the clause. If, upon the completion of that voyage by disembarking her passengers and discharging her cargo, she were chartered to carry cargo or passengers from one port of the Commonwealth to another, her first port of clearance on the new voyage, as well as her "port of destination," would be within the Commonwealth, and she would carry Commonwealth law with her from the beginning to the end of the local voyage.

§ 40. "The Queen's Ships of War."

Public ships of war are regarded as floating fortresses representing the sovereignty and independence of the country to which they belong. "A ship of war retains its national character with all its incidental privileges and immunities in whatever waters it may go, but if members of the crew leave the ship or its tenders, or its boats, they are liable to the territorial jurisdiction of the country into which they go. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity as agent of his State. In his ship he is protected; he has entire freedom of movement; he is under no obligation to expose himself to the exercise of the jurisdiction of the country in whose ports, harbours, bays, rivers, or other territorial waters he may find himself; if he voluntarily does so he may be fairly expected to take the consequences of his acts." (Hall's International Law [1895]. p. 205.)

Although the extra-territoriality of a public ship does not extend to her officers and men whilst they are on shore in a foreign country, the territorial government often abandons cognizance and waives the punishment of offences committed by a public ship's company on shore to the government to which the ship belongs. (Rivier, *Principes du Droit des Gens* [1896], 1., 334-51.)

Definitions[41].

6. "The Commonwealth" shall mean[42] the Commonwealth of Australia as established under this Act[43].

"The States"[44] shall mean such of the colonies[46] of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being

are parts of the Commonwealth[45], and such colonies or territories[47] as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

Historical Note.—Clause 5 of the Commonwealth Bill of 1891 was as follows:—

"The term 'The States' shall be taken to mean such of the existing colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and the Province of South Australia, as for the time being form part of the Commonwealth, and such other States as may hereafter be admitted into the Commonwealth under the Constitution thereof, and each of such colonies so forming part of the Commonwealth shall be hereafter designated a State."

At the Adelaide session, 1897, the clause was introduced and passed in the same words. (Conv. Deb., Adel., pp. 625-6). At the Sydney session, a suggestion made by the Legislative Council of New South Wales (where it had been originated by Mr. R. E. O'Connor) to define "Original States" and "New States," was discussed; and ultimately the definition of "Original States" was agreed to. On Mr. Solomon's motion, the words "including the Northern Territory of South Australia" were agreed to. (Conv. Deb., Syd. [1897] pp. 231-9, 986-7.) At the Melbourne session, drafting amendments were made before the first report; and also after the fourth report, when the words "'Colony' shall mean any colony or province" were added.

In the Bill as introduced in the Imperial Parliament, the following words were added to the definition of Commonwealth:—"and the laws of the Commonwealth shall be colonial laws within the meaning of the Colonial Laws Validity Act, 1865." In Committee, these words were omitted, and the words "'Colony' shall mean any colony or province"—which it was thought might raise a doubt as to the application of the Colonial Laws Validity Act—were also omitted. (See pp. 222-248, 351-2, *supra*.)

§ 41. "Definitions."

The definitions in the Act are remarkably few, being confined to the words "Commonwealth" and "State"—both old English words which receive by this Act a new technical application—and the phrase "Original States." Every other word and phrase of the Constitution is left to be construed from its natural meaning and its context.

It is safer to abstain from imposing, with regard to Acts of Parliament, any further canons of construction than those applicable to all documents. (Lamplugh *v.* Norton, 22 Q.B.D. 452.) When a doubt arises upon the construction of the words of an Act of Parliament, it is the duty of the Court to remove the doubt by deciding it; and when the Court has given its decision, the point can no longer be considered doubtful. (Bell *v.* Holtby, L.R. 15 Eq. 178.) Acts should be construed according to the intent of Parliament. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves, in such case, best declare the intention of the legislature. (Sussex Peerage, 11 Cl. and F. 86; 8 Jur. 793.) The Court knows nothing of the intention of an Act, except from the words in which it is expressed, applied to the facts existing at the time. (Logan *v.* Courtown, 20 L.J. Ch. 347; Digest of Eng. Ca. L., xiii., p. 1888.) Anyone who contends that a section of an Act of Parliament is not to be read literally, must be able to show one of two things, either that (1) there is some other section which cuts down its meaning, or else (2) that the section itself is repugnant to the general purview of the Act. (Nuth *v.* Tamplin, 8 Q.B.D. 253. *Id.* p. 1889.) "I prefer to adhere to the golden rule of construction that the words of a statute are to be read in their ordinary sense, unless the so construing them will lead to some incongruity or manifest absurdity." (Per Grove, J., Collins *v.* Welch, 5 C.P.D. at p. 29. *Id.* p. 1889.) "The more literal construction of a section of a statute ought not to prevail if

it is opposed to the intentions of the legislature as apparent by the statute, and, if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." (Per Lord Selborne, L.C., Caledonian R. Co. *v.* North British R. Co., 6 App. Cas. 122; *Id.* p. 1889.) "No Court is entitled to depart from the intention of the legislature as appearing from the words of the Act because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two." (Per Lord Blackburn, Rothes *v.* Kirkcaldy Waterworks Commissioners, 7 App. Cas. 702; *Id.* p. 1889.)

"If we can fairly construe an Act so as to carry out what must obviously have been the intention of the legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought, from those general considerations, to adopt the interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied." (Per Jessel, M.R., Freme *v.* Clement, 44 L.T. 399, *id.* p. 1890.)

"In order to construe an Act of Parliament, the court is entitled to consider the state of the law at the time it was enacted." (Per Lord Esher, M.R., Philipps *v.* Rees, 24 Q.B.D. 17, *id.* p. 1892.)

It is useless to enter into an inquiry with regard to the history of an enactment, and any supposed defect in former legislation on the subject which it was intended to cure, in cases where the words of an enactment are clear. It is only material to enter into such inquiry where the words of an enactment are ambiguous and capable of two meanings, in order to determine which of the two meanings was intended. (Per Lord Esher, M.R., Reg. *v.* London [Bishop], 24 Q.B.D. 213.) If the words are really and fairly doubtful, then, according to well-known legal principles and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates. (Reg. *v.* Most, 7 Q.B.D. 251.) The court cannot impute to the legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. (Beadon *v.* King, 22 L.J. Ch. 111, Dig. of Eng. Ca. L. xiii. p. 1892.)

It is the most natural and genuine exposition of a statute to construe one part by another, for that best expresseth the meaning of the makers, and this exposition is *ex visceribus actus*. (Reg. *v.* Mallow Union, 12 Ir. C.L.R. 35.) The common law rights of the subject, in respect of the enjoyment of his property, are not to be trenched upon by a statute, unless such intention is shown by clear words or necessary implication. Statutes restrictive of the common law receive a restrictive construction. (Ash *v.* Abdy, 3 Swans. 664, Dig. of Eng. Ca. L. xiii. p. 1893.)

In construing Acts which infringe on the common law, the state of the law before the passing of the Act must be ascertained to determine how far it is necessary to alter that law, in order to carry out the object of the Act. (Swanton *v.* Goold, 9 Ir. C.L.R. 234.) A right to demand a poll is a common law incident of all popular elections, and as such cannot be taken away by mere implication which is not necessary for the reasonable construction of a statute. (Per Brett, L.J., Reg. *v.* Wimbledon Local Board, 8 Q.B.D. 459.) The general law of the country is not altered or controlled by partial legislation, made without any special reference to it. (Denton *v.* Manners, 27 L.J. Ch. 199; affirmed 27 L.J. Ch. 623, Dig. of Eng. Ca. L. xiii. p. 1893.)

As a rule, existing customs or rights are not to be taken away by mere general words in an Act. But, without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act, and though the particular custom may have been confirmed, years before, by a verdict in a court of law. (Green *v.* Reg., 1 App. Cas. 513, *id.* p. 1894.)

"When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken." (Per Lord Watson, Clyde Navigation Trustees *v.* Laird, 8 App. Cas. 673, *id.* p. 1895.)

§ 42. "Shall Mean."

An interpretation clause is a modern innovation, and frequently does a great deal o harm. (Lindsay *v.* Cundy, 1 Q.B.D. 348; Reg. *v.* Boiler Explosion Act Commissioners, (1891), 1 Q.B. 703; Dig. Eng. Ca. L. Vol. xiii. p. 1886.)

"But for the interpretation clause, no difficulty as to the construction would have arisen. But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the

meaning of such as are plain." (Reg. *v.* Pearce, per Lush, J., 5 Q.B.D. 386, 389; Robinson *v.* Barton-Eccles, 8 App. Cas. 798; *id.* 1885.)

An interpretation clause in an Act should be understood to define the meaning of the word thereby interpreted, in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation. (Midland R. Co. *v.* Ambergate, Nottingham and Boston and Eastern Junction R. Co., 10 Hare, 359, *id.* p. 1885.)

§ 43. "Commonwealth . . . as Established Under this Act."

We have summarized the literary history of the name Commonwealth. (Note § 17, *supra.*) We now come to the statutory definition of the term. This definition, it will be observed, is a vague and technical one; the dominant words being "as established under this Act." For the true nature and primary meaning of the expression, the student is required to examine the first six clauses of the Act, which deal with the establishment of the new community. The Commonwealth is not in any way defined or explained by the Constitution itself; that deals only with the governing organization of the Commonwealth.

The first observation to be made is that the Commonwealth should not be confounded with the Constitution or with the Government. The Commonwealth, as a political entity and a political partnership, is outside of and supreme over the Constitution; it is outside of and supreme over the Government provided by that Constitution. The Government of the Commonwealth, consisting of two sets of legislative, executive and judicial departments, central and provincial, does not constitute the community. At the back of the Government lies the amending power—the *quasi*-sovereign organization of the Commonwealth within the Constitution; at the back of the Commonwealth and the Constitution is the British Parliament, its creator and guardian, whose legal relationship to it requires that the Commonwealth should be described, not as an absolutely sovereign organization, but by some term indicating a degree of subordination to that body. (Burgess, Political Sc., I., p. 57.)

The Commonwealth is established by a clause in the Imperial Act which could operate antecedently to and independently of the Constitution detailed in Clause 9, and of the machinery and procedure therein specified. In other words, the Commonwealth is the legal objective realization of an Australian *quasi*-Federal State or a *quasi*-National State, using those phrases in a sense to be hereafter explained. What, then, are the essential attributes and characteristics of the Commonwealth "as established by the Act?" These may be thus summarized:—First, its population basis; secondly, its territorial basis; thirdly, its federal principle; fourthly, its Imperial relationship; resulting in the establishment of a united people, upon a defined territory, organized on a federal plan, consistently with the Imperial connection, legally equipped for political action and development.

(1.) Population Basis.—Clause 3, illustrated by the preamble of the Act, explicitly provides that on the day appointed by the Queen's proclamation the people of the concurring colonies shall be united in a Federal Commonwealth. This union is not founded on force or coercion, but on a consensus of opinion induced by a consciousness of common interests and mutual benefit. The people so agreeing had all the elements of ethnic unity, such as sameness of race, language, literature, history, custom, faith and order of life, combined with the contributing influences of antecedent intercourse and territorial neighbourhood. (Burgess' Political Sc., vol. I., p. 2.)

Hence there were, co-existing with the desire for union, all the conditions and requirements essential for successful and harmonious union. These people, then, formerly living under separate systems of government are, by Clause 3 of the Act, declared to be united in a Federal Commonwealth, and by Clause 4 the Commonwealth is established. If the Act had given no further explanation, and had enumerated no other incidents or attributes of the Commonwealth, it might have been contended that the

Commonwealth was merely a personal union of the people without any other element of cohesion and organization; but all doubt on that point is removed by important phrases which occur in other clauses.

(2.) Territorial Basis.—In Clause 5 a distinction is drawn between the people "of every State" and "of every part of the Commonwealth." One expression relates to human beings, as residents of States, whilst the other evidently refers to land or country which might not be within a State, but might nevertheless be within the Commonwealth. In the clause now under review the States are defined as such of the colonies as form the union and become "parts of the Commonwealth." In the Imperial Acts erecting the colonies they are described as territories included within certain geographical boundaries. Hence, if the colonies are parts of the Commonwealth, their territories are by the terms of the definition "parts of the Commonwealth." These words, therefore, clearly show that the Commonwealth is a territorial community, having the right to conduct its governing operations in, over, and through certain territory, and, when they are read in conjunction with certain sections of the Constitution, it is plain that the Commonwealth has the right of eminent domain which may be exercised in the manner prescribed by the Constitution throughout its confines, when necessary for the execution and enjoyment of the powers conferred by the Constitution. (Kohl *v.* United States, 91 U.S., 367.) So far the Commonwealth "established under this Act" is a united people, organized within a united territory; the people being the population of the former colonies, and the territory being coincident with the territorial limits of the former colonies in addition to such other territory as may be added to the Commonwealth under section 122. Two other important features of the Commonwealth are, however, discoverable in the actual language of the Act.

(3.) Federal Form.—The only word in the Act creating the Commonwealth which is at all suggestive of structural design or functional distribution is the word "federal;" it occurs once in the preamble and once in the clause under review, as descriptive of the form and structure of the new community. It is true that it appears in several passages in the constitution, but there it is descriptive of the central governing organs of the community, and not of the community itself. The Commonwealth is declared to be a Federal Commonwealth. The original and fundamental idea implied by "federal" and its various shades of meaning, as used in modern political literature, have been already analysed. (See Note. § 27, "Federal," *supra.*)

(4.) Imperial Relationship.—By the preamble the Commonwealth is declared to be "Under the Crown;" it is constitutionally a subordinate, and not an independent Sovereign community, or state. But its population is so great, its territory so vast, the obvious scope and intention of the scheme of union are so comprehensive, whilst its political organization is of such a superior type, that it is entitled to a designation which, whilst not conveying the idea of complete sovereignty and independence, will serve to distinguish it from an ordinary provincial society.

Quasi-National State.—Burgess contends that there is no such thing in political science as a "federal State;" that this adjective is applicable only to the organs of government and the distribution and division of governing powers; that its application to the State itself is due to a confusion of State with Government. (Political Sc., vol. I. p. 165.) What is really meant by such expressions as "Federal State" or "Federal Commonwealth," technically inaccurate, according to this eminent jurist, is a National State, with a federal government—a dual system of government under common sovereignty. Such a State comprehends a population previously divided into a group of independent States. Certain causes have contributed to a union of this group of States into a single State, and the new State has constructed a government for the general affairs of the whole State, and has left to the old bodies, whose sovereignty it has destroyed, certain residuary powers of government to be exercised by them so long as the new State makes no other disposition. The old States become parts of the Government in the new States, and nothing more. (Political Sc., I. 79.) The Commonwealth

therefore, may be said to possess nearly all, but not quite all, the characteristics and features of a national State. In order to denote its subordinate relation as an integral part of the British Empire, and not an independent sovereign State, some qualifying adjective or particle is necessary, such as "*semi*" or "*quasi*." We may therefore define the Commonwealth, established by this Act, as a *quasi*-national State (or *semi*-national State) composed of a homogeneous and related people of ethnic unity, occupying a fixed territory of geographical unity, bound together by a common Constitution, and organized by that Constitution under a dual system of provincial and central government, each supreme within its own sphere, and each subject to the common Constitution.

Secondary Meaning of "Commonwealth."—In several sections of the Constitution the term "Commonwealth" is used inartistically to denote the Central Government as contrasted with the Governments of the States, *i.e.*, "The Legislative Power of the Commonwealth," sec. 1; "the Executive Power of the Commonwealth," sec. 61; "the Judicial Power of the Commonwealth," sec. 71. These expressions refer to the Legislative, Executive, and Judicial Powers granted by the Constitution to the various organs of the Central Government. In the American Constitution the term "United States" is sometimes used to describe the Union and sometimes to denote the Central Government of the Union. These are instances of the secondary use and significance of corresponding terms in both Constitutions. The secondary use and meaning of "Commonwealth" must be distinguished from its primary and proper meaning as defined in the constructive clauses of the Imperial Act.

§ 44. "States."

Various Meanings.—We will first consider the term "State" as popularly understood in English speaking communities, without reference to technical or external relations; secondly, "State" in its international significance; thirdly, "State" in its federal significance; and finally, "Nation" as contrasted with "State."

Popular Significance.—In a popular sense the word "State" is often employed to denote the governing political authority of a country as distinguished from the inhabitants thereof; the mechanism of government; the organism of government as opposed to the persons who have to submit to the rule of the government; the central government, in contradistinction to the local governing authorities and the local governing institutions. Sometimes it is specially used to contrast the secular and political with the ecclesiastical organization of a country. (Ency. of British Law, vol. XI., p. 710.)

International Significance.—"State" has a technical meaning known to international law, according to which it is an organized political entity, having certain recognizable predicates, such as population, territory, independence of other entities like itself, and an organized system of self-government enabling it to determine its own internal organization and development. (Sheldon Amos, The Science of Politics (1883), p. 64.) The modern notion of the State was not brought into clear consciousness till a number of parallel States presented themselves side by side, and each of them by enforcing its own claim against the others manifested to itself and to the world its own personality, independence and integral unity. (*Id.*) For the purpose of comparison other definitions of "State" are here appended.

"A State is a collective body composed of a multitude of individuals united for their safety and convenience and intended to act as one man. Such a body can be only produced by a political union, by the consent of all persons to submit their own private wills to the will of one man or of one or more assemblies of men to whom the supreme authority is entrusted, and this will of that one man or one or more assemblies of men is, in different States, according to their different constitutions understood to be law." (Blackstone's Commentaries, I. 52.)

"This description of a State, it will be observed, omits all reference to territoriality and independence of other States; as such it is deficient. Further it is only applicable to States in which the supreme authority is entrusted to the will of one man, or one or more assemblies of men, and is not applicable to a federation in which the ultimate power is reserved to the people. (Judge Wilson's Comments on Blackstone's theory, 2 Dallas, 458.)

"For all the purposes of international law, a State may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries, capable of making peace and war, and of entering into international relations with other communities." (Phillimore's International Law, I., p 81.)

"By a sovereign State we mean a community, or number of persons permanently organized under a sovereign Government of their own; and by a sovereign Government we mean a Government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior Government. These two factors, the one positive, the other negative, the exercise of power and the absence of superior control, compose the notion of sovereignty, and are essential to it." (Montague Bernard, Neutrality of Great Britain during the American Civil War.)

"The State is a particular portion of mankind viewed as an organized unit, and its characteristics are the comprehension of individuals within its territory, the exclusiveness of its powers, its permanence and its sovereignty, that is its absolute, unlimited, and universal power over individuals who are its subjects. These constitute the essence of a State." (Burgess, Political Sc., I., p. 51-2.)

"The State is now the people in sovereign organization. This is an immense advance in the development of the State. It is the beginning of the modern political era. Under its educating influence the consciousness of the State spreads rapidly to the great mass of the population, and the idea of the State becomes completely secularized and popularized. The doctrine that the people, in ultimate sovereign organization, are the State, becomes a formulated principle of the schools, and of political science and literature. The jurists and publicists, and the moral philosophers, lead in the evolution of the idea. The warriors and the priests are assigned to the second place. The sovereign people turn their attention to the perfecting of their own organization. They lay hands upon the royal power. They strip it of its apparent sovereignty, and make it purely office. If it accommodates itself to the position, it is allowed to exist; if not, it is cast aside. At last the State knows itself, and is able to take care of itself. The fictions, the make-shifts, the temporary supports, have done their work, and done it successfully. They are now swept away. The structure stands upon its own foundation. The State, the realization of the universal in man, in sovereign organization over the particular, is at last established—the product of the progressive revelation of the human reason through history." (Burgess, *id.*, p. 66.)

"A colony is, at the outset, no State. It is local government, with perhaps more or less of local autonomy. It may grow to contain in itself the elements to form a State, and may become a State by revolution, or by peaceable severance from the motherland; but before this, there is one simple State, and after it, there are two simple States, but at no time is there a compound State. If the motherland should so extend its state organization as to include the colony as active participant in the same, the state organization would still be simple; it would only be widened. A larger proportion of the population of such a State would be thereby introduced into the sovereign body. The only change which could be effected in this manner, as to the form of State, would be possibly the advance from monarchy to aristocracy, from aristocracy to democracy. The sovereignty would not be divided between the motherland and the colony, for the sovereignty is and must be a unit. It must be wholly in the motherland or wholly in the motherland and colony, as one consolidated, not compounded, organization." (Burgess, *id.*, p. 77-8.)

Federal Significance.—The term "State" has also a special meaning applied to a federal system. In federal nomenclature a State is one of a number of communities formerly autonomous and self-governing, such as the States of America, and the States of Germany, which have agreed to transfer a portion of their political power to a union of the States, in the governing operations of which they retain an active share. Internationally such communities have no status as States; they are States only in a titular sense. "The old States become parts of the government in the new State, and nothing more. It is no longer proper to call them States at all. It is in fact only a title of honour, without any corresponding substance." (Burgess, Political Sc., I., p. 80.) They could, with equal convenience and propriety, be designated by other names, such as the Provinces of Canada, and the Cantons of Switzerland. Blackstone's definition, and all other standard definitions of a State would, of course, be quite inapplicable to those communities called "States" which are merely parts of a federal or national State, using those terms in the same sense previously discussed. A "State," therefore, in the ordinary sense of a federal constitution, is said to be a political community of free

citizens, occupying a territory of defined boundaries, and organized with other similar communities, under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, that forms the distinct and greater political unit which the American constitution designates as the United States. (Texas *v.* White, 7 Wall., 721) A State such as one of the United States of America is a body of political co-equals, or units, commonly called "the people," in whom, as electors, the sovereign and uncontrollable power originally resides, and whose will, as expressed and proclaimed by them in their written Constitution, is their sole organic law and bond of political existence. The United States are a community of such States, politically united only by a federal constitution and general government founded therein. (Bateman, Political and Constitutional Law, p. 21.)

"The States were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any proposition from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war. On the other side, if the union of the States comprises the idea of a confederation, it comprises that also of consolidation. A union of the States is a union of the men composing them, from whence a national character results to the whole. Congress can act alone without the States, they can act (and their acts will be binding) against the instructions of the States. If they declare war, war is *de jure* declared; captures made in pursuance of it are lawful; no acts of the States can vary the situation, or prevent the judicial consequences. If the States, therefore, retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects, they formed a nation in others. The Convention could clearly deliberate on and propose any alterations that Congress could have done under the Federal Articles. And could not Congress propose, by virtue of the last article, a change in any article whatever, and as well that relating to the equality of suffrage as any other? He made these remarks to obviate some scruples which had been expressed. He doubted much the practicability of annihilating the States; but thought that much of their power ought to be taken from them." (Rufus King in the Federal Convention 1788; Elliott's Debates 2nd ed. V., pp. 212-213)

"Some contend that the States are sovereign, when in fact they are only political societies. The States never possessed the essential rights of sovereignty. They were always vested in Congress. Their voting as States in Congress is no evidence of their sovereignty. The State of Maryland voted by counties. Did this make the counties sovereign? The States, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation." (Madison in the Federal Convention; Elliott's Debates 2nd ed. I., p. 461.)

A great controversy went on in America for many years as to whether the States, as integrated in the federal constitution, formed a union of independent commonwealths acting together for the limited purposes of general government, or whether they formed a single sovereign and independent political State composed of the whole mass of the American people. A few years before 1889, when Mr. Bryce published his book, the American Protestant-Episcopal Church at its annual Convention introduced, among the short sentence prayers, one suggested by an eminent New England divine, "O Lord, bless our nation." Next day the prayer was brought up for reconsideration, when so many objections were raised by the laity to the word nation, as importing a recognition of national unity, that it was dropped, and instead were adopted the words, "O Lord, bless the United States." Referring to this incident Mr. Bryce says:—

"But it is only the expression, on its sentimental side, of the most striking and pervading characteristic of the political system of the country, the existence of a double government, a double allegiance, a double patriotism. America is a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs." (The American Commonwealth, I., p. 12.)

"The acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a League of States into a Federal State, by giving it a National Government, with direct authority over all citizens. But as this national government

was not to supersede the governments of the States, the problem which the Constitution-makers had to solve was two-fold. They had to create a central government. They had also to determine the relations of this central government to the States as well as to the individual citizen. An exposition of the Constitution and criticism of its working must therefore deal with it in these two aspects; as a system of national government built up of executive powers and legislative bodies, like the monarchy of England or the republic of France, and as a Federal system linking together and regulating the relations of a number of commonwealths which are for certain purposes, but for certain purposes only, subordinated to it." (*Id.*, p. 29.)

"The government of the United States is federal government. By this I do not mean that the central government alone is a federal government. It is true that this term is generally applied to it, but I think this arises from the mistaken assumption that it is the government of a federal State. I think I have shown that there is no such thing as a federal State; that, in what is usually called the federal system, one State employs two separate and largely independent governmental organizations in the work of government. What I mean, therefore, in the proposition that the government of the United States is federal government, is that the whole governmental system is federal and that the central government is one of two governmental organizations employed by the State." (Burgess, Political Sc. II., p. 18.)

A Confederacy.—A confederacy is not a State. The members of the confederacy remain separate States. The confederacy has no sovereignty; it is merely a system of government founded on inter-state treaty dissolvable at will.

Commonwealth and States.—As we have already seen, Dr. Burgess contends that there is no such thing as a federal State. A federation, he says, is merely a dual system of government under a common sovereignty. (Political Sc., I., p. 79.) This definition is partly in conflict with that of Professor Dicey, who recognizes the possibility of a federal State, which he defines as a political contrivance intended to reconcile national unity and power with the maintenance of State rights. (Law of the Constitution, p. 131.) It does not agree with that of Mr. Bryce, who in the foregoing passage describes the United States as a Federal State. (American Comm., p. 12.)

From this conflict of literary authority we turn to the Imperial Act constituting the Commonwealth, where we find it described as a Federal Commonwealth, and we may assume that the expression is there used by the framers in either the first or the second of the four meanings already analysed (see Note, § No. 27, "Federal," *supra*), viz., as (1) descriptive of a union of States, linked together as co-equal societies, forming one political system, regulated and co-ordinated in their relations to one another by a common Constitution; or (2) as descriptive of the new community formed by such union. In this Act the term "States" is used as descriptive of those co-equal societies.

The Commonwealth, in almost every feature, answers the German expression *Bundesstaat* or composite State. In this sense it may be described as a single State which is administered by a dual system of government—one set of ruling organs dealing with those matters common to the whole State and another dealing with those relating to the several communities, considered as separate entities. (R. R. Garran, The Coming Commonwealth, p. 17.)

Nation.—As an abstract definition, a Nation may be described as a population of ethnic unity inhabiting a territory of geographic unity. By ethnic unity is meant a population having a common language, a common literature, common traditions and history, common customs, and a common consciousness of rights and wrongs. By geographic unity is meant a territory separated from other territory by natural physical boundaries. The nation, as thus defined, is the nation in perfect and complete existence, and this is hardly as yet anywhere to be found. (Burgess, Political Science, I., p. 2.) Where geographic and ethnic unities coincide, or very nearly coincide, the nation is almost sure to become a State. The nation must pass through many preliminary stages in its development before it reaches the maturity of a political State. (*Id.* p. 3.)

"Not all nations, however, are endowed with political capacity or great political impulse. Frequently the national genius expends itself in the production of language, art, or religion; frequently it shows itself too feeble to bring even these to any degree of perfection. The highest talent for political organization has been exhibited by the Aryan

nations, and by these unequally. Those of them remaining in the Asiatic home have created no real States; and the European branches manifest great differences of capacity in this respect. The Celt, for instance, has shown almost none; the Greek but little, while the Teuton really dominates the world by his superior political genius. It is therefore not to be assumed that every nation must become a State. The political subjection or attachment of the unpolitical nations to those possessing political endowment appears, if we may judge from history, to be as truly a part of the course of the world's civilization as is the national organization of States. I do not think that Asia and Africa can ever receive political organization in any other way. Of course, in such a state of things, the dominant nation should spare, as far as possible, the language, literature, art, religion and innocent customs of the subject nation; but in law and politics it is referred wholly to its own consciousness of justice and expedience. Lastly, a nation may be divided into two or more States on account of territorial separation—as for example, the English and the North American, the Spanish-Portuguese and the South American - and one of the results of this division will be the development of new and distinct national traits. From these reflections, I trust that it will be manifest to the mind of every reader how very important it is to distinguish clearly the nation, both in word and idea, from the State; preserving to the former its ethnic signification, and using the latter exclusively as a term of law and politics. (Burgess, Political Sc., I., pp. 3-4.)

§ 45. "Parts of the Commonwealth."

Territoriality of the Commonwealth.—The territorial basis of the Commonwealth has been already briefly referred to. The above words so clearly and emphatically establish this principle, that special attention should be drawn to them at this stage. Grotius, in his celebrated treatise, wrote: "There are commonly two things which are subject to sovereignty *(Imperium)*; first, persons, which alone sometimes suffice, as an army of men, women and children seeking new plantations; secondly, lands, which are called territory." (*De Jure Belli et Pace II*, pp. 3 and 4.) The case contemplated by Grotius as presenting the possible condition of a non-territorial sovereignty could scarcely occur in our time. It would be difficult to recognize the existence of a State without its undisputed possession of a defined territory; the only approach to such a phenomenon that might temporarily arise would be a rebel army wandering from place to place and recognized as a belligerent, which is tantamount to being recognized as a State. (Encyc. of the Law of England, Vol. xi. p. 710.) This, however, would be a feeble example of a State. It would have, at best, a precarious existence; its occupation of territory would be shifting, uncertain, and undefined; it would lack that continuity, cohesion, and recognition which are the essential attributes of a State. On the whole, therefore, the dictum of this distinguished jurist, whatever possible application it might have had in his time (1583-1645), may be regarded as untenable in the present age, in which territorial occupation is looked upon as one of the most important factors of the constitution of a true State. The inevitable tendency towards the establishment of territorial sovereignty, as an advance on personal and tribal sovereignty, is an historical fact of great significance. It is thus referred to by Sir Henry Maine:—

"From the moment when a tribal community settles down finally upon a definite space of land, the Land begins to be the basis of society in place of Kinship. The constitution of the Family through actual blood-relationship is of course an observable fact, but, for all groups of men larger than the Family, the Land on which they live tends to become the bond of union between them at the expense of Kinship, ever more and more vaguely conceived. We can trace the development of idea both in the large and now extremely miscellaneous aggregations of men combined in States or Political Communities, and also in the smaller aggregations collected in Village-Communities and Manors, among whom landed property took rise. The barbarian invaders of the Western Roman Empire, though not uninfluenced by former settlements in older homes, brought back to Western Europe a mass of tribal ideas which the Roman dominion had banished from it; but, from the moment of their final occupation of definite territories, a transformation of these ideas began. Some years ago I pointed out (Ancient Law, pp. 103 *et seq.*) the evidence furnished by the history of International Law that the notion of territorial sovereignty, which is the basis of the International system, and which is inseparably connected with dominion over a definite area of land, very slowly substituted

itself for the notion of tribal sovereignty. Clear traces of the change are to be seen in the official style of kings Of our own kings, King John was the first who always called himself King of England. (Freeman, 'Norman Conquest,' I. 82, 84.) His predecessors commonly or always called themselves Kings of the English. The style of the king reflected the older tribal sovereignty for a much longer time in France. The title of King of France may no doubt have come into use in the vernacular soon after the accession of the dynasty of Capet, but it is an impressive fact that, even at the time of the Massacre of St Bartholomew, the Kings of France were still in Latin *Reges Francorum*, and Henry the Fourth only abandoned the designation because it could not be got to fit in conveniently on his coins with the title of King of Navarre, the purely feudal and territorial principality of the Bourbons. (Freeman, *loc. cit.*) We may bring home to ourselves the transformation of idea in another way. England was once the country which Englishmen inhabited. Englishmen are now the people who inhabit England. The descendants of our forefathers keep up the tradition of kinship by calling themselves men of English race, but they tend steadily to become Americans and Australians. I do not say that the notion of consanguinity is absolutely lost, but it is extremely diluted, and quite subordinated to the newer view of the territorial constitution of nations. The blended ideas are reflected in such an expression as 'Fatherland,' which is itself an index to the fact that our thoughts cannot separate national kinship from common country. No doubt it is true that in our day the older conception of national union through consanguinity has seemed to be revived by theories which are sometimes called generally theories of Nationality, and of which particular forms are known to us as Pan-Sclavism and Pan-Teutonism. Such theories are in truth a product of modern philology, and have grown out of the assumption that linguistic affinities prove community of blood. But wherever the political theory of Nationality is distinctly conceived, it amounts to a claim that men of the same race shall be included, not in the same tribal, but in the same territorial sovereignty. We can perceive, from the records of the Hellenic and Latin city-communities, that there, and probably over a great part of the world, the substitution of common territory for common race, as the basis of national union, was slow, and not accomplished without very violent struggles." (Maine's Early History of Institutions, 72-75.)

§ 46. "Such of the Colonies."

New South Wales.—The area of this colony, the oldest established of the Australian group, is 306,066 square miles. It is bounded on the east by the Pacific ocean, on the south by the colony of Victoria, on the north by the colony of Queensland, and on the west by the colony of South Australia. Population, 31st Dec., 1899, 1,348,400; public revenue from all sources, 1898-9, £9,572,912. Executive Government at the passing of the Commonwealth of Australia Constitution Act:—Governor and Commander-in-Chief, the Right Honourable William Earl Beauchamp, K.C.M.G.; Lieutenant-Governor, Sir Frederick Matthew Darley, K.C.M.G., C.J. Administration—Premier, Colonial Treasurer, and Minister for Railways, Sir William J. Lyne; Colonial Secretary, the Hon. John See; Secretary for Lands, the Hon. T. H. Hassall; Secretary for Public Works, the Hon. E. W. O Sullivan; Attorney-General, the Hon. B. R. Wise, Q.C.; Minister for Public Instruction and Industry, the Hon. John Perry; Minister for Justice, the the Hon. W. H. Wood; Secretary for Mines and Agriculture, the Hon. J. L. Fegan; Postmaster-General, the Hon. W. P. Crick; Representative in the Legislative Council, the Hon. F. B. Suttor.

New Zealand.—There are two principal islands, known as the North and Middle Islands, besides the South or Stewart's Island, and small outlying islands. The group is nearly 1,000 miles long, and 200 miles across at the broadest part. Its coast line extends over 4,000 miles. New Zealand is situated 1,200 miles to the east of the Australian continent. The area of New Zealand is estimated to embrace 104,471 square miles, of which the North Island comprises 44,468 square miles, the Middle Island 58,525, and Stewart's Island 665 square miles. Population, 31st Dec., 1898, 743,463; public revenue, 1898-9, £5,258,228. Executive Government at the passing of the Commonwealth of Australia Constitution Act:—Governor and Commander-in-Chief, the Right Hon. the Earl of Ranfurly, K.C.M.G. Administration—Premier, Treasurer, Commissioner of Trade and Customs, Minister of Labour, Minister of Native Affairs, the Right Hon. R. J. Seddon, P.C.; Colonial Secretary, Postmaster-General, Minister of

Railways, Industries, and Commerce, the Hon. J. G. Ward; Minister of Lands and Agriculture, Commissioner of Forests, the Hon. J. McKenzie; Commissioner of Stamp Duties and Member representing the Native Races, the Hon. J. Carroll; Minister of Education, Immigration and in charge of Hospitals and Charities, the Hon. W. C. Walker; Minister of Public Works, Marine and Printing Office, the Hon. W. Hall-Jones; Minister for Justice and Defence, the Hon. J. Thompson

Queensland.—Queensland comprises the whole north-eastern portion of the Australian continent, including the adjacent islands in the Pacific Ocean and in the Gulf of Carpentaria. The territory is of an estimated area of 668,497 English square miles, with a seaboard of 2,550 miles. Population, 31st Dec., 1899, 482,400; public revenue, 1898-9, £4,174,086. Executive Government at the passing of the Commonwealth of Australia Constitution:—Governor and Commander-in-Chief, the Right Hon. Baron Lamington, K.C.M.G.; Lieutenant-Governor, Sir Samuel W. Griffith, G.C.M.G., C.J. Administration—Premier, Treasurer, and Secretary for Mines, the Hon. Robert Philp; Chief Secretary, the Hon. J. R. Dickson, C.M.G.; Home Secretary, the Hon. J. F. G. Foxton; Attorney-General, the Hon. Arthur Rutledge, Q.C.; Secretary for Public Lands, the Hon. W. B. H. O'Connell; Secretary for Railways and Public Works, the Hon. John Murray; Secretary for Agriculture, the Hon. J. V. Chataway; Postmaster-General and Secretary for Public Instruction, the Hon. J. G. Drake; Ministers without portfolios, the Hon. G. W. Gray and D. H. Dalrymple.

Tasmania.—The area of the colony is estimated at 26,215 square miles, of which 24,330 square miles form the area of Tasmania proper, the rest constituting that of a number of small islands, in two main groups, the north-east and north-west. Population, 31st Dec., 1899, 182,300; public revenue, 1898-9, £908,223. Executive Government at the passing of the Commonwealth of Australia Constitution Act:—Captain-General and Governor-in-Chief, Viscount Gormanston, K.C.M.G. Administration—Premier and Attorney-General, the Hon. N. E. Lewis; Chief Secretary, the Hon. G. T. Collins; Treasurer, the Hon. B. S. Bird; Minister of Lands, Works, and Mines, the Hon. E. Mulcahy; without portfolio, the Hon. F. W. Piesse.

Victoria.—Victoria is bounded on the north and north-east by a straight line drawn from Cape Howe to the nearest source of the river Murray, thence by the course of that river to the eastern boundary of the colony of South Australia, thence by that boundary to the Southern Ocean. It has an area of 87,885 square miles. Population, 31st Dec., 1899, 1,162,900; public revenue, 1898-9, £7,396,943. Executive Government at the passing of the Commonwealth of Australia Constitution Act:—Lieutenant-Governor, the Hon. Sir John Madden, K.C.M.G., C.J. Administration—Premier and Chief Secretary, the Hon. Allan McLean; Treasurer, the Hon. Wm. Shiels; Attorney-General, the Hon. Wm. Hill Irvine; Solicitor-General, the Hon. John M. Davies; Minister of Mines, Water Supply, and Railways, the Hon. Alfred R. Outtrim; Minister of Public Works and Agriculture, the Hon. Geo. Graham; Minister of Lands, the Hon. James McColl; Minister of Education and Trade and Customs, the Hon. Dr. Charles Carty Salmon; Postmaster-General, the Hon. Wm. A. Watt; Minister of Defence and Public Health, the Hon. Donald Melville; without portfolio, the Hon. James Balfour.

South Australia.—The original boundaries of the province, according to the statute of 4 and 5 Will. IV. c. 95, were fixed between 132° and 141° E. long. as its eastern and western boundaries, the 26° of S. lat. as its northern limit and bounded on the south by the Southern Ocean. The boundaries were subsequently extended; under the statute of 24 and 25 Vic. c. 44, a strip of land between 132° and 129° E. long. was added on October 10th, 1861. (Statesman's Year Book, 1899; Webb's Imperial Law, p. 99.) The total area of South Australia proper is 380,070 square miles; and including the Northern Territory it is calculated to amount to 903,690 square miles. Population, 31st Dec., 1899, 370,700; public revenue, 1898-9, £2,731,208. Executive Government at the pass-

ing of the Commonwealth of Australia Constitution Act:—Governor and Commander-in-Chief, the Right Hon. Baron Tennyson, K.C.M.G.; Lieutenant-Governor, the Right Hon. Sir S. J. Way, Bart., J.C. Administration—Premier and Treasurer, the Hon. F. W. Holder; Chief Secretary, the Hon. G. Jenkins; Attorney-General, the Hon. John H. Gordon; Commissioner of Lands and Minister for Mines, the Hon. L. O'Loughlin]; Commissioner of Public Works, the Hon. R. W. Foster; Minister of Education and Agriculture, the Hon. E. L. Batchelor.

Northern Territory.—The Northern Territory of South Australia, formerly known as Alexandra Land, embraces an immense tract of country, and contains an area of about 523,620 square miles. It is bounded on the north by the Indian Ocean—that portion of it known as the Arafura Sea; on the south by the 26th parallel of south latitude, which is the line of demarcation between it and South Australia proper; on the east by the 138th meridian of east longitude, which divides it from Queensland; and on the west by the 129th meridian of east longitude, which separates it from Western Australia. It also comprises all the bays, gulfs, and adjacent islands on its northern coasts. The eastern boundary line of this territory cuts the coast near the mouth of the Wentworth river, on the south-east coast of the Gulf of Carpentaria, and the western boundary near Cape Domett, in Cambridge Gulf. (Aust. Hand Book [1900], p. 390.)

The Home Government originally proposed to annex this territory to Queensland; but, in consequence of the favourable report given by Mr. John M'Douall Stuart (the explorer) of the country on the northern coast, the South Australian Government petitioned the Home Government for its annexation to South Australia. This request was granted, and by royal letters patent of 6th July, 1863, a "supplementary commission" was issued extending the boundaries of that colony accordingly. The letters patent recited the provision of the Act (5 and 6 Vic. c. 76, sec. 51), empowering the Queen by letters patent to separate from New South Wales any part of the territory of that colony lying to the northward of 26° south latitude, and to erect the same into a separate colony or colonies (see p. 72, *supra*). They also recited the Act (24 and 25 Vic. c. 44, sec. 2), which empowered the Queen to annex to any Australian colony any territories which in the exercise of the above powers might have been erected into a separate colony; with a proviso that it should be lawful for the Queen in such letters patent to reserve the power of revoking or altering the same, and also on such revocation to exercise the power again. The letters patent then proceeded to declare that "We have thought fit, in pursuance of the powers so vested in Us, and of all other powers and authorities to Us in that behalf belonging, to annex, and we do hereby annex to Our said colony of South Australia, until We think fit to make other disposition thereof," so much of the colony of New South Wales as lies to the northward of 26° south latitude, and between 129° and 138° east longitude, together with the bays, gulfs, and adjacent islands; "and we do hereby reserve to Us, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our letters patent, as to Us or them shall seem fit." (Parl. Papers [S.A.]. 1896, Vol. ii., No. 113.)

Western Australia.—As defined by Royal Commission, Western Australia includes all that portion of the continent situated to the westward of 129° E. longitude. The greatest length of this territory from Cape Londonderry in the north to Peak Head (south of King George's Sound) in the south is 1,450 miles, and its breadth from Steep Point near Dirk Hartog's Island, on the west, to the 129th meridian, on the east, about 850 miles. According to the latest computation, the total estimated area of the colony is 975,920 English square miles, including islands. Population 31st December, 1898—168,129; public revenue, 1898-9—£2,478,811. Executive Government at the passing of the Commonwealth of Australia Constitution Act:—Governor and Commander-in-Chief, Lieutenant-Colonel Sir Gerard Smith, K.C.M.G. Administration: Premier and Colonial Treasurer—The Right Hon. Sir John Forrest, P.C., K.C.M.G.; Commissioner of Railways and Director of Public Works—the Hon. F. H. Piesse; Minister for Crown Lands—the Hon. G. Throssell; Minister of Mines—the Hon. H. B. Lefroy; Attorney-

General—the Hon. R. W. Pennefather; Colonial Secretary—the Hon. G. Randell; without portfolio—the Hon. S. Burt, Q.C.

§ 47. "Colonies or Territories."

The only "States" at the outset will be the "Original States," namely, New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania. But under sec. 121 the Federal Parliament may admit or establish new States; and any colonies or territories which are so established as States will thenceforth be included in the definition. Apart from New Zealand and the northern Territory of South Australia, new States are hardly likely to be formed except by the sub-division of existing States.

Territories.—A description may here be given of the chief Australasian territories which are likely, in time, to become territories of the Commonwealth—though their size or political condition, or both, render it unlikely that any of them will be admitted to the rank of States.

Norfolk Island.—This island, about five miles in length, and three in breadth, situated 900 miles from the Australian main land, and 1,100 miles from Sydney, was discovered by Captain Cook, on 9th October, 1774. It is said to be one of the most beautiful spots in the Pacific. The inhabitants are governed, since 14th November, 1896, by a Resident Magistrate, and an elective Council of 12 members; they are subject to the instructions of the Governor of New South Wales, who is expected to visit it once during his term of office. Area, 10 square miles; population about 750.

Lord Howe Island.—This picturesque island, seven miles in length, and about one and half miles in breadth, situated about 400 miles from Sydney, was discovered by Lieutenant Ball, on 14th February, 1788, whilst on a voyage in H.M.S. *Supply* from Port Jackson to found a Settlement at Norfolk Island. It is administered by the Government of New South Wales, and since 1882, it has been under the jurisdiction of a visiting Magistrate from Sydney. Population, 55.

Fiji.—The Fiji Islands were ceded to the Queen by the Chiefs and people thereof, and the British flag was hoisted on 10th October, 1874. Rotumah was annexed in December, 1880. The islands are ruled by a Governor, assisted by an Executive and a Legislative Council. There are about 80 inhabited islands in the group, containing a total area, including Rotumah, of about 8,000 square miles, and having a population of 121,180; of whom 99,773 are Fijians, and the rest Indians, Polynesians, Rotumans, and Europeans.

New Guinea.—By letters patent, dated 8th June, 1888, British New Guinea was erected into a separate possession, as part of the Queen's dominions. Its area is calculated to include about 86,000 square miles. The territory is at present governed by a local administrator, assisted by an Executive Council; the sum of £15,000 per year being guaranteed by the colonies of Queensland, New South Wales, and Victoria towards the expenses of governing the territory.

Repeal of Federal Council Act. (48 and 49 Vic. c. 60.)

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia[48] and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Historical Note.—Clause 6 of the Commonwealth Bill of 1891 was in almost identical words, and was adopted by the convention of 1897-8 without debate. At the Melbourne session, verbal amendments were made before the first report and after the fourth report.

§ 48. "Laws Passed by the Federal Council."

The following Acts have been passed by the Federal Council, viz :—

(1.) 49 Vic. No. 1. An Act for shortening the language used in Acts of the Federal Council of Australasia. Cited as "The Federal Council Interpretation Act, 1886." (Vic. Gov. Gaz., 19 Feb., 1886, p. 396.)

(2.) 49 Vic. No. 2. An Act to facilitate the proof throughout the Federation of Acts of the Federal Council and of the Acts of the Parliaments of the Australasian Colonies, and of Judicial and Official Documents and of the Signatures of certain Public Officers. Cited as "The Federal Council Evidence Act, 1886." (Vic. Gov. Gaz., 19 Feb., 1886, p. 397.)

(3.) 49 Vic. No. 3. An Act to authorize the service of Civil Process out of the jurisdiction of the colony in which it is issued. Cited as "The Australasian Civil Process Act, 1886." (Vic. Gov. Gaz., 19 Feb., 1886, p. 397.)

(4.) 49 Vic. No. 4. An Act to make provision for the enforcement within the Federation of judgments of the Supreme Court of the Colonies of the Federation. Cited as "The Australasian Judgments Act, 1886." (Vic. Gov. Gaz., 19 Feb., 1886, p. 398.)

(5.) 51 Vic. No. 1. An Act to regulate the Pearl Shell and Beche de mer Fisheries in Australasian waters adjacent to the colony of Queensland. Cited as "The Queensland Pearl Shell and Beche de mer Fisheries (extra-territorial) Act, 1888." Reserved for the Royal assent 20 Jan., 1888, and proclaimed 19 July, 1888. (Vic. Gov. Gaz., 17 Aug., 1888, p. 2576 ; 31 Aug., 1888, p. 2706 ; and 7 Sept., 1888, p. 2753.)

(6.) 52 Vic. No. 1. An Act to regulate the Pearl Shell and Beche de mer Fisheries in Australasian waters adjacent to the colony of Western Australia. Cited as "The Western Australian Pearl Shell and Beche de mer Fisheries (extra-territorial) Act of 1889." Reserved for the Royal assent 4 Feb. 1889, and proclaimed 18 Jan., 1890. (Vic. Gov. Gaz., 31 Jan., 1890, p. 332.)

(7.) 54 Vic. No. 1. An Act to facilitate the recognition in other colonies of Orders and Declarations of the Supreme Court of any colony in matters of Lunacy. Cited as "The Australasian Orders in Lunacy Act, 1891." (Vic. Gov. Gaz., 17 Feb., 1891, p. 903.)

(7.) 56 Vic. No. 1. An Act to make provision for the Discipline and Government of the Garrisons established at King George's Sound and Thursday Island at the joint expense of the Australian Colonies or some of them (3 Feb., 1893). Cited as "The Federal Garrisons Act, 1893." (Published in the Vic. Gov. Gaz., 3 March, 1893, p. 1131.)

(8.) 60 Vic. No. 1. An Act to provide for the naturalization within the Australian Colonies, or some of them, of persons of European descent naturalized in any of such colonies (1 Feb., 1897). Cited as "The Australasian Naturalization Act, 1897." (Vic. Gov. Gaz., 19 March, 1897, pp. 1121-2.)

(9.) 60 Vic. No. 2. An Act to make provisions for the enforcement in certain cases within the Australasian Colonies, or some of them, of Orders of the Supreme Courts of such Colonies for the production of Testamentary Instruments (1 Feb., 1897). Cited as "The Australasian Testamentary Process Act, 1897." (Vic. Gov. Gaz., 19 March, 1897, p. 1123.)

The colonies represented in the Federal Council were :—Victoria, Queensland, Western Australia, Tasmania, Fiji ; and also, for a period of two years (from 10th December, 1888, to 10th December, 1890), South Australia. (See Historical Introduction, p. 114, *supra*.)

Application of Colonial Boundaries Act. (58 and 59 Vic. c. 34.)

8. After the passing of this Act the Colonial Boundaries Act, 1895[49], shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

Historical Note.—At the Melbourne Session of the Convention, after the first report, this clause was proposed by Mr. O'Connor in precisely the form in which it now stands. (Conv. Deb., Melb., pp. 1,826-7.)

§ 49. "Colonial Boundaries Act."

This is an Act to provide, in certain cases, for the alteration of the boundaries of self-governing colonies. It provides as follows:—

(i.) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order-in-Council or letters-patent, the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony.

(ii.) Provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof.

(iii.) In this Act "self-governing colony" means any of the colonies specified in the schedule to this Act.

SCHEDULE.

Self-Governing Colonies.

Canada.	South Australia.	New Zealand.
Newfoundland.	Queensland.	Cape of Good Hope.
New South Wales.	Western Australia.	Natal.
Victoria.	Tasmania.	

The effect of this clause is to make the Colonial Boundaries Act apply, not to the separate States of the Commonwealth, but to the Commonwealth as a whole—just as it applies to the Dominion of Canada as a whole. In other words, the colonies which become States are in effect struck out of the schedule, and the Commonwealth of Australia is substituted.

The purpose of the Act is to confer general statutory authority on the Queen to alter the boundaries of a self-governing colony, with the consent of that colony, without the necessity of resorting to Imperial legislation in every case.

The reason for repealing the Act, so far as it applied to colonies which become States of the Commonwealth, is that the Constitution itself makes provision for the alteration of the boundaries of States. Sec. 123 provides that the Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of a majority of voters in the State, alter the limits of the State.

Now, therefore, the Colonial Boundaries Act only applies to the alteration of the boundaries of the Commonwealth. Apart altogether from that Act, the Commonwealth has power under section 121 to alter the boundaries of the Commonwealth by admitting new States; and sec. 122 contemplates, and perhaps impliedly gives, the power to accept or acquire new territories.

The first question is—What constitutes the consent of the Commonwealth within the meaning of the Colonial Boundaries Act? The consent of a colony is ordinarily given by its Legislature; and the consent here intended is evidently the consent of the Parliament of the Commonwealth. It may indeed be contended that by the Commonwealth, which is described in the Colonial Bonndaries Act, as "a self-governing colony," is meant the community; and that the consent of the community cannot be given either

by the Parliament of the Commonwealth or by the Parliaments of the States, or both, but only by the community in *quasi*-sovereign organization—*i.e.*, by the amending power. This, however, was certainly not the intention of the framers of the Colonial Boundaries Act, or of the Federal Constitution; whatever may be the teachings of political science as to the seat of *quasi*-sovereignty in the Commonwealth. The consent of Canada under the Colonial Boundaries Act is clearly to be given by the Parliament of Canada; and the consent of the Commonwealth means the consent of the Parliament of the Commonwealth. That is to say, the word "Commonwealth" is used here as in other provisions as referring to the central governing organs of the Commonwealth. (See notes § 17 and § 43 "Commonwealth," *supra*.)

Where the alteration of the boundaries of the Commonwealth involves merely territory which is not part of any State, the clause presents no further difficulty; but where it involves the alteration of the limits of a State, it becomes a question whether in addition to the consent of the Parliament of the Commonwealth, the consent of the Parliament and electors of the State is also necessary. The Colonial Boundaries Act, as amended by the Constitution Act, provides that Orders in Council, or letters patent, altering the boundaries of the Commonwealth, shall be valid if made with the consent of the Commonwealth; sec. 123 of the Constitution provides that the Parliament of the Commonwealth may, with the consent of the Parliament and a majority of the electors of a State, alter the limits of the State. The latter section certainly implies that the Parliament of the Commonwealth may not alter the limits of a State without such consent. The question is whether, in consenting to an alteration of boundaries by the Queen, the Parliament can be said to alter the limits of a State. Under sec. 123, the Parliament of the Commonwealth makes the alteration; under the Colonial Boundaries Act, the Queen makes the alteration, and the Parliament of the Commonwealth merely consents. It is certainly open to argument that the consent of the Commonwealth, in such a case, is in effect an alteration of the limits of a State by the Commonwealth, and therefore that the Parliament of the Commonwealth cannot lawfully give such consent without the consent of the Parliament of the State, and the approval of a majority of the electors.

Constitution.

9. The Constitution[50] of the Commonwealth shall be as follows:—

THE CONSTITUTION.

This Constitution is divided as follows:—

Chapter I.—The Parliament:
Part I.—General:
Part II.—The Senate:
Part III.—The House of Representatives:
Part IV.—Both Houses of the Parliament:
Part V.—Powers of the Parliament:
Chapter II.—The Executive Government:
Chapter III.—The Judicature:
Chapter IV.—Finance and Trade:
Chapter V.—The States:
Chapter VI.—New States:
Chapter VII.—Miscellaneous:
Chapter VIII.—Alteration of the Constitution:
The Schedule.

Historical Note.—The division of the Constitution into Chapters and Parts is precisely the same as in the Commonwealth Bill of 1891. At the Adelaide Session, 1897, the wording of the Bill of 1891 was followed exactly. At the Melbourne Session, after the fourth report, a few verbal changes were made—notably the substitution of "Alteration" for "Amendment;" but the mode of division remained unchanged.

In the Bill as introduced into the Imperial Parliament, the clause was altered to read:—"Subject to the foregoing provisions, the Constitution of the Commonwealth shall be as set forth in the schedule to this Act." The Constitution was appended as a schedule. In Committee, however, the clause was restored to its original shape. (See Hist. Intro., pp. 242, 248, *supra*.)

§ 50. "The Constitution."

Organization of the Commonwealth within the Constitution.—Up to this stage the Imperial Act has dealt with the organization of the Commonwealth outside of and without reference to the Constitution. Clause 9 unfolds the Constitution, which, as we have already seen, deals with the internal organization of the Commonwealth, distributes power, provides for the government of the Commonwealth, guarantees the corporate rights of the States, parts of the Commonwealth, and the personal rights and liberties of individuals resident within the Commonwealth; and contains provisions for the accomplishment of changes to meet the possible requirements and potentialities of the future. We are now able to appreciate the distinction, previously emphasized, between the Commonwealth and the Constitution. Back of the Federal and State governments lies the amending power—the *quasi*-sovereign organization of the Commonwealth within the Constitution; back of the amending power and the Constitution lies the sovereign British Parliament, which ordained the Constitution. (Burgess, Political Sc., I., p. 57.) The Constitution embodies the terms of the deed of political partnership between the people and the States, by whose union the Commonwealth is composed. This deed contains a complete scheme for the regulation of the legal rights and duties of the people, considered both as members of the united community, and as members of the provincial communities in which they respectively reside; it contains a full delimitation and distribution of the governing powers of the Commonwealth, not only creating a central government, but expressly confirming the Constitutions, powers and laws of the State governments so far as not inconsistent with grants of powers to the central government. This is a feature which presents a marked contrast to the Constitution of the United States, referring to which Bryce says:—

"It must, however, be remembered that the Constitution does not profess to be a complete scheme of government, creating organs for the discharge of all the functions and duties which a civilized community undertakes. It pre-supposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess and discharge." (Bryce's American Comm., vol. I., p. 29.)

By implication, no doubt, the State Constitutions of the United States must be read along with and into the Federal Constitution in order to make it cover the whole field of civil government. But no such implication or inference is necessary in order to show that the Constitution of the Commonwealth is not a fragmentary statute dealing in a partial manner with the political government of the Union. It does not merely presuppose the State governments. It expressly recognizes and confirms their existence (secs. 106-7-8). It is a comprehensive and a complete system of government, partitioning the totality of *quasi*-sovereign powers delegated to the Commonwealth, as well as providing for a future development and expansion of those powers. This is suggested by a general conspectus of the Constitution now under review, and it is confirmed by an analysis of the Constitution in detail. A logical classification of the various powers exercisable under the Constitution would resolve them into three parts—

(1.) General authority vested in the Federal Parliament, the Federal Executive, and the Federal Judiciary, with limitations and qualifications.

(2.) Residuary authority of the States as defined in their respective Constitutions, confirmed and continued by sections 106, 107, and 108 of the supreme Constitution, and exercised by them through their respective legislative, executive, and judiciary organization, with limitations and qualifications.

(3.) Power to amend the Constitution of the Commonwealth, enlarging or diminishing the area of federal authority and jurisdiction; or enlarging or diminishing the area of State authority and jurisdiction.

Tripartite Division of Government.—It will be noticed that the authority and jurisdiction assigned to the central or general government is distributed among three departments—(1) The Legislature; (2) the Executive; (3) the Judiciary. A further tripartite division of the legislative power itself is seen in the threefold mode of legislation—the legislative power being vested jointly in three bodies—(1) The Queen; (2) the Senate; and (3) the House of Representatives. (See Bancroft on the Constitution of the United States, *infra*.)

The same division and co-ordination is observed in the Constitutions of the States. It is a fundamental principle in the British and American political systems The Constitution of the Commonwealth is a compound, embodying the best features of both those time-honoured models, and eliminating those considered objectionable, according to the views and judgments of its framers. This tripartite principle of division and distribution of power has been followed in the Constitution of the Commonwealth; though, of course, there are differences in the relative powers of the several organs.

"In every form of government (πολιτεία) there are three departments (μόρια), and in every form the wise law-giver must consider, what, in respect to each of these, is for its interest. If all is well with these, all must needs be well with it, and the differences between forms of government are differences in respect to these. Of these three, one is the part which deliberates (τὸ βουλευόμενον) about public affairs; the second is that which has to do with the offices . . . ; and the third is the judicial part (τὸ δικάζον)." (Aristotle, Politics, Book vi., c. xiv.; cited Foster's Comm., I., 299.)

"The tripartite division of government into legislative, executive, and judicial, enforced in theory by the illustrious Montesquieu, and practised in the home government of every one of the American States, became a part of the Constitution of the United States, which derived their mode of institutiug it from their own happy experience. It was established by the federal convention with rigid consistency that went beyond the example of Britain, where one branch of the legislature still remains a court of appeal. Each one of the three departments proceeded from the people, and each is endowed with all the authority needed for its just activity. The president may recommend or dissuade from enactments, and has a limited veto on them; but whatever becomes a law he must execute. The power of the legislature to enact is likewise uncontrolled, except by the paramount law of the Constitution. The judiciary passes upon every case that may be presented, and its decision on the case is definitive; but without further authority over the executive or the legislature, for the convention had wisely refused to make the judges a council to either of them. Tripartite division takes place not only in the threefold powers of government; it is established as the mode of legislation. There too, three powers proceeding from the people, must concur, except in cases provided for, before an act of legislation can take place. This tripartite division in the power of legislation—so at the time wrote Madison, so thought all the great builders of the constitution, so asserted John Adams with vehemence and sound reasoning—is absolutely essential to the success of a federal republic; for if all legislative powers are vested in one man or in one assembly, there is despotism; if in two branches, there is a restless antagonism between the two; if they are distributed among three, it will be hard to unite two of them in a fatal strife with the third. But the executive, and each of the two chambers, must be so chosen as to have a character and strength and popular support of its own. The Government of the United States is thoroughly a government of the people. By the English aristocratic revolution of 1688, made after the failure of the popular attempt at reform, the majority of the House of Commons was in substance composed of nominees of the House of Lords, so that no ministry could prevail in it except by the power of that House; and as the prime minister and cabinet

depended on the majority in the House of Commons, the House of Lords directly controlled the government not only in its own branch, but in the Commons, and through the Commons in the nomination of the ministry. All these branches of the government were in harmony, for all three branches represented the aristocracy. In the United States, on the other hand, all the branches of power—president, senators, and representatives—proceed directly or indirectly from the people. The government of the United States is a government by the people, for the people." (Bancroft, History of the Constitution of the United States, vol. ii., p. 327-8-9, 6th ed., 1889.)

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to the government, whether State or national, are divided into three grand departments—the executive, the legislative, and the judicial. That the function appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States certain important exceptions. These are then stated substantially as set forth in the text." (Per Mr. Justice Miller, in Kilbourn *v.* Thompson, 103 U.S., 168; Foster's Comm., I., p. 296.)

"One branch of the government cannot encroach on the domain of another without danger." (Per Chief Justice Waite, in the Sinking Fund Cases, 99 U.S., 700, 718; quoted with approval by Mr. Justice Harlan, in Clough *v.* Curtis, 134 U.S., 361; Foster, I., 297.)

"The maintenance of the system of checks and balances, characteristic of republican constitutions, requires the co-ordinate departments of government, whether federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle." (Per Chief Justice Fuller, in *re* Tyler, 149 U.S., 164; to the same effect in Swan, 150 U.S., 637; Foster, I., 297.)

"The classification of governmental powers into three is as old as Aristotle, but the importance of their separation was first explained by Montesquieu. His great work was accepted as infallible by the leaders of the American people throughout the Revolution and at the time of the Federal Convention. More than half the first State constitutions contained declarations of the importance of the distinction. The rest recognized it in their structure. The first constitution proposed for Massachusetts was rejected partly for the reason that the powers were not kept sufficiently apart." (Foster, I., 299.)

"Where the government lays down general rules for the guidance of conduct, it is exercising its legislative functions. Where it is carrying those rules into effect, it is exercising its executive powers. And where it is punishing or remedying the breach of them, it is fulfilling judicial duties. It by no means follows that the exercise of these different classes of functions is always entrusted to different hands. But, nevertheless, the distinctions between the functions themselves usually exist, both in central and in local matters." (Jenks, Government of Victoria, p. 228.)

The Constitution of the Commonwealth, in accordance with these time-honoured precedents and principles, draws a clear-cut distinction between the law-making and the law-enforcing agencies; the legislative power being vested in the Federal Parliament, and the Executive power being vested in the Queen, and exercisable by the Governor-General with the advice of a Federal Executive Council. The two departments are differentiated as clearly as they can be by language. But out of the Executive Council will spring a body whose name is not to be found in this Constitution; whose name is not legally known to the British Constitution; a body which is "the connecting link, the hyphen, the buckle," fastening the legislative to the executive part of the Federal Government; that ministerial committee of Parliament, nominally and theoretically servants of the Crown, but in reality, though indirectly, appointed by the National Chamber; that committee whose tenure of office depends upon its retention of the confidence of the National Chamber and by and through whose agency a close union, if not a complete fusion, is established between the executive and legislative powers—The Cabinet. (Walter Bagehot, English Constitution, 2nd ed., pp. 10-11.) This separation in theory, but fusion in practice, of the legislative and executive functions, through the

agency of the Cabinet, may, to those who have not much considered it, seem a dry and small matter, but it is "the latent essence and effectual secret of the English Constitution." (*Id.*, p. 16; see Note, § 271, "Executive Government.)

CHAPTER I.—THE PARLIAMENT[51].

§ 51. "Parliament."

Origin.—This word, which, Bagehot says, is descriptive of the greatest inquiring, discussing, and legislative machine the world has ever known, "the great engine of popular instruction and political controversy," is derived from the Old English, *Parlement;* French, *Parlement, Parler*, to speak; Low Latin, *Parliamentum*—a parleying, a discussion, a conference; hence a formal conference on public affairs; an assembly of representatives of a nation. (Webster's Internat. Dictionary.) Freedom of speech is the essence of political representation, and without it a national council could not exist.

"The word (which was at first applied to general assemblies of the States under Louis VII. in France, about A.D. 1150) was not used in England until the reign of Hen. III., and the first mention of it, in our statute law, is in the preamble to stat. Westm. I., 3 Ed. I., A.D. 1272. When therefore it is said that Parliaments met before that era, it is by a license of speech, considering every national assembly as a Parliament. See I. Comm., c. 2, p. 147, and the notes thereof." (Tomlins's British Law—Title, *Parliament.*)

"In 21 Henry III. the King finds himself, in consequence of pressing money embarrassments, again compelled to make a solemn confirmation of the charter, in which once more the clauses relating to the estates are omitted. Shortly afterwards, as had happened just one hundred years previously in France, the name 'parliamentum' occurs for the first time (Chron., Dunst., 1244; Matth., Paris, 1246), and, curiously enough, Henry III. himself, in a writ addressed to the Sheriff of Northampton, designates with this term the assembly which originated the Magna Charta: '*Parliamentum Runemede, quod fuit inter Dom. Joh., Regem patrem nostrum et barones suos Angliæ.*' (Rot. Claus., 28 Hen. III.) The name 'parliament' now occurs more frequently, but does not supplant the more indefinite terms *concilium, colloquium*, &c." (Gneist, English Constitution, p. 261.)

Precursors and Prototypes.—The Parliament of the Commonwealth is not an original invention in any of its leading principles. It has its roots deep in the past. It has been built on lines suggested by the best available models of its kind. Its framers did not venture to indulge in any new fangled experiments; they resisted every temptation to leave the beaten tract of precedent and experience, or to hanker after revolutionary ideals. In constructing a legislative machine for the new community they believed that they would most successfully perform their work by utilizing and adapting the materials to be found in the British, American, and Canadian Constitutions, with such developments and improvements as might be justified by reason and expediency. Of them and their work it may be said, as of the authors of the Constitution of the United States and of their work—

"They had a profound disbelief in theory and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of Government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such vesture of their thought and experience as they were meditating." (Mr. Lowell's Address on Democracy, Oct. 6, 1884.)

"They had neither the rashness nor the capacity necessary for constructing a Constitution, *a priori*. There is wonderfully little genuine inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested. Accordingly they started from the system on which their own colonial governments, and afterwards their State governments, had been conducted. This system bore a general resemblance to the British

Constitution; and in so far it may with truth be said that the British Constitution became a model for the new national government." (Bryce's American Comm., I., p .31.)

"There were other precursors of the federal government; but the men who framed it followed the lead of no theoretical writer of their own or preceding times. They harboured no desire of revolution, no craving after untried experiments. They wrought from the elements which were at hand, and shaped them to meet the new exigencies which had arisen. The least possible reference was made by them to abstract doctrines; they moulded their design by a creative power of their own, but nothing was introduced that did not already exist, or was not a natural development of a well-known principle. The materials for building the American constitution were the gifts of the ages." (Bancroft, Constitution of the U.S , II , p. 322.)

"In the constant remaking of the constitutions of Europe, South America, and even Asia, Africa, and the Pacific islands, they should teach statesmen the pitfalls to avoid and the paths to seek for the permanent security of both liberty and property. These can be found only by an exhaustive study of the precedents which are landmarks of the progress of the development of the Constitution of the United States, before as well as since its adoption. They lead from the forests of Germany in the time of Tacitus, over the island of Runnymede and the rock at Plymouth, beyond the apple-tree at Appomatox into the old Senate Chamber at Washington, where Chief Justice Fuller sits with his associates. They were the result of conflicts with the sword, the pen, and the tongue, in the field, the press, the senate, and the court. Amongst their builders are enrolled the names of Simon de Montfort, Coke, Eliot, Hampden, Lilburne, Milton, Shaftesbury, Locke, Wilkes, Jefferson, Hamilton, Marshall, Webster. and Lincoln. They present the spectacle of the struggles of a people to obtain civil and religious liberty for themselves, to extend them to those of another and despised race, and now to combine them with the rights to ungoverned labour and complete security for private property." (Foster's Comm., I., p. 2.)

"The form of government which prevails usually in primitive communities comprises a king or chief, a senate or gathering of elders or selectmen with whom he consults, and a public assembly of all freemen with the right of suffrage, who decide questions of importanee, whether legislative, executive, or judicial, which are submitted to them. This naturally arose from the councils of war, where the general, after consulting the more experienced, took the sense of the whole body of warriors before an important enterprise. Such a legislative assemblage of the whole people may still be seen once a year on the Tynwald in the Isle of Man, in the Swiss cantons of Uri, Unterwalden, Glarus, and Appenzell; and more frequently in the town meetings in New England and the Western States. In Switzerland the voters still follow the early custom of attending armed. Of such a character were the federal assemblies of the Achaian, Ætolian and Lycian Leagues, which each citizen had a right to attend, although they voted by cities. They were manifestly impracticable when a government was spread over an extensive territory, and to the lack of representative institutions has been ascribed the loss of liberty in Greece and Rome. The senates of these confederations seem to have been composed of the present and former magistrates of the different cities, who acted rather as ambassadors than legislators, and voted by cities, each having an equal voice regardless of differences in wealth and population." (*Id.*, p. 307-8.)

PART I.—GENERAL.

Legislative Power.

1. The legislative power[52] of the Commonwealth shall be vested in a Federal Parliament[53], which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

UNITED STATES.—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.—Const., Art. I., sec. 1

CANADA.—There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.—B.N.A. Act, 1867, sec. 17.

HISTORICAL NOTE.—The clause in the Commonwealth Bill of 1891 was in substantially the same form. The clause as introduced at the Adelaide session, 1897, substituted "States Assembly" for "Senate," but in Committee, on Mr. Walker's

motion, the name "Senate" was restored. (Conv. Deb., Adel., pp. 480-2.) Mr. Higgins proposed "National Assembly" in place of "House of Representatives," and Mr. Symon proposed "House of Commons," but both suggestions were negatived. (Conv. Deb., Adel., pp. 483, 628-9, 1189.) At the Sydney session, suggestions of the Legislative Council of New South Wales, to omit "Federal" and to substitute "House of Assembly" for "House of Representatives," were negatived. (Conv. Deb., Syd. [1897], p. 253.) At the Melbourne session, after the fourth report, "power" was substituted for "powers."

§ 52. "Legislative Power."

Legislation consists in the making of laws. It is contrasted with the Executive power, whose office is to enforce the law, and with the Judicial power which deals with the interpretation and application of the law in particular cases. "The legislative power of the Commonwealth," referred to in this section, means the legislative power in respect of matters limited and defined in the Constitution; or, in the words of the corresponding section of the United States Constitution, it means "the legislative power herein granted." The legislative power so granted and vested in the Federal Parliament does not exhaust the whole of the *quasi*-sovereign authority of the Commonwealth. A residuum of power continues vested in the States. What is not granted to the federal government and what is not possessed by the States is reserved to the people of the Commonwealth, and may at any time be brought into action by the provision for amendment of the Constitution of the Commonwealth. By the process of amendment further legislative power may be assigned to the Federal Parliament. That Parliament will possess only such authority as is expressly, or by necessary implication, conferred upon it by the Constitution, as it stands, or by amendments which may hereafter be incorporated into and become part of the Constitution.

The power of the Federal Parliament can only be found by searching through the federal constitutional instrument. It has no scrap or particle of authority except such as can be discovered or inferred somewhere within the document. A general enumeration of the legislative powers of the Parliament is given in section 51 of the Constitution. That, however, is not the only section in which legislative power is conferred. Numerous sections may be referred to, in which law-making authority is embedded. Thus every section beginning with the words or containing the words "until the parliament otherwise provides" contains a grant of legislative power. Other sections not so plainly identifiable are of the same effect; such as sec. 27—the Parliament may alter the number of members of the House of Representatives; Chapter III.—the Parliament may create inferior federal courts and make other judiciary arrangements; sec. 94—the Parliament may distribute the surplus revenue; sec. 102—the Parliament may forbid preferences and discriminations by States; sec. 104—the Parliament may take over the public debts of the States; Chapter VI.—The Parliament may admit new States, govern territories, and alter the limits of States with the consent thereof.

§ 53. "Federal Parliament."

The Queen.—The Federal Parliament consists of the Queen, the Senate, and the House of Representatives This is a statutory recognition of the Queen as a constituent part of Parliament. In the British Constitution, and in most of the colonial constitutions, the King or Queen for the time being has up to the present been recognized in form and in theory, at least, as the principal legislator, if not the sole legislator, acting by and with the consent of the parliamentary bodies. For over three hundred years every Act of Parliament passed in England has begun with the well-known formula "Be it enacted by the King's (Queen's) most excellent Majesty by and with the advice and consent," &c. In the Australian Constitutional Acts, 5 and 6 Vic. c. 76, and 13 and 14 Vic. c. 59, the legislative power was vested in the Governor by and with the advice and consent of the Legislative Council, &c. In the subsequent constitutions of the self-

governing Australian colonies (1855) the power of legislation was conferred upon the Queen "by and with the advice and consent of the said Council and Assembly." In the Constitution of the Commonwealth the old fiction that the occupant of the throne was the principal legislator, as expressed in the above formula, has been disregarded; and the ancient enacting words will hereafter be replaced by words more in harmony with the practice and reality of constitutional government. The Queen, instead of being represented as the principal or sole legislator, is now plainly stated to be one of the co-ordinate constituents of the Parliament. Consequently, federal legislation will begin with such mandatory words as "Be it enacted by the Queen, the Senate, and the House of Representatives," or, "Be it enacted by the Parliament of the Commonwealth of Australia."

It would not be correct to say that the Queen's share in the exercise of federal legislative authority will be altogether formal and nominal. As regards matters of purely Australian policy, no doubt the Governor-General, as representative of the Queen, will be guided by the advice of the federal administration, as to whether he should, in the Queen's name, assent to a proposed law passed by both Houses. But if he has reason to believe that any proposed law comes within a class of bills to which, in his discretion as the Queen's representative, he ought not to assent, he will reserve the proposed law for the Queen's pleasure. A Bill so reserved will not have any force unless and until it receives the Queen's assent within two years from the day on which it was presented to the Governor-General (sec. 60). If the Governor-General assents to a proposed law in the Queen's name, and the Imperial Government find that it is contrary to an Imperial Act applicable to the Commonwealth, or that it is in excess of the legislative power possessed by the Federal Parliament, or that it is inconsistent with Her Majesty's treaty obligations, Her Majesty may be advised to disallow such law, within one year from the Governor-General's assent. (Secs. 58 and 59.)

"The right of the Crown, as the supreme executive authority of the empire, to control all legislation which is enacted in the name of the Crown, in any part of the Queen's dominion, is self-evident and unquestionable. In the mother country, the personal and direct exercise of this prerogative has fallen into disuse. But eminent statesmen, irrespective of party, and who represent the ideas of our own day, have concurred in asserting that 'it is a fundamental error to suppose that the power of the Crown to reject laws has consequently ceased to exist.' The authority of the Crown, as a constituent part of the legislative body, still remains; although, since the establishment of parliamentary government, the prerogative has been constitutionally exercised in a different way. But, in respect to the colonies, the royal veto upon legislation has always been an active and not a dormant power. The reason of this is obvious. A colony is but a part of the empire, occupying a subordinate position in the realm. No colonial legislative body is competent to pass a law which is at variance with, or repugnant to, any Imperial statute which extends in its operation to the particular colony. Neither may a colonial legislature exceed the bounds of its assigned jurisdiction, or limited powers. Should such an excess of authority be assumed, it becomes the duty of the Crown to veto, or disallow, the illegal or unconstitutional enactment. This duty should be fulfilled by the Crown, without reference to the conclusions arrived at in respect to the legality of a particular enactment, by any legal tribunal. It would be no adequate protection to the public, against erroneous and unlawful legislation on the part of a colonial legislature, that a decision of a court of law had pronounced the same to be *ultra vires*. An appeal might be taken against this decision, and the question carried to a higher court. Pending its ultimate determination, the public interests might suffer. Therefore, whenever it is clear to the advisers of the Crown that there has been an unlawful exercise of power by a legislative body, it becomes their duty to recommend that the royal prerogative should be invoked to annul the same." (Todd, 1st ed., pp. 125-6; 2nd ed., p. 155.)

The Bicameral System.—The Senate and the House of Representatives compose the two Chambers, according to what is generally described as the Bicameral System. Apart from the philosophical and practical arguments in favour of a two-chambered legislature as against a single-chambered legislature, a political union on the federal plan could not have been accomplished without the constitution of two Houses to represent the composite elements of the union.

"Theory and practice both proclaim that in a single House there is danger of a legislative despotism." (James Wilson, in the American Federal Convention, 16th June, 1787.)

"We may say that modern constitutional law has settled firmly upon the bicameral system in the legislature, with substantial parity of powers in the two Houses, except in dealing with the budget; and that, in the control of the finances, a larger privilege is regularly confided to the more popular House, *i.e.*, the House least removed in its origin from universal suffrage and direct election." (Burgess, Political Sc., II., p. 106.)

"A single body of men is a ways in danger of adopting hasty and one-sided views, of accepting facts upon insufficient tests, of being satisfied with incomplete generalizations, and of mistaking happy phrases for sound principles. Two legislative bodies do not always escape these crude and one-sided processes and results, but they are far more likely to do so than is a single body. There is a sort of natural and healthy rivalry between the two bodies, which causes each to subject the measures proceeding from the other to a careful scrutiny, and a destructive criticism, even though the same party may be in a majority in both. In this conflict of views between the two houses lies, in fact, the only safe-guard against hasty and ill-digested legislation when the same party is in majority in both houses. A disagreement between the majorities in such a case is far more likely, also, to lead to a deeper generalization of principle than when the struggle is between the majority and the minority in each house; since the majority in each house will be much more inclined to look into the real merits of the question in the former than in the latter instance, and will come to a decision far more independent of partizanship." (Burgess, Political Sc., II., pp. 106-7.)

"The necessity of a double, independent deliberation is thus the fundamental principle of the bicameral system in the construction of the legislature. A legislature of one chamber inclines too much to radicalism. One of three chambers or more would incline too much to conservatism. The true mean between conservatism and progress, and therefore the true interpretation of the common consciousness at each particular moment, will be best secured by the legislature of two chambers. There is another reason for this system, which, though less philosophic, is fully as practical. It is that two chambers are necessary to preserve the balance of power between the legislative and executive departments. The single-chamber legislature tends to subject the executive to its will. It then introduces into the administration a confusion which degenerates into anarchy. The necessity of the state then produces the military executive, who subjects the legislature to himself. History so often presents these events in this sequence, that we cannot refrain from connecting them as cause and effect. The two chambers, on the other hand, are a support in the first place to the executive power, and therefore in the second place to the legislature. By preventing legislative usurpation in the beginning, the bicameral legislature avoids executive usurpation in the end." (*Id.*, p. 107.)

Governor-General.

2. A Governor-General[54] appointed by the Queen shall be Her Majesty's Representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure[55], but subject to this Constitution, such powers and functions of the Queen[56] as Her Majesty may be pleased to assign to him.

Historical Note.—Clause 2 Chap. I. of the Commonwealth Bill of 1891 was as follows:—

"The Queen may, from time to time, appoint a Governor-General, who shall be Her Majesty's representative in the Commonwealth, and who shall have and may exercise in the Commonwealth during the Queen's pleasure, and subject to the provisions of this Constitution, such powers and functions as the Queen may think fit to assign to him."

In Committee, Sir George Grey proposed to make the clause read "There shall be a Governor-General," with the intention of making the Governor-General elective. This, after debate, was negatived by 35 votes to 3. Mr. Baker proposed to insert, after "functions," the words "as are contained in Schedule B hereto, and such other powers and functions as are not inconsistent therewith." He urged that the clause, as it stood

made the royal instructions part of the Constitutional law of the Commonwealth; and though he was not prepared at present to define the powers of the Governor-General, he wished to affirm the principle that they should be contained in the Constitution. Mr. Deakin and Dr. Cockburn thought that the best means of securing Mr. Baker's object would be to state on the face of the Constitution that the Governor-General should always act on the advice of his Ministers. Mr. Wrixon thought that if they were careful, in the Executive Chapter, to thoroughly establish responsible Government, they might let this clause go. Mr. Baker finally withdrew his amendment. (Conv. Deb., Syd. [1891] pp. 560-78.)

At the Adelaide session, 1897, the clause was introduced in the same words, except that the powers exercisable by the Governor-General were defined to be "such powers and functions *of the Queen* as Her Majesty may think fit to assign to him." Mr. Glynn, lest these words might revive dormant or dead prerogatives, moved to add "and capable of being constitutionally exercised as part of the prerogative of the Crown" This was negatived. (Conv. Deb., Adel., p. 629.)

At the Sydney session, Mr. Reid suggested that the clause be postponed. Mr. Barton agreed, saying "Some question may arise about the clause, which I do not like to indicate at present; but the Committee may take my word for it that it will be wise to postpone it now." (Conv. Deb., Syd. [1897] pp. 253-4.) Subsequently, as a drafting amendment, the clause was altered to read :—"A Governor-General appointed by the Queen shall be," &c. After the fourth report, the words "the provisions of" were omitted.

§ 54. "A Governor-General."

"The governor of a colony constitutes the only political link connecting the colony with the mother country. So far as regards the internal administration of his government, he is merely a constitutional sovereign acting through his advisers; interfering with their policy or their patronage, if at all, only as a friend and impartial councillor. But whenever any question is agitated touching the interests of the mother country—such, for instance, as the imposition of customs duties, or the public defence—his functions as an independent officer are called at once into play. He must see that the mother country receives no detriment. In this duty he cannot count on aid from his advisers: they will consult the interests either of the colony or of their own popularity; he may often have to act in opposition to them, either by interposing his veto on enactments or by referring those enactments for the decision of the home government. But for these purposes the constitution furnishes him with no public officers to assist him in council or execution, or to share his responsibility. The home government looks to him alone." (Merivale's Lectures on Colonization, 1861, p 649.)

"Under responsible government a Governor becomes the image, in little, of a constitutional king, introducing measures to the legislature, conducting the executive, distributing patronage, in name only, while all these functions are in reality performed by his councillors. And it is a common supposition that his office is consequently become one of parade and sentiment only. There cannot be a greater error. The functions of a colonial Governor under responsible government are (occasionally) arduous and difficult in the extreme. Even in the domestic politics of the colony, his influence as a mediator between extreme parties and controller of extreme resolutions, as an independent and dispassionate adviser, is far from inconsiderable, however cautiously it may be exercised. But the really onerous part of his duty consists in watching that portion of colonial politics which touches on the connection with the mother country. Here he has to reconcile, as well as he can, his double function as governor responsible to the Crown, and as a constitutional head of an executive controlled by his advisers. He has to watch and control, as best he may, those attempted infringements of the recognized principles of the connection which carelessness or ignorance, or deliberate intention, or mere love of popularity, may from time to time originate. And this duty, of peculiar nicety, he must perform alone. . . His responsible ministers may (and probably will) entertain views quite different from his own. And the temptation to surround himself with a camarilla of special advisers, distinct from those ministers, is one which a governor must carefully resist. It may, therefore, be readily inferred, that to execute the office well requires no common abilities, and I must add that the occasion has called forth these abilities." (*Id.*, p. 666.)

"The office of Governor tends to become—in the most emphatic sense of the term—the link which connects the mother country and the colony, and his influence the means by which harmony of action between the local and Imperial authorities is to be preserved. From his independent and impartial position, the opinion of a Governor must needs have great weight in the colonial councils; while he is free to constitute himself, in an especial manner, the patron of those larger and higher interests—as of education, and of moral and material progress in all its branches—which, unlike the contests of party, unite, instead of dividing, the members of the body-politic." (Lord Elgin [1854], cited Todd's Parl. Gov. in Col., p. 809, 2nd ed.)

"The Governor-General of Canada is the representative of the Queen, and the highest authority in a dominion vast in extent, occupied by several millions of people, comprising within itself various provinces recently brought together which can only knit into a mature and lasting whole by wise and conciliatory administration. Nor is the position insulated. The Governor-General is continually called upon to act on questions affecting international relations with the United States. The person who discharges such exalted functions ought to possess not only sound judgment and wide experience, but also an established public reputation. He should be qualified both to exercise a moderating influence among the different provinces composing the union, and also to bear weight in his relations with the British minister at Washington and with the authorities of the great neighbouring republic." (Despatch by the Duke of Buckingham, Secretary of State for the Colonies [1868], explaining the reasons of the Imperial Government for advising the Queen to refuse assent to a bill passed by the Dominion Parliament to reduce the salary of the Governor-General. Cited, Todd, p. 810, 2nd ed.)

§ 55. "During the Queen's Pleasure."

"Colonial Governors invariably hold office during the pleasure of the Crown; but their period of service in a colony is usually limited to six years from the assumption of their duties therein; although, at the discretion of the Crown, a Governor may be re-appointed for a further term. The rule which limits the term of service of a Governor to six years was established principally for the purpose of ensuring in Governors the utmost impartiality of conduct, by disconnecting them from fixed relations with the colony over which they are appointed to preside. It was first made applicable to all British colonies by a circular despatch from Mr. Secretary Huskisson, issued in May, 1828, as follows:—'It shall for the future be understood that, at the expiration of six years, a Governor of a colony shall, as a matter of course, retire from his government, unless there should be some special reasons for retaining him there; and that the way should thus be opened for the employment of others, who may have claims to the notice of His Majesty's government.'" (Todd, 2nd ed., pp. 122-3.)

§ 56. "Powers and Functions of the Queen."

Section 2 of the Constitution is the same in substance as section 2 ch. I. of the Commonwealth Bill of 1891. When it was first proposed in 1891, strong exception was taken to it and other sections relating to the Governor-General on the ground that they would confer extraordinary and enormous powers on the Governor-General, far in excess of any authority previously conferred on any governor in these colonies. Subsequent discussion showed that this contention was untenable.

During the progress of Provincial Government in the Australian colonies, two propositions have been suggested as explaining the position and attributes of the Governor of a Constitutional colony. One proposition has been that the Governor, as the Representative of the Queen, is vested with authority defined and limited, partly by the statute law establishing the Queen's Government in the colony, partly by the letters patent constituting the office of Governor, partly by the commission appointing him to the office, and finally by the royal instructions communicated to him by the Secretary of State on behalf of Her Majesty. (Anson's Law and Custom of the Constitution, vol. ii., p. 260.) The other view has been that the Governor of a colony, in which the system known as Responsible Government exists, is a local constitutional ruler, vested with authority defined or necessarily implied by the statute law establishing the Queen's Government in the colony, and vested thereby with all the prerogatives of the Crown reasonably necessary for the exercise of the proper functions of government; that the responsible ministers of such a colony possess, by virtue of that law, the power

to advise the representative of the Crown to do any act which it would be competent for the legislature of the colony to sanction, and which ordinarily is, or under special circumstances may become, reasonably necessary to its existence as a body constituted by law, or for the proper exercise of the functions which it is intended to execute. (Per Higinbotham, C.J., in Ah Toy *v.* Musgrove [1888], 14 V.L.R. p 295-6.) A similar contention was raised in the year in which that case was decided in Victoria by the Government of Ontario, to the effect that the Lieutenant-Governor of the Province was entitled, *virtute officii*, to exercise all the prerogatives of the Crown incident to executive authority in matters over which the provincial legislature had jurisdiction, in the same manner as, and to the same extent that the Governor-General was entitled, *virtute officii*, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the Dominion Parliament. (Ontario Sess. Pap., 1888, No. 37, pp. 20-2.) The same doctrine was mooted in the Canadian courts on the hearing of the pardoning power case. (Attorney-General of Canada *v.* Attorney-General of Ontario, 22 Ont. Rep. 222; 19 Ont. App. Rep. 31. Cited, A. H. F. Lefroy, *Law Quarterly Review*, July, 1899, p. 283.)

In the construction of the powers and functions of the Governor-General of the Commonwealth no such difficulties and ambiguities as were discussed in Ah Toy *v.* Musgrove need arise. The principal and most important of his powers and functions, legislative as well as executive, are expressly conferred on him by the terms of the Constitution itself. Among these may be mentioned: the appointment of the times for holding the Sessions of Parliament; the prorogation of the Parliament; the dissolution of the House of Representatives (sec. 4); the dissolution of the Senate and of the House of Representatives simultaneously (sec. 57); the convening of a joint sitting of the members of the Senate and of the House of Representatives (sec. 57); the assent in the name of the Queen to Bills passed by the Federal Houses; the withholding of the Queen's assent to such Bills; the reservation of Bills for the Queen's pleasure; the recommendation of amendments to be made in Bills (sec. 58); the exercise of the Executive power of the Commonwealth (sec. 61); the appointment of political officers to administer departments of state of the Commonwealth (sec. 64); the command of the naval and military forces of the Commonwealth (sec. 68); and generally, "in respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony" (sec. 70). These are powers and functions vested in the Governor-General by statute, to be exercised by him in accordance with the recognized principles of Responsible Government. The point to emphasize is, that they are legislative and executive powers and functions conferred on the Governor-General, not by Royal authority, but by statutory authority. (See Note § 60.)

The section now under consideration authorizes the Governor-General to exercise such powers and functions as Her Majesty may be pleased to assign to him. These powers and functions, however, must not be confused with the statutory authority and statutory duties to which reference has been made, relating to the Government of the Commonwealth, expressly specified in and expressly conferred on the Governor-General by the Constitution. The powers and functions contemplated by this section relate either to matters subordinate and ancillary to the statutory authority and statutory duties enumerated in the Constitution, or to matters connected with the Royal prerogative (that body of powers, rights, and privileges, belonging to the Crown at common law, such as the prerogative of mercy), or to authority vested in the Crown by Imperial statute law, other than the law creating the Constitution of the Commonwealth. Some of these powers and functions are of a formal character; some of them are purely ceremonial; others import the exercise of sovereign authority in matters of Imperial interests. The nature of some of the prerogative as well as formal and ceremonial power sreferred to, may be gathered from the extracts from letters patent and commissions relating to the office of Governor, which will be found further on. Among examples of powers relating to

matters of Imperial interests the following may be suggested: the observance of the relations during peace, or in time of war, of foreign States to Great Britain, so far as they may be affected by the indirect relations of such foreign States to the Commonwealth; the treaty rights and obligations of the Crown; the treatment of belligerent and neutral ships in the waters of the Commonwealth in times of war; the control of Her Majesty's Imperial naval and military forces within the limits of the Commonwealth. (Higinbotham, C.J., in Ah Toy *v.* Musgrove [1888], 14 V.L.R., 380.)

Responsibility of Governors.— Reference may here be made to two leading cases in which the powers, privileges, and immunities of colonial Governors were considered. In Mostyn *v.* Fabrigas, [1775], 1 Cowp. 161-172, 2 W. Bl. 929, Lord Mansfield held that a Governor of a colony is in the nature of a Viceroy. This dictum, however, has not been generally acquiesced in, and it is now understood that Mostyn *v.* Fabrigas simply decided that Governor Mostyn was liable to be sued in England for personal wrongs done by him, whilst he was Governor of Minorca. In the case of Musgrave *v.* Pulido [1879], 5 App. Cas. 102, Pulido, the charterer of a schooner, sued Sir Anthony Musgrave, the Governor of Jamaica, to recover damages from him for an alleged act of trespass committed by him in seizing and detaining the schooner at Kingston. The defendant pleaded to the jurisdiction of the Court, in effect alleging that he was Captain-General and Governor-in-Chief of the island of Jamaica, and that the acts complained of were done by him as Governor of the island, and in the exercise of his reasonable discretion as such. The plea did not aver, even generally, that the seizure of the plaintiff's ship was an act which the defendant was empowered to do as Governor, nor even that it was an act of state. It was held that a Governor of a colony (in ordinary cases) cannot be regarded as Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and is limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of municipal courts to determine whether any exercise of power by a Governor is within the limits of his authority, and, therefore, an act of state. On these grounds it was decided that the plea was not a sufficient answer to the action.

Mode of Appointment.—The constitutional position of the Governor-General, as a component of the Executive Government of the Commonwealth, will be considered in detail in our notes to Chapter II. (§ 271). Under this section allusion can appropriately be made (1) to the practice which originally prevailed in connection with the creation of the office of Colonial Governor; the method of appointment to such office, and the assignment of official powers and functions of a stereotyped character to the holder of the office for the time being; and (2) to the changes which, in recent years, have been made in the direction of emancipating the Governor from the restraint and embarrassment of antiquated instructions, and enabling him to act as a constitutional ruler, in accordance with the recognized principles of Responsible Government.

Colonial Governors were formerly appointed by letters patent, under the Great Seal, which defined the scope of their powers, duties, and functions. Pending the preparation of the authorative instruments it was the practice, before 1875, to issue a minor commission under the Royal Sign Manual and Signet, to a new Governor, authorizing him to act under the commission and instructions given to his predecessor in the same office. The validity of this practice having been doubted, the Imperial Government decided in 1875 to abandon it, and thereafter, as soon as practicable, to make permanent provision by letters patent under the Great Seal in every colony of the empire for the constitution of the office of Governor therein, and it was further decided to fill the office as it became vacant, by appointment to be made, by special commission, under the Royal Sign Manual and Signet, which commission should recite the letters patent, and direct the appointee to fulfil the duties of the office according to the permanent instructions issued in connection therewith. (Todd, Parl. Gov. in Col., 2nd ed., p. 109.) There are therefore, now, three important documents associated with the office of Governor:—

(1.) The Letters-Patent.

(2.) The Commission.

(3.) The Instructions.

The Letters Patent.—By the letters-patent constituting the office of Governor in each colony, the powers and duties of the Governor were formerly defined as follows :—

(i.) To do and to execute all things that belong to the said command and the trust reposed in him according to the Letters-patent, Commission and Instructions.

(ii.) To keep and use the Public Seal of the Colony.

(iii.) To appoint an Executive Council.

(iv.) To make and execute grants of land according to law.

(v.) To appoint Judges, Commissioners, Justices, Ministers, and other officers.

(vi.) To grant a pardon to any offender who has committed a crime and to remit fines and forfeitures.

(vii.) To remove or suspend from office any person upon sufficient cause appearing.

(viii.) To summon, prorogue, or dissolve any legislative body established within the colony.

(ix.) To grant licenses for marriages, letters of administration, probate of wills, and to deal with the custody and management of idiots, lunatics, and their estates.

(x.) To appoint a deputy to act in his occasional absence from the colony.

(xi.) Before entering on the duties of his office to cause his commission to be read and published, and to take the Oath of Allegiance and the usual oath for the due execution of the office of governor and for the due and impartial administration of justice.

The Commission.—This document contains the appointment to the office constituted by the letters-patent, and the usual form of it is as follows :—

Draft of a Commission passed under the Royal Sign Manual and Signet, ...to be Governor and Commander-in-Chief of the Colony of .....and its Dependencies.

Dated..... ..... VICTORIA R.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India : To Our trusty and well-beloved..... ...

Greeting :

We do by this Our Commission under Our Sign Manual and Signet appoint you, the said....., until Our further pleasure shall be signified, to be Our Governor and Commander-in-Chief in and over Our Colony of .....and its Dependencies during Our Will and pleasure, with all and singular the powers and authorities granted to the Governor of Our said Colony in Our Letters-patent under the Great Seal of Our United Kingdom of Great Britain and Ireland constituting the Office of Governor, bearing date at Westminster, the.....day of.....in the.....year of Our Reign, which said powers and authorities We do hereby authorize you to exercise and perform, according to such Orders and Instructions as Our said Governor for the time being hath already or may hereafter receive from Us. And for so doing this shall be your Warrant.

And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Colony and its Dependencies, and all others whom it may concern, to take notice hereof, and to give their ready obedience accordingly. Given at Our Court at Windsor, this.....day of.....in the.....year of Our Reign.

By Her Majesty's Command.

The Instructions.—The powers and functions of the governor partially enumerated in the letters-patent were formerly more fully detailed in the Instructions, and may be summarized as follows :—

(i.) To administer the oath of allegiance to persons holding office or place of trust.

(ii.) To communicate these instructions to the Executive Council of the Colony.

(iii.) To summon the Executive Council for the despatch of business.

(iv.) To preside at the meetings of the Executive Council.

(v.) To see that a full and exact record is kept of the votes and proceedings of the Executive Council.

(vi.) To consult the Executive Council in all cases, excepting in cases where the Queen's service would sustain material prejudice by consulting the Council, or when the matters to be decided should be too unimportant to require their advice or too urgent to admit of their advice being given within the time available ; provided that in such urgent cases he should inform the Executive Council, as soon as possible, of the measures adopted.

(vii.) To act in opposition to the advice which may in any case be given by the Executive Council, provided that in such case he should fully report to the Secretary of State for the Colonies any such proceeding, with the grounds and reasons thereof.

(viii.) To transmit to the Secretary of State for the Colonies twice in each year a copy of the minutes of the Council for the preceding half-year.

(ix.) To assent to or dissent from or reserve for the Queen's pleasure such bills as may be passed by the colonial parliament subject to certain rules—

(*a*) That each different matter be provided for by a different law without intermixing different matters in the same Act having no relation to one another.

(*b*) That no clauses be inserted in an Act foreign to the title of such Act.

(*c*) That no perpetual clause be made part of any temporary law.

(x.) To reserve for the Queen's pleasure bills dealing with the following :—

(*a*) Divorce.

(*b*) Grants to the Governor.

(*c*) Bills affecting the currency.

(*d*) Bills imposing differential duties other than as allowed by the Australian Colonies Duties Act, 1873.

(*e*) Bills apparently inconsistent with treaty obligations.

(*f*) Bills interfering with the discipline of the land and sea forces of the Colony.

(*g*) Bills of an extraordinary nature and importance prejudicially affecting—(1) The Royal prerogative, or (2) the rights and property of British subjects not residing in the Colony, or (3) the trade and shipping of the United Kingdom and its Dependencies.

(*h*) Bills containing provisions to which the Royal assent has been once refused.

(xi.) To transmit abstracts of all laws assented to by the Governor or reserved for the Queen's pleasure, with explanatory observations.

(xii.) To transmit fair copies of the journals and minutes of the proceedings of both Houses of Parliament "which you are to require from the clerks or other proper officer in that behalf."

(xiii.) After reciting the Commission authorizing and empowering a Governor to grant a pardon to any offender the instructions formerly proceeded as follows:—

"Now, we do hereby direct and enjoin you to call upon the judge presiding at the trial of any offender who may from time to time be condemned to suffer death by the sentence of any court within our said colony, to make to you a written report of the case of such offender, and such report of the said judge shall by you be taken into consideration at the first meeting thereafter which may be conveniently held of our said Executive Council, where the said judge shall be specially summoned to attend, and you shall not pardon or reprieve any such offender as aforesaid unless it shall appear to you expedient so to do upon receiving the advice of our Executive Council therein, but in all such cases you are to decide either to extend or to withhold a pardon or reprieve, according to your own deliberate judgment, whether the members of our said Executive Council concur therein or otherwise; entering, nevertheless, on the minutes of the said Council a minute of your reasons at length, in case you should decide any such question in opposition to the judgment of the majority of the members thereof."

(xiv.) To promote religion and education among the native inhabitants of the colony, and to protect them from violence and injustice.

(xv.) Not on any pretence whatever to quit the colony without having first obtained official leave from the Queen.

The new practice above referred to (p. 391) was framed to meet the views of Canada, but was first brought into operation in February, 1877, on the occasion of the appointment of Sir H. Bartle Frere to the office of Governor and Commander-in-Chief of the Cape of Good Hope, and it was followed in April, 1877, on the appointment of Sir W. F. D. Jervois as Governor and Commander-in-Chief of South Australia. The instructions accompanying the letters-patent in each of these cases were, in the main, an embodiment of the instructions previously issued for the guidance of Governors, no alteration in substance then being made. Indeed, they were practically the same in effect as those issued to the Governor of New South Wales in the year 1829, when that colony ceased to be a military settlement, and acquired a rudimentary form of civil government. A comparison of the instructions issued to Australian Governors up to the year 1887, with the commission and instructions issued to Sir Charles A. Fitzroy as Governor-in-Chief of New South Wales in the year 1850, would show that no substantial alteration had been made during that interval of 37 years. (Chief Justice Higinbotham's letter to Sir Henry Holland, 28 Feb., 1887; Professor Morris, Memoir of George Higinbotham, p. 211.)

For some time previous to the initiation of the new practice, the Government of the Dominion of Canada had been in communication with the Secretary of State for the Colonies on the subject of an alteration in the terms of the royal instructions.

"It was contended by Mr. Blake on behalf of the Dominion that the peculiar position of Canada, in relation to the mother country, entitled her to special consideration, and that the existing forms, while they might be eminently suited to other colonies, were inapplicable and objectionable in her case. For Canada is not merely a colony or province of the empire, she is also a Dominion, composed of seven provinces federally united under an imperial charter or Act of Parliament, which expressly recites that her constitution is to be similar in principle to that of the United Kingdom." (Todd, Parl. Gov. in the Col., 2nd ed., p. 110.)

"As a foundation principle, necessary to be asserted and maintained in any instrument which might be issued for the purpose of defining the powers of a Governor-General in Canada, Mr. Blake contended that it ought to be clearly understood that, 'as a rule, the governor does and must act through the agency (and upon the advice) of ministers; and ministers must be responsible for such action;' save 'only in the rare instances in which owing to the existence of substantial Imperial as distinguished from Canadian interests, it is considered that full freedom of action is not vested in the Canadian people.'" (*Id.*, p. 111.)

"Mr. Blake's contention, 'that there is no dependency of the British Crown which is entitled to so full an application of the principles of constitutional freedom as the Dominion of Canada,' was admitted to be correct by her Majesty's Government; and

the official instruments made use of, in the appointment, on the 7th October, 1878, of the Marquis of Lorne to be Governor-General of Canada, clearly indicate, in their substantial omissions, as well as in their positive directions, the larger measure of self-government thenceforth conceded to the new Dominion. This increase of power, to be exercised by the government and Parliament of Canada, was not merely relatively greater than that now enjoyed by other colonies of the empire, but absolutely more than had been previously intrusted to Canada itself, during the administration of any former Governor-General." (*Id.*, p. 116.)

The Canadian Letters-Patent.—By letters-patent, 5th October, 1878, the office of Governor-General of Canada was formally constituted, and the Governor-General was thereby authorized and commanded by the Queen :—

(i.) To do and to execute all things that belong to the said command and the trust reposed in him according to the Letters-patent, Commission and Instructions.

(ii.) To keep and use the Public Seal of the Colony.

(iii.) To appoint an Executive Council.

(iv.) To remove or suspend from office any person holding any office under the Crown in Canada, so far as the same may lawfully be done.

(v.) To exercise all powers lawfully belonging to the Crown in respect of the summoning, proroguing, or dissolving the parliament of Canada.

(vi.) To appoint any person or persons, jointly or severally, to be his deputy or deputies within any part of Canada, to exercise such of the powers or functions of the Governor-General as he may please to assign to him or them.

The Canadian Commission.—On 7th October, 1878, the Marquis of Lorne was appointed by Royal Commission to be the Governor-General of Canada. This Commission recited the letters-patent aforesaid and conferred the office upon Lord Lorne with all the powers and authorities belonging to it, according to such orders and instructions as have already been, or may hereafter be, communicated to him from the sovereign ; and commanded "all and singular our officers, ministers, and loving subjects in our said Dominion, and all others whom it may concern, to take due notice hereof, and give their ready obedience accordingly." (Todd, 2nd ed., p. 122.)

The Canadian Instructions.—The Royal Instructions accompanying the letters-patent constituting the office of Governor-General of Canada recited the letters-patent aforesaid and enjoined the Governor-General for the time being :—

(i.) To cause his commission to be read and published in the presence of the Chief Justice or other judge of the Supreme Court, and of the members of the Dominion Privy Council, and to be duly sworn upon entering upon the duties of his office.

(ii.) To administer, or cause to be administered, the necessary oaths to all persons who shall hold any office or place of trust in the Dominion.

(iii.) To communicate these and any other instructions he may receive to the Dominion Privy Council.

(iv.) To transmit to the Imperial Government copies of all laws assented to by him in the Queen's name, or reserved for signification of the Royal pleasure ; with suitable explanatory observations and copies of the journals and proceedings of the Parliament of the Dominion.

(v.) When any crime has been committed for which any offender might be tried within the Dominion, "to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender ; and, further, to grant any offender convicted of any crime, in any court, or before any judge, justice, or magistrate, within our said Dominion, a pardon, either

free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due, or payable to us. Provided always, that our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from, our said Dominion. And we do hereby direct and enjoin that our said Governor-General shall not pardon or reprieve any such offender without first receiving, in capital cases, the advice of the Privy Council for our said Dominion, and in other cases, the advice of one, at least, of his ministers, and in any case in which such pardon or reprieve might directly effect the interests of the empire, or of any country or place beyond the jurisdiction of the government of our said Dominion, our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid."

(vi.) Not to quit the Dominion without leave first obtained.

It will be seen that the Canadian Instructions differed in several material respects from those which were, at that time, applicable to other self-governing colonies, in which the old instructions remained unaltered for several years longer. One of the most prominent critics, and certainly the most uncompromising assailant, of the old instructions, was the Hon. Geo. Higinbotham, once Attorney-General of Victoria, and subsequently Chief Justice of that colony. In a letter, dated 28th February, 1887, addressed by him to the Right Hon. Sir Henry T. Holland, then Secretary of State for the Colonies, Chief Justice Higinbotham expressed and summarized the views which he had long held concerning the unconstitutionality of some of these instructions.

"The radical vice of the Governor's letters patent, commission and instructions, both public and private, appears to me to be this—that they studiously and persistently refuse to take note of the fundamental change made in the public laws of the Australian colonies by the Constitution Acts of 1854-5. In particular, they pretend to confer powers and authorities which have been already conferred with others by the Constitution Statutes; they decline to recognize the dual character of the Governor, and applying a misleading title to the advisers of the Governor in one of his two characters, they affect to ignore altogether the existence of responsible government. I will refer to particular clauses which present the most striking illustrations of a violation in these respects of constitutional law.

"Clause II. of the letters patent.—'We do hereby authorize, empower, and command our said Governor and Commander-in-Chief (hereinafter called the Governor) to do and execute all things that belong to his said office, according to the tenor of these our letters patent, and of such commission as may be issued to him under our sign manual and signet, and according to such instructions as may from time to time be given to him under our sign manual and signet, or by our order in our Privy Council, or by us through one of our principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the colony.'

"This purports to grant, subject to limitations, certain authorities and powers already vested in the Governor by the Constitution Statute. The grant is, in my opinion, void, and the limitations and the commands founded thereon are also void and illegal.

"Clause VI. of instructions.—'In the exercise of the powers and authorities granted to the Governor by our said letters patent, he shall in all cases consult with the Executive Council, excepting only in cases which are of such a nature that, in his judgment, our service would sustain material prejudice by consulting the said Council thereupon, or when the matters to be decided are too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may necessary for him to act in respect to any such matters—in all such urgent cases, he

shall, at the earliest practical period, communicate to the said Council the measures which he may so have adopted, with the reasons thereof.'

"This is an instruction which a Governor does not, and cannot obey. The Executive Council, in the proper sense of this expression, has never been convened in Victoria. Like the Privy Council, it could not be convened, except by the direction of the Victorian Premier. If by the words 'Executive Council,' the 'Cabinet' is intended to be referred to, this instruction is unmeaning and void. It is, doubtless, the duty of the representative of the Sovereign to consult his advisers, and it is their duty to advise him in all matters connected with local affairs, but the duty in neither case springs from this royal instruction. If it be intended to direct the Governor to consult his advisers in matters connected with his duty as an officer of the Imperial Government, this is an indirect instruction, offensive in form and without either legal authority or means of enforcement, to Her Majesty's Ministers to do something which they are not required by their duty as Ministers of the Crown to do.

"Clause VII. of instructions.—'A Governor may act in the exercise of the powers and authorities granted to him by our said letters patent in opposition to the advice given to him by the members of the Executive Council, if he shall in any case deem it right to do so, but in any such case he shall fully report the matter to us by the first convenient opportunity, with the grounds and reasons of his action.'

"I think that this instruction can only be characterized as a distinct denial of the fundamental principle of the existing public law of Victoria. As a direct instigation to Her Majesty's representative to violate that law, it offers a grave indignity and conveys an unmistakable menace to him and to his advisers, who are here and elsewhere misnamed the Executive Council.

"Clause XI. of instructions.—'Whenever any offender shall have been condemned to suffer death by the sentence of any court, the Governor shall call upon the judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at the first meeting thereafter which may be conveniently held of the Executive Council, and he may cause the said judge to be specially summoned to attend at such meeting and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do upon receiving the advice of the said Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon or a reprieve according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise; entering nevertheless on the minutes of the said Executive Council a minute of his reasons at length in case he should decide such action in opposition to the judgment of the majority of members thereof.'

"This instruction presents a glaring instance of not less flagrant illegality. The prerogative of mercy is a prerogative essentially necessary to the administration of criminal law. The exercise of it in Victoria is therefore a matter in which the representative of the Crown can and ought to act solely upon the advice of his responsible advisers, and neither the Crown nor the Crown's Imperial advisers are legally competent to dictate or advise upon his action. By this instruction the Governor is personally ordered to call upon the judge to make to him a written report—an order which, if it were conveyed otherwise than through and by the advice of the Minister, it would be, I conceive, the duty of the judge to refuse to comply with. The Governor is further required to decide 'either to extend or to withhold a pardon or a reprieve, according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise.' This unjust and cruel as well as illegal order is not obeyed, and could not be obeyed by any Governor in the only cases to which it could apply. It has been attempted to excuse this instruction on the ground that it is virtually obsolete, yet on two separate occasions long subsequent to the passing of the Australian Constitution Acts, the Colonial Office has expressed its approval of this instruction, and has repeated the injunction to the Governor to obey it.

"Clauses VIII. and X. of instructions.—VIII. 'In the execution of such powers as are vested in the Governor by law for assenting to or dissenting from or of reserving for the signification of our pleasure, bills which have been passed by the Legislature of the

colony, he shall take care as far as may be practicable that in the passing of all laws each different matter be provided for by a different law without intermixing in one and the same law such things as have no proper relation to each other; and that no clause be inserted in or annexed to any law which shall be foreign to what the title of such law imports, and that no perpetual clause be part of any temporary law.' X. 'The Governor is to take care that all laws assented to in our name, or reserved for the signification of our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and shall also transmit fair copies of the journals and minutes of the proceedings of the legislative bodies of the colony, which he is to require from the clerks or other proper officers in that behalf of the said legislative bodies.'

"These clauses are not illegal because they relate to the reservation of bills for the signification of Her Majesty's pleasure. I refer to them only as showing the almost contemptuous disrespect and want of consideration displayed by the Colonial Office towards Australian Parliaments and Imperial officers in Australia. To order a Governor to take care that in the passing of all laws each different matter shall be provided for by a different law may at one time have been proper and not unnecessary. Addressed, as the order indirectly is, to Legislatures consisting of two Houses of Parliament like the Legislative Council and the Legislative Assembly of the various Australian colonies, it is an insult to all of those bodies. And it has proved on one occasion, at least, a cause of actual embarrassment to Her Majesty's Government in Victoria. When the Governor is ordered to require from the clerks in Parliament fair copies of the journals and minutes of the proceedings of the Legislative bodies, he is humiliated by being needlessly instructed to make a requirement which, if disputed, he could not enforce, and for the fulfilment of which he is in any and in every case indebted to the aid—which is, of course, never withheld—of a Minister of the Crown."

One of the immediate results of this important letter was that Sir Henry Holland, afterwards Lord Knutsford, consulted the Imperial law officers with reference to the points so forcibly raised by the Chief Justice, and in July, 1888, he re-drafted the instructions with a view of meeting many of the points brought under his notice and of bringing the instructions more into conformity with the existing state of things. Lord Knutsford went out of office in 1892, and one of his last official acts was the promulgation of the re-drafted royal instructions for the guidance of colonial governors. Referring to this important event, Professor Morris writes:—

"The improvement was enormous. For the first time Responsible Government is recognized. For the first time the Governor is instructed to accept the advice of his ministers, whereas all earlier editions seem to imply that he is to be careful about accepting such advice and ready to oppose them." (Professor Morris, Memoir of George Higinbotham, p. 202.)

"The measure of the victory with respect to Downing Street is to be found in the altered instructions. The Home law officers told Lord Knutsford that it was not illegal for governors to correspond with the Colonial Office; but the tone of that office is not now the tone of Mr. Cardwell, nor of the Duke of Buckingham, but rather this 'involves no question calling for the intervention of the Imperial Government; it is not one on which it seems to me incumbent to express an opinion.' Contrast the instructions to Sir Charles Darling, signed 'V. Rg.,' of June 23rd, 1863, with those published in the *Victoria Government Gazette* of September 2nd, 1892, signed, July 9th of that year, 'V. R. I.' The difference is enormous. The Victorian newspapers of that September commented on the change, and praised the wisdom of the Colonial Office in making it; but no one remembered the Victorian politician whose persistent efforts were at last successful. That number of the *Gazette* was published only four months before his death." (*Id.* p. 229.)

The New Instructions.—The re-drafted instructions, approved by Her Majesty on the advice of Lord Knutsford, contained a complete recognition of the principle of responsible government, in form as well as in practice, in all self-governing colonies. All the old and obsolete provisions which were really only applicable to Crown colonies, and particularly those complained of by Chief Justice Higinbotham, were now eliminated. As portions of these new instructions will be the basis of the "powers and functions of

the Queen" which may be assigned by Her Majesty to the Governor-General under sec. 2 of this constitution, they may be here appropriately inserted :—

"(i.) In these Our Instructions, unless inconsistent with the context, the term 'the Governor' shall include every person for the time being administering the Government of the Colony, and the term 'the Executive Council' shall mean the members of Our Executive Council for the Colony who are for the time being the responsible advisers of the Governor.

(ii.) The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Law in force in the Colony. The Governor is to administer such Oaths or cause them to be administered by some Public Officer of the Colony.

(iii.) The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as he shall find convenient for Our Service to impart to them.

(iv.) The Governor shall attend and preside at the meetings of the Executive Council, unless prevented by some necessary or reasonable cause, and in his absence such member as may be appointed by him in that behalf, or in the absence of such member the senior member of the Executive Council actually present shall preside ; the seniority of the members of the said Council being regulated according to the order of their respective appointments as members thereof.

(v.) The Executive Council shall not proceed to the despatch of business unless duly summoned by authority of the Governor, nor unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched.

(vi.) In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any member of the said Council to require that there be recorded upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

(vii.) The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes :—

(1.) Any Bill for the divorce of persons joined together in holy matrimony.

(2.) Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.

(3.) Any Bill affecting the currency of the Colony.

(4.) Any Bill imposing differential duties (other than as allowed by the Australian Colonies' Duties Act, 1873).

(5.) Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

(6.) Any Bill interfering with the discipline or control of Our forces in the Colony by land or sea.

(7.) Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.

(8.) Any Bill containing provisions to which Our assent has been once refused, or which has been disallowed by Us. . .

Unless he shall have previously obtained Our Instructions upon such Bill, through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the Colony of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

(viii.) The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers ; and in any case in which such pardon or reprieve might directly affect the interests of our empire, or of any country or place beyond the jurisdiction of the Government of the colony, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

(ix.) All commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers shall, unless otherwise provided by the law, be granted during pleasure only.

(x.) The Governor shall not quit the colony without having first obtained leave from us for so doing under our Sign Manual and Signet, or through one of our principal Secretaries of State, except for the purpose of visiting the Governor of any neighbouring colony for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the colony.

(xi.) The temporary absence of the Governor for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with our said letters-patent, be deemed a departure from the colony within the meaning of the said letters-patent.

V.R.I."

Special Instructions.—Every colonial governor, after his appointment to office, is subject to the control of the Crown, as an Imperial officer. In addition to the permanent and general instructions which he receives in connection with his commission, he may, from time to time, be charged with any further instructions, special or general, which the Crown may lawfully communicate to him under particular circumstances. The medium of communication between the sovereign and her representative in any British colony is the Secretary of State. (Todd, 2nd ed., p. 122.)

In the absence of special appointment, the governor of a British possession is also *ex-officio* Vice-Admiral thereof. (26 and 27 Vic. c. 24, sec. 3, and 30 and 31 Vic. c. 45, s. 4 ; repealed and re-enacted by the Colonial Courts of Admiralty Act, 1890, 53 and 54 Vic. c. 27, s. 10.)

Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the salary of the Governor-General[57], an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

UNITED STATES.—The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.—Const. (Art. II. sec. 1, 7).

SWITZERLAND.—The President of the Confederation and the other members of the Federal Council receive an annual salary from the Federal Treasury.—Const. (Art. 99).

CANADA.—Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.—B.N.A. Act, 1867, sec. 105.

HISTORICAL NOTE.—Clause 3, Chap. I., of the Commonwealth Bill of 1891 was as follows :—

"The annual salary of the Governor-General shall be fixed by the Parliament from time to time, but shall not be less than ten thousand pounds, and shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth. The salary of a Governor-General shall not be diminished during his continuance in office."

In Committee, Sir Harry Atkinson moved the omission of the words "but shall not be less than £10,000;" but after discussion he withdrew the amendment. Sir John Bray moved to omit "but shall not be less than," and insert "and until so fixed shall be." This was negatived by 24 votes to 12. An amendment by Sir George Grey, to substitute "altered" for "diminished," was also negatived. (Conv. Deb., Syd. [1891], pp. 578-85.)

At the Adelaide session, 1897, the clause was introduced as follows:—"The annual salary of the Governor-General shall be ten thousand pounds, and shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth." In Committee, on the motion of Mr. Higgins, the words "Until the Parliament otherwise provides" were prefixed. An amendment by Mr. Howe, to substitute "seven" for "ten," was negatived. On Mr. Barton's motion, the second paragraph was added. (Conv. Deb., Melb., pp. 629-33.)

At the Sydney session, suggestions by the Legislative Assembly and Legislative Council of South Australia, to reduce the salary to £7,000 and £8,000 respectively, were negatived, as was also an amendment by Mr. Glynn to omit the second paragraph. (Conv. Deb., Syd. [1897], p. 254.) Drafting amendments to the first paragraph brought it into its present shape.

§ 57. "Salary of the Governor-General."

"On May 22, 1868, at the close of the first session of Parliament of the new Dominion of Canada, an Act passed by the Senate and House of Commons 'to fix the salary of the Governor-General' was reserved for the consideration of Her Majesty's pleasure thereon. It was proposed, by this Act, to reduce the salary of the Governor-General from £10,000, at which rate it had been fixed by the Imperial Act. of Union, in 1867 (subject to alteration by the Parliament of Canada), to £6,500. But on July 30, 1868, the Secretary of State for the Colonies notified Lord Monck (the Governor-General) that while it was 'with reluctance, and only on serious occasions, that the Queen's government can advise Her Majesty to withhold the royal sanction from a bill which has passed two branches of the Canadian Parliament,' yet that a regard for the interests of Canada, and a well-founded apprehension that a reduction in the salary of the Governor which would place the office, as far as salary is a standard of recognition, in the third class among colonial governments, obliged Her Majesty's Government to advise that this bill should not be permitted to become law. In accordance with the opinions entertained by the Imperial Government on this subject, and with the right to legislate thereon, which was expressly conferred upon the Parliament of Canada by the 105th section of the British North America Act, the Dominion Parliament, in 1869, re enacted, by their own authority, the clause of the Imperial statute which fixed the salary of the Governor-General at £10,000 sterling, the same to be payable out of the consolidated revenue of Canada. This Act was necessarily reserved, under the royal instructions; but it received the assent of Her Majesty in council on August 7, 1869. From this date, no further attempt has been made to reduce the salary of the Governor-General." (Todd, Parl. Gov. in the Col., 2nd ed., p. 177.)

"The present compensation of the President of the United States, as fixed by statute, is $50,000 per annum, together with the use, as a residence, of the executive mansion, and of the furniture and effects kept therein." (Burgess, Political Sc., II. p. 244.)

"I think we might trust the Federal Parliament with fixing the amount, and then, of course, there will be an after-clause that the salary of no Governor-General is to be changed during his term of office. That is only fair. But we might trust the Federal Parliament with saying from time to time how much salary should be paid to the Governor-General." (Mr. H. B. Higgins, Conv. Deb., Adel. [1897], p. 629.)

"I beg to say that the object of the Constitutional Committee was to lift this question of the salary of the Governor-General above that incessant nagging and criticism which has given rise to some of the most discreditable episodes in our political life. We have had in our various Parliaments all sorts of questions as to the value of a Governor, or the value of our connection with the British Crown, with a view to diminish his salary. The Governor-General is the only constitutional link we have between the mother-country and ourselves, and £10,000 is not too small a sum; indeed, everyone will admit that it is a fair salary. This is the salary of the President of the United States, and the object of the Constitutional Committee was to lift the office of the Governor-General, and the person himself, above the attacks to which I have referred—attacks which are made by persons who either despise the British Crown, or wish to subvert the

position of the Governor-General. Under cover of these arguments, attacks are made upon the individuals who represent the Queen in the different colonies. As the Governor-General is to be a visible link between the British empire and ourselves, we should place him beyond the possibility of any trafficking being indulged in about the question of salary." (Mr. G. H. Reid, *id.*, p. 629.)

"I feel as strongly as Mr. Reid does the undesirability of frequent attacks upon the Governor, or his salary, or his perquisites, or anything else that belongs to him; but I am afraid that liability to attack would not be at all lessened if people were disposed to make it by inserting this provision for a fixed salary. My own inclination is that the reverse would be the case, because if people were disposed to cast unpleasant aspersions upon the Governor-General they would be more likely to do so if they could not relieve any antagonistic feeling they had by reducing his salary or that of his successors. There is a great deal of human nature in man, and if people, however fair they might wish to be, felt they could not gratify in any other way the criticism they may wish to indulge in, they would indulge in it with a great deal more acerbity if they could not touch the salary of the Governor-General or his successor. We may very fairly leave it with the Federal Parliament we are going to constitute, and the men who will compose this Senate and House of Representatives, to deal fairly and honourably with the Governor-General and his salary." (Mr. J. H. Symon, *id.*, p. 630.)

Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint[58] to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office[59] during his administration of the Government of the Commonwealth.

CANADA.—The provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.—B.N.A. Act, 1867, sec. 10.

HISTORICAL NOTE.—Clause 4, Chap. I., of the Commonwealth Bill of 1891 was as follows:—

"The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being or other the Chief Executive Officer or Administrator of the Government of the Commonwealth, by whatever title he is designated."

At the Adelaide session, 1897, the clause was introduced as follows:—

"The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such other person as the Queen may appoint to be the Chief Executive Officer or Administrator of the Government of the Commonwealth; but no such person shall be entitled to receive any salary in respect of any other office under the Crown during his administration of the Government of the Commonwealth."

In Committee the words "under the Crown" were omitted, and "from the Commonwealth" inserted after "salary." (Conv. Deb., Adel., pp. 633-5) At the Melbourne session, drafting amendments were made after the fourth report.

§ 58. "Such Person as the Queen may Appoint."

These words refer to the appointment of an acting Governor-General or Administrator of the Government of the Commonwealth, appointed under commission by the Queen. This officer, when so appointed, is authorized to exercise all the powers and functions of the Governor-General. He is not to be confused with the Deputy Governor-General, provided for by sec. 126. A Deputy Governor-General can only be appointed

by the Governor-General himself under the authority of the Queen, and can only exercise such powers and functions as are assigned to him by the Governor-General, subject to any limitations imposed by the Queen ; and the appointment of a Deputy does not affect the exercise by the Governor-General himself of those powers. (See sec. 126.)

"During the temporary absence of a Governor from his colony, it was formerly the general practice for the Crown, by a dormant commission under the sign-manual, to empower the Chief Justice or senior judge therein to act as administrator of the government ; but difficulties having sometimes arisen in carrying out an arrangement of this kind, it is not now invariably resorted to, at least, in the first instance. Instead of this provision to supply the place of an absent Governor, it is now customary either to appoint a Lieutenant-Governor or Administrator of the Government under the royal sign-manual ; or else that the senior officer for the time being of Her Majesty's regular troops in the colony shall be empowered to act in this capacity. But where no such provision has been made, it is usual and appropriate for the Chief Justice or senior judge to be authorized to act as Administrator of the Government, in the event of the death, incapacity, removal or departure from the Government of the Governor and (if there be such an officer) of the Lieutenant-Governor of the colony." (Todd, Parl. Gov. in the Col., 2nd ed. p. 123.)

§ 59. "Salary . . . in Respect of any other Office."

At the Adelaide session of the Convention, a section was inserted in Chapter III. providing that no person holding any judicial office should be appointed to or be capable of holding the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government. (Adel. Bill, sec. 80 ; Conv. Deb. Adel. pp. 1174-6) At the Melbourne session, this section was eliminated on the ground that it contained an undue limitation of the prerogative of the Crown, and that it might prejudicially restrict the choice of the Crown in the appointment of an Administrator of the Government for the time being. The Queen has now, therefore, unfettered discretion in the selection and appointment of an Administrator of the Federal Government ; he may be an Imperial officer; he may be an officer of the Commonwealth, such as President of the Senate or a Judge of the High Court ; he may be a Governor of a State or other State officer ; or he may not occupy any official position whatever at the time of his appointment. No qualification or disqualification for the office is prescribed, the Queen's choice, in conformity with the advice of her Imperial Ministers, being considered a sufficient guarantee for the appointment of a suitable and acceptable Federal Administrator, as well as for that of Governor-General himself. No mention is made in this section of the salary to be paid to the Administrator for his services in that capacity. It may be assumed that he will be paid out of the £10,000 per year payable to the Queen out of the consolidated fund of the Commonwealth for the maintenance of the Governor-Generalship, and that the amount will be apportioned in some manner satisfactory to the Imperial Government. There is, however, a distinct provision that no person acting as Administrator shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth. This inhibition will prevent a Federal Judge, should he be appointed Administrator, or the President of the Senate, should he be so appointed, from receiving the salary annexed to those respective offices during his administration of the Government. But should the Governor of a State or other State officer be so appointed, it will be competent for him to receive the salary of his State office as well as the salary for the Federal office.

Sessions of Parliament. Prorogation and dissolution. Summoning Parliament. First Session.

5. The Governor-General may appoint such times[60] for holding the sessions of the Parliament[61] as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue[62] the Parliament, and may in like manner dissolve[63] the House of Representatives.

After any general election the Parliament shall be summoned[64] to meet not later than thirty days after the day appointed for the return of the writs[65].

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

UNITED STATES.—The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. —Const., Art. I., sec. 4, subs. 2.

CANADA.—The Parliament of Canada shall be called together not later than six months after the union.—B.N.A. Act, 1867, sec. 19.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, the first and third paragraphs of this section were contained, in almost identical words, in Clause 6 of Chap. I.; whilst the substance of the second paragraph was added to clause 42 in Committee, on the motion of Sir John Bray. (Conv. Deb., Syd. [1891], pp. 585, 643-62.)

At the Adelaide session, the same provisions were introduced almost verbatim. (Conv. Deb., Adel., p. 635.) At the Sydney session, the question of dissolving the Senate was raised, and the clause was postponed till the deadlock question had been settled. (Conv. Deb., Syd. [1897], pp. 254-6, 987.)

At the Melbourne session, drafting amendments were made before the first report and after the fourth report; the second paragraph being brought up from the "Duration of House of Representatives" clause (sec. 28).

§ 60. "May Appoint such Times."

This is the first section in the Constitution in which a specific power to perform executive acts is vested in the Governor-General. It will be noticed that the section states that the Governor-General may perform these acts, and there is no reference to his so acting by the advice of the Federal Executive Council. The powers conferred on the Governor-General by this, and other sections similarly worded, may be here summarized for the purpose of comparing them with other powers conferred on the Governor-General in Council.

STATUTORY POWERS OF THE GOVERNOR-GENERAL.—The Governor-General may appoint the times for the holding the sessions of Parliament (sec. 5).

The Governor-General may prorogue Parliament (sec. 5).

The Governor-General may dissolve the House of Representatives (sec. 5).

The Governor-General shall notify to the Governor of a State interested the happening of a vacancy in the Senate (sec. 21).

The Governor-General may recommend to Parliament the appropriation of revenue or money (sec. 56).

The Governor-General may dissolve the Senate and the House of Representatives simultaneously (sec. 57).

The Governor-General may convene a joint sitting of members of both Houses (sec. 57.)

The Governor-General may assent in the Queen's name to a proposed law, or withhold assent, or reserve the law for the Queen's pleasure (sec. 58).

The Governor-General may recommend to Parliament amendments in proposed laws (sec. 58.)

The Governor-General may exercise, as the Queen's representative, the executive power of the Commonwealth (sec. 61).

The Governor-General shall choose and summon members of the Federal Executive Council, and may dismiss them (sec. 62).

The Governor-General may appoint officers to administer departments of State, and may dismiss them (sec. 64).

The Governor-General may, in the absence of Parliamentary provision, direct what offices shall be held by Ministers of State (sec. 65).

The Governor-General as the Queen's representative has the command-in-chief of the naval and military forces (sec. 68).

The Governor-General may proclaim dates when certain departments shall be transferred to the Commonwealth (sec. 69).

The Governor-General may, "in respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth," exercise all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony (sec. 70).

Statutory Powers of the Governor-General in Council.—On the other hand there are numerous sections in which authority to do executive acts is vested expressly in the Governor-General in Council, thus :—

The Governor-General in Council may issue writs for general elections of the House of Representatives (sec. 32).

The Governor-General in Council may issue writs for elections to fill vacancies in the House of Representatives (sec. 33).

The Governor-General in Council may establish departments of State (sec. 64).

The Governor-General in Council may appoint and remove all officers except Ministers of State (sec. 67).

The Governor-General in Council may exercise, "in respect of matters which under this Constitution pass to the Executive Government of the Commonwealth," all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony with the advice of his Executive Council (sec. 70).

The Governor-General in Council shall appoint the Justices of the High Court, and may appoint Justices of other Federal Courts (sec. 72).

The Governor-General in Council may, on addresses from both Houses, remove Justices of the High Court and of other Federal Courts (sec. 72).

The Governor-General in Council may draw money from the Federal Treasury and expend the same until the first meeting of the Parliament (sec. 83).

The Governor-General in Council may appoint members of the Inter-State Commission (sec. 103).

The Governor-General in Council may, on addresses from both Houses, remove members of the Inter-State Commission (sec. 103).

Mode of Exercising these Powers.—Without anticipating our general comments on the Executive Government of the Commonwealth, which naturally appear under the heading of Chapter II. (note § 271) it may be advisable here to make a preliminary observation in explanation of the two groups of executive powers, so classified.

The first group includes powers which properly or historically belong to the prerogatives of the Crown, and survive as parts of the prerogative; hence they are vested in the Governor-General, as the Queen's representative. The second group includes powers either of purely statutory origin or which have, by statute or custom, been detached from the prerogative; and they can, therefore, without any constitutional impropriety, be declared to be vested in the Governor-General in Council. But all those powers which involve the performance of executive acts, whether parts of the prerogative or the creatures of statute, will, in accordance with constitutional practice, as developed by the system known as responsible government, be performed by the Governor-General, by and with the advice of the Federal Executive Council. (See Note § 275.) If the section now under review had been made to read "the Governor-General in Council may appoint such times for holding the sessions of the Parliament," &c., the words "in Council" would have been an invasion of the Royal prerogative; because it is invariably recognized as a prerogative of the Crown to summon, prorogue and dissolve Parliament. The words would moreover have been mere surplusage; nothing would have been gained, since parliamentary government has well established the principle that the Crown can perform no executive act, except on the advice of some minister responsible to Parliament. Hence the power nominally placed in the hands of the Governor-General is really granted to the people through their representatives in Parliament. Whilst, therefore, in this Constitution some executive powers are, in technical phraseology, and in accordance with venerable customs, vested in the Governor-General, and others in the Governor-General in Council, they are all substantially in *pari materia*, on the same footing, and, in the ultimate resort, can only be exercised according to the will of the people.

"There are certain prerogative rights which have been long demitted or got rid of by statute or by other practice—generally by statute—and in any statute drafted the words "in Council" are inserted. There are certain other prerogative rights which, not having been the subject of such demission, as it is sometimes called, I believe, not having been given up in any way, apparently, are not so described in a statute. There are certain prerogative rights—this was all gone into at Adelaide, and decided by the Convention according to the contention I am advocating—which are not described in a statute as rights of the Governor in Council, simply because no statute has ever dealt with them, and because they belong to that part of the prerogative which has never been nominally given up by the Crown. Of such is the power to summon and dissolve Parliament, to which no one who understood these matters would dream of adding the words 'in Council.' But yet these rights can never be exercised without the advice of a responsible Minister, and if that advice is wrongly given it is the Minister who suffers." (Mr. E. Barton, Conv. Deb., Melb., pp. 2253-4.)

The executive powers referred to, however, must not be confounded with the authority vested in the Governor-General to assent to a proposed law or withhold his assent or to reserve it for the Queen's pleasure. (See Note, § 267.) This is not an executive, but a legislative power entrusted to him as the Queen's representative and one which he may exercise "according to his discretion." That is the only section in which a discretionary power is clearly and unequivocally given to the Governor-General; it is in reference to matters of legislation and not matters of administration. (See Note, § 271, "The Executive Government.")

§ 61. "Holding the Sessions of the Parliament."

"It is by the act of the Crown alone that Parliament can be assembled. The only occasions on which the Lords and Commons have met by their own authority, were previously to the restoration of King Charles II., and at the Revolution in 1688. The first Act of Charles the Second's reign declared the Lords and Commons to be the two houses of Parliament, notwithstanding the irregular manner in which they had been assembled; and all their Acts were confirmed by the succeeding Parliament summoned by the king, which however qualified the confirmation of them, by declaring that 'the manner of the assembling, enforced by the difficulties and exigencies which then lay upon the nation, is not to be drawn into example.' In the same manner, the first Act of the reign of William and Mary declared the Convention of Lords and Commons to be the two houses

of Parliament, as if they had been summoned according to the usual form; and the succeeding Parliament recognized the legality of their Acts." (May, Parl. Prac., 10th ed., p. 38.)

§ 62. "Prorogue."

Prorogation is the continuance of the Parliament from one session to another, as an adjournment is a continuance of the session from day to day. Prorogation puts an end to the session, and quashes any Bills which are begun and not perfected. According to the practice of the Imperial Parliament, such Bills must be resumed *de novo* (if at all) in a subsequent session, as if they had not previously been introduced. (See Tomlins, Vol. II. Parliament, viii.; May, Parl. Prac. 10th ed. p. 43.) The Houses may, however, by standing orders provide for the resumption of such Bills, upon motion, at the stage at which they were interrupted. (See, for instance, Standing Orders, 200-2, of Legislative Council, New South Wales; Standing Orders, 295-7, of Legislative Assembly, New South Wales.) A prorogation may be effected by commission, but the usual course is by proclamation.

"Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of the Parliament. The session is never understood to be at an end until a prorogation; though, unless some Act be passed or some judgment given in Parliament, it is in truth no session at all." (Tomlins, vol. II, Parliament.)

"All orders of Parliament determine by prorogation, and one taken by order of the Parliament after their prorogation, may be discharged on an *habeas corpus*, as well as after a dissolution; but it was long since determined that the dissolution of a Parliament did not alter the state of impeachments brought up by the Commons in a preceding Parliament." (*Id.*)

"The Crown may bring the session to an end by a prorogation, which has the effect of quashing all proceedings, except impeachments and appeals before the House of Lords. Parliament is prorogued by the sovereign in person in the House of Lords, or by commission; it may also be prorogued by proclamation from the day for which it was summoned, or to which it had been previously prorogued." (Encyclopedia, Laws of England IX. p. 401.)

§ 63. "Dissolve."

This section confers upon the Governor-General the power to dissolve the House of Representatives before the expiration of the three years for which it is elected. By section 57 the Governor-General, in the circumstances therein specified, is further authorized to dissolve the Senate and the House of Representatives simultaneously.

Granting a Dissolution.—It is the prerogative of the Crown to dissolve an existing Parliament subject only to the constitutional rule that this great power, described by Sir Charles G. Duffy as "the most popular of all the prerogatives," and one of immense utility, can be exercised only on the advice and approval of a Minister of State directly responsible to the national chamber. The granting of a dissolution is, of course, an executive act, the ministerial responsibility for which can be easily established. The following have been suggested as the leading considerations which should reasonably support and justify ministerial advice in favour of a dissolution (Todd, 2nd ed. p. 771):

(i.) When a vote of "no confidence" is carried against a government which has not already appealed to the country.

(ii.) When there are reasonable grounds to believe that an adverse vote against the government does not represent the opinions and wishes of the country, and would be reversed by a new Parliament.

(iii.) When the existing Parliament was elected under the auspices of the opponents of the government.

(iv.) When the majority against a government is so small as to make it improbable that a strong government can be formed from the opposition.

Refusing a Dissolution.—The refusal of a dissolution, recommended by a Minister of State, is not an executive act; it is a refusal to do an executive act. It seems to be

generally admitted by constitutional authorities that the Crown has still an undoubted constitutional right to withhold its consent to the application of a minister for permission to dissolve Parliament. The sovereign, it is said, ought not to be a mere passive instrument in the hands of ministers; it is not merely the right but the duty of the sovereign to exercise his judgment on the advice so tendered.

"And though, by refusing to act upon that advice, he incurs a serious responsibility, if they should in the end prove to be supported by public opinion, there is, perhaps, no case in which this responsibility may be more safely and more usefully incurred than when ministers have asked to be allowed to appeal to the people from a decision pronounced against them by the House of Commons. For they might prefer this request when there was no probability of the vote of the House being reversed by the nation, and when the measure would be injurious to the public interests. In such a case, the sovereign ought clearly to refuse to allow a dissolution." (Todd, Parl. Govt. in England, II., 2nd ed., 510.)

"The power of dissolution is, of all the trusts vested in His Majesty, the most critical and delicate." (Burke, Works, III., p. 525.)

"It is a great instrument in the hands of the Crown, and it would have a tendency to blunt the instrument if it were employed without grave necessity." (Sir Robert Peel, Speeches, IV., p. 710.)

"It seems to be generally supposed that a defeated minister is entitled, if he think fit, at once to 'appeal to the country.' The concurrence of the Crown is assumed as a matter of course. But although ministers may advise a dissolution, the King is by no means bound to follow that advice. The refusal to grant the dissolution would indeed be a sufficient ground for the resignation of ministers; but, on the other hand, compliance with the request can only be meant to assist them against the hostility of Parliament. Such assistance the King cannot and ought not indiscriminately to give. The question therefore arises in what circumstances, according to modern constitutional usage, ought the prerogative of dissolving Parliament to be exercised." (Hearn's Gov. of Eng., p. 162.)

"Except where some organic change has been effected in the construction of Parliament, the only reason which can induce the King prematurely to dismiss his Great Council must be either that the advice that he obtains from it is unacceptable to him, or that he can obtain no definite and decided advice, or that the two portions of his Council are discordant. In other words, either there is a difference of opinion between the Crown and the House of Commons on the subject of some ministry; or the different parties in the Commons are so equally divided that business is obstructed; or the two Houses cannot on some material question come to an agreement." (Hearn's Gov. of Eng., p. 163-4.)

"If the minister to whom a dissolution has been refused is not willing to accept the decision of the sovereign, it is his duty to resign. He must then be replaced by another minister, who is prepared to accept full responsibility for the act of the sovereign, and for its consequences, in the judgment of Parliament." (Todd, Parl. Govt. in Eng., vol. ii., p. 408.)

"It is evident, therefore, that the sovereign—when, in the exercise of this prerogative, a dissolution is either granted or refused—must be sustained and justified by the agreement of a responsible minister. If this be constitutionally necessary, as respects the sovereign, it is doubly so in the case of a Governor. For the sovereign is not personally responsible to any earthly authority; but a Governor is directly responsible to the Crown for every act of his administration." (Todd, Parl. Govt. in the Col., 2nd ed., p. 761.)

"As the representative of the Crown in the dominion, colony, or province, over which he is commissioned to preside, the power of dissolution rests absolutely and exclusively with the Governor or Lieutenant-Governor for the time being. He is personally responsible to the Crown for the lawful exercise of this prerogative, but he is likewise bound to take into account the welfare of the people, being unable to divest himself of a grave moral responsibility towards the colony he is commissioned to govern." (Todd, *id.*, p. 800.)

"Whilst this prerogative, as all others in our constitutional system, can only be administered upon the advice of counsellors prepared to assume full responsibility for the Governor's decision, the Governor must be himself the judge of the necessity for a dissolution. The 'constitutional discretion' of the Governor should be invoked in respect to every case wherein a dissolution may be advised or requested by his ministers; and his judgment ought not to be fettered, or his discretion disputed, by inferences drawn from previous precedents, when he decides that a proposed dissolution is unnecessary or undesirable." (Todd, *id.*, p. 800.)

"It is the duty of a Governor to consider the question of a dissolution of the parliament or legislature solely in reference to the general interests of the people and not from a party standpoint. He is under no obligation to sustain the party in power if he believes that the accession to office of their opponents would be more beneficial to the public at large. He is, therefore, justified in withholding a dissolution requested by his ministers, when he is of opinion that it was asked for merely to strengthen a particular party, and not with a view to ascertain the public sentiment upon disputed questions of public policy. These considerations would always warrant a governor in withholding his consent to a dissolution applied for, under such circumstances, by a ministry that had been condemned by a vote of the popular chamber. If he believes that a strong and efficient administration could be formed that would command the confidence of an existing Assembly, he is free to make trial thereof instead of complying with the request of his ministers to grant them a dissolution as an alternative to their enforced resignation of office. On the other hand, he may at his discretion grant a dissolution to a ministry defeated in Parliament and desirous of appealing to the constituencies, notwithstanding that one or both branches of the legislature should remonstrate against the proposed appeal, if only he is persuaded that it would be for the public advantage that the appeal should be allowed." (Todd, *id.*, p. 801.)

"Parliament is usually dissolved by proclamation under the great seal, after having been prorogued to a certain day. This proclamation is issued by the Queen, with the advice of her Privy Council; and announces that the Queen has given order to the Lord Chancellor of Great Britain and the Lord Chancellor of Ireland to issue out writs in due form, and according to law, for calling a new Parliament; and that the writs are to be returnable in due course of law." (May's Parl. Prac., 10th ed., p. 46.)

"On the 17th July, 1837, Parliament was prorogued and dissolved on the same day. On the 23rd July, 1847, the Queen, in proroguing Parliament, announced her intention immediately to dissolve it; and it was accordingly dissolved by proclamation on the same day, and the writs were despatched by that evening's post; and this course is now the ordinary, but not the invariable practice." (May's Parl. Prac., 10th ed., p. 47.)

§ 64. "The Parliament shall be Summoned."

The first Federal Parliament will have to be elected and summoned to meet for the despatch of business not later than six months after the establishment of the Commonwealth. This part of the section refers to two important events—(1) the establishment of the Commonwealth, and (2) the summoning of the first Parliament. Several intervening events are assumed to have taken place; such as the appointment by the Governor-General of Ministers of State to constitute the first administration of the Commonwealth, and the election of the first Parliament. A Federal Ministry will have to be appointed immediately upon the establishment of the Commonwealth, for on the accomplishment of the union the departments of Customs and Excise, in the several States, are by the terms of the Constitution transferred to the Commonwealth, and the Executive Government will be at once required for the purpose of administering those departments as well as for the purpose of supervising the issue of writs, appointing returning officers, and generally making arrangements necessary for the election of members of the House of Representatives. The writs for the election of Senators are issued by the Governors of States. The various successive steps and stages in the inauguration of the new regime may be here recapitulated for general survey—

The Passing of the Act. (9th July, 1900.)

The Passing of Electoral Laws by the Colonial Parliaments.

The Issue of the Queen's Proclamation (17th September, 1900).

The Appointment of the Governor-General.

The Arrival of the Governor-General in Australia.

The Establishment of the Commonwealth and the Commencement of the Operation of the Constitution on the day appointed in the Queen's Proclamation (1st January, 1901).

The Transfer of the Departments of Customs and Excise to the Commonwealth (1st January, 1901).

The Appointment of the First Federal Ministry.

The Issue by the Governor-General of Writs for the Election of Members of the House of Representatives.

The Issue by the Governors of States of Writs for the Election of Senators.
The Election of Representatives.
The Election of Senators.
The Return of the Writs.
The Summoning of the New Parliament.
The Meeting of the New Parliament not later than Six Months after the establishment of the Commonwealth.

§ 65. "Day Appointed for the Return of the Writs."

The provision of this Section, that after any general election the Parliament shall be summoned to meet not later than thirty days "after the day appointed for the return of writs" would seem to refer to the day appointed by the Governor-General in Council under section 32, under which writs are issued for general elections of members of the House of Representatives; such writs would of course appoint the day upon which they are required to be returned. The passage in this section, now under consideration, was taken from a paragraph in ch. I., pt. III., sec. 41 of the Draft Bill of 1891, which under the heading of "Duration of the House of Representatives," provided that "The Parliament shall be called together not later than thirty days after the day appointed for the return of the writs for the general election." From this it appears "that the day appointed" means the time specified for the return of the writs issued by the Federal Government for the election of the House of Representatives; and that it has no reference to the times which may be appointed by the Governors of States for the return of writs issued by them for the election of Senators for their respective States. It does not seem to suggest that the Governor-General in Council could limit the time within which the election of Senators would have to be held, and their names certified by the Governors of States. The Governor-General in Council could issue no mandate to the Governors of States on this subject. On the contrary, the State authorities can fix their own times for the election of senators, without reference to the Federal Government (sec. 9). Should any of the States omit to provide for their representation in the Senate, that body could proceed to the despatch of business in the absence of senators from such State (sec. 11), provided that there was a quorum present, consisting of at least one-third of the whole number of the senators (sec. 22).

Yearly Session of Parliament.

6. There shall be a session of the Parliament once at least in every year[66], so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

Canada.—There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.—B.N.A. Act, 1867, s. 20.

Historical Note.—This provision, which occurs in the Constitutions of all the Australian colonies, was contained, verbatim, in the Commonwealth Bill of 1891, and was adopted by the Convention of 1897-8, without debate or amendment.

§ 66. "Once at Least in Every Year."

The annual meeting of the Federal Parliament is secured by this section of the Constitution, in accordance with numerous colonial precedents. In the United Kingdom, however, the Queen is only bound by statute to issue writs within three years after the expiration of a Parliament. The guarantee of an annual session is the necessity of providing money for the public service.

"The annual meeting of Parliament, now placed beyond the power of the Crown by a system of finance, rather than by distinct enactment, had, in fact, been the law of England from very early times. By the statute 4 Edward III, c. 14, 'it is accorded that Parliament shall be holden every year once, [and] [or] more often if need be.' And again, in the 36 Edw. III., c 10, it was granted 'for redress of divers mischiefs and grievances which daily happen [a Parliament shall be holden or] be the Parliament holden *every year*, as another time was ordained by statute.' It is well known that by extending the words, 'if need be,' to the whole sentence instead of to the last part only, to which they are obviously limited, the kings of England constantly disregarded these laws. It is impossible, however, for any words to be more distinct than those of the 36 Edward III., and it is plain from many records that they were rightly understood at the time. In the 50 Edward III., the Commons petitioned the king to establish, by statute, that a Parliament should be held each year; to which the king replied, 'In regard to a Parliament each year, there *are* statutes and ordinances made, which should be duly maintained and kept.' So also to a similar petition in the 1 Richard II., it was answered, 'So far as relates to the holding of Parliament each year, let the statutes thereupon be kept and observed; and as for the place of meeting, the king will therein do his pleasure.' And in the following year the king declared that he had summoned Parliament, because at the prayer of the Lords and Commons it had been ordained and agreed that Parliament should be held each year. In the preamble of the Act 16 Chas. I., c. 1, it was also distinctly affirmed, that 'by the laws and statutes of this realm, Parliament ought to be holden at least once every year for the redress of grievances: but the appointment of the time and place of the holding thereof hath always belonged, as it ought, to his majesty and his royal progenitors.' Yet by the 16 Chas. II., c. 1, a recognition of these ancient laws was withheld: for the Act of Charles I. was repealed as 'derogatory of his majesty's just rights and prerogative'; and the statutes of Edward III were incorrectly construed to signify no more than that 'Parliaments are to be held very often.' All these statutes, however, were repealed, by implication, by this Act, and also by the 6 and 7 Will. and Mary, c. 2, which declares and enacts 'that from henceforth Parliament shall be holden once in three years at the least.'" (May's Parl. Prac., pp. 38-40.)

PART II.—THE SENATE.

The Senate.

7. The Senate[67] shall be composed of senators for each State[68], directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate[69].

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland[70], if that State be an Original State[71], may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained[72] and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and

the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

United States.—The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.—Const., Art. I., sec. 3, sub-sec. 1.

Canada.—The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators.—B.N.A. Act, 1867, sec. 21.

In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:—

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick; which Three Divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows:—Ontario by twenty-four Senators; Quebec by twenty-four Senators; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.—*Id.*, sec. 22.

The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator.—*Id*, sec. 24.

Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.—*Id.*, sec. 25.

If at any time on the recommendation of the Governor-General the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.—*Id.*, sec. 26.

In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the Three Divisions of Canada is represented by twenty-four Senators, and no more.—*Id.*, sec. 27.

The number of Senators shall not at any time exceed seventy-eight.—*Id.*, sec. 28.

A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.—*Id.*, sec. 29.

Historical Note.—Clause 9, Chap. I., of the Commonwealth Bill of 1891 was as follows:—

"The Senate shall be composed of eight members for each State, directly chosen by the Houses of the Parliament of the several States during a session thereof, and each senator shall have one vote. The senators shall be chosen for a term of six years. The names of the senators chosen in each State shall be certified by the Governor to the Governor-General."

In Committee, the debate opened with a warning by Mr. Wrixon that, if the Senate were given large powers, the clause must be reconsidered; "it will never do to give equal representation to the smallest, as well as to the largest States, if the Senate is to be a large and determined power in the Constitution." An amendment by Mr. Munro, to substitute "six" for "eight," was negatived. Mr. Kingston proposed to omit the words "directly chosen by the Houses," &c., so as to leave each State to determine the mode of election. The arguments in favour of a uniform mode of election, however, were too strong; and the time was not yet ripe for the plan of direct election. Mr. Kingston's amendment was negatived by 34 votes to 6. (Conv. Deb., Syd. [1891], pp. 588-99.)

At the Adelaide session, the provision was introduced as follows (part of clause 9):—

"The Senate shall be composed of six senators for each State, and each senator shall have one vote.

"The senators shall be directly chosen by the people of the State as one electorate.

"The senators shall be chosen for a term of six years, and the names of the senators chosen by each State shall be certified by the Governor to the Governor-General.

"The Parliament shall have power, from time to time, to increase or diminish the number of senators for each State, but so that the equal representation of the several States shall be maintained and that no State shall have less than six senators."

The discussions upon this clause at the Adelaide and Sydney sessions may be most conveniently referred to under separate subject-headings.

Equal Representation.—At the Adelaide session, Mr. Higgins proposed that representation in the Senate should be according to a sliding scale, intermediate between

equal and proportionate representation. This was negatived by 32 votes to 5. (Conv. Deb., Adel., pp. 641-68, 1190.) At the Sydney session, a suggestion by both Houses of the New South Wales Parliament, providing for proportionate representation, with a minimum of three senators for each State, and a minimum total number of 40 senators, was negatived by 41 votes to 5. (Conv. Deb., Syd. [1897], pp. 256-355.) In the re-draft of the clause proposed at Sydney, doubts as to the construction of the clause, read with the clause providing for the representation of new States (sec. 121), were removed by restricting the right of equal representation to "Original States." (See Conv. Deb., Syd. [1897], pp. 257-8.) The same principle was affirmed by a suggestion of the Legislative Assembly of Victoria, declaring that the provision for the maintenance of equal representation should not apply to new States admitted on other terms. This was opposed by those who claimed that equal representation was an essential principle of Federation, but was supported by those who defended equal representation as a necessary compromise. It was agreed to by 25 votes to 20. (Conv. Deb., Syd. [1897], pp. 394-415.)

Direct Election by People.—At the Adelaide session, Mr. Dobson protested against the direct election of senators on the same suffrage as the House of Representatives, but moved no amendment. (Conv. Deb., Adel., pp. 670-2.) At the Sydney session, Sir John Forrest announced his preference for election by the Legislatures. (Conv. Deb., Syd. [1897], p. 361.)

As one Electorate.—At the Adelaide session, Mr. Lyne criticized the policy of making each State one electorate, and advocated single-member constituencies (Conv. Deb., Adel., pp. 668-9.) At the Sydney session, suggestions by the Legislative Assembly of New South Wales, and by both Houses of all the other colonies, to omit the words "as one electorate," were discussed. Sir John Forrest suggested three electorates, seeing that three members for each State were to retire periodically. Mr. Fraser suggested six electorates. After debate, the words "until the Parliament otherwise provides" were inserted by 29 votes to 19; and the words "as one electorate" were retained by 29 votes to 18. (Conv. Deb., Syd. [1897], pp. 360-91.)

Term of Office.—At the Adelaide session, Mr. Higgins proposed to reduce the senators' term of office from six to four years. This was negatived. (Conv. Deb., Adel., p. 670.)

Certifying Names.—At the Sydney session, a suggestion by the Legislative Assembly of Victoria to omit this provision—on the ground that the States should have nothing to do with the electoral machinery of the Senate—was negatived. (Conv. Deb., Syd. [1897], pp. 391-4.)

At the Sydney session, the clause was re-drafted in the following form :—

"The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise determines, as one electorate, and each senator shall have one vote. Until the Parliament otherwise provides, there shall be six senators for each Original State. The Parliament may, from time to time, increase or diminish the number of senators for each State, but so that equal representation of the several Original States shall be maintained, and that no Original State shall have less than six senators. The Senators shall be chosen for a term of six years, and the names of the senators chosen by each State shall be certified by the Governor to the Governor-General."

At the Melbourne session, before the first report, the words "and each Senator shall have one vote" were transferred to another clause (sec. 23); and the words "chosen for each State" were substituted for "chosen by each State." After the second report, Mr. Isaacs proposed to allow each State, provisionally, to divide the State into electorates. This was negatived by 27 votes to 16. (Conv. Deb., Melb., pp. 1922-8.) Verbal amendments were made after the fourth report.

At the Premiers' Conference, 1899, the paragraph enabling the Parliament of Queensland, in the absence of federal legislation, to divide the State into electoral divisions, was agreed to.

§ 67. "The Senate."

The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the Constitution, using the word federal in the sense of linking together and uniting a number of co-equal political communities, under a common system of government. The Senate is not merely a branch of a bicameral Parliament; it is not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of federal legislation which they may consider to be in excess of the jurisdiction of the Federal Parliament. In addition to the legal remedy it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.

That the Senate is the Council of States in the Federal Parliament is proved by the words of this section. There are to be six senators for each Original State. That the States, and not the people, are actually represented in the Senate is shown by the requirement that the "equal representation of the several Original States shall be maintained." Equality of representation, it is argued, is a natural corollary of State representation, because the colonies were, prior to federation, politically equal; equal in constitutional power and status, although not necessarily equal in territory or population. Territory and population afford no absolute test of political status. The true test is the power to govern. Crown colonies would not have been admitted members of the Federal Partnership, on terms of equality with the responsible-government colonies. Further, it was one of the terms of the federal bargain that, in consideration of the transfer of general powers to the Commonwealth, each colony represented in the Convention should, on becoming a State, maintain its original relative equality and individuality unimpaired. That could only be done by equality of representation in the Council of States. Without the adoption of that principle the federation of the Australian colonies would not have been accomplished.

After prolonged and exhaustive debates the Federal Convention, by decisive majorities, accepted the principle of equal representation of Original States in the Senate, as a positive and indispensable condition of the Federal scheme. The question had to be considered, not so much from its logical and symmetrical aspect—not so much as a principle capable of satisfactory dialectical analysis and vindication—but rather as one of the terms of the Federal compact, which is based on compromise. The problem to be solved in the case of the Australian colonies desiring to federate was similar to that which had to be solved by the framers of the American Constitution; it was—how to reconcile the creation of a strong national government with the claims and susceptibilities of separate, and, in their own eyes, *quasi*-sovereign States. The solution of the problem was found in a Parliament partly national and partly Federal. The national part of the Parliament is the House of Representatives—the organ of the nation. The Federal part of the Parliament is the Senate—the organ of the States, the visible representative of the continuity, independence, and reserved autonomy of the States, linking them together as integral parts of the Federal union. As *quasi*-sovereign entities, it was contended that they were entitled to equal representation, because they were constitutionally and politically equal; inequality in the number of people within their jurisdiction did not constitute inequality in their *quasi*-sovereignty; in sovereignty there were no degrees. This was the only logical ground suggested. Whether it was

sound or unsound is not so material as the fact that a majority of the Australian communities affirmed that they would not agree to transfer a part of their political rights and powers to a central Legislature except on the condition that, as States, they should be equally represented in one of the Chambers of that Legislature.

The functions and basis of the Senate are fully explained and vindicated in the annexed quotations from standard authorities and extracts from speeches delivered in the Federal Convention. The fact that equal State representation cannot be taken away, even (as may be contended) by an amendment of the Constitution, fully warrants the presentation of the case for the Senate in the language of some of its strongest advocates.

"Whatever may now be thought of the reasoning of the contending parties, no person who possesses a sincere love of country and wishes for the permanent union of the States can doubt that the compromise actually made was well founded in policy, and may now be fully vindicated upon the highest principles of political wisdom and the true nature of the government which was intended to be established. It may not be unprofitable to review a few of the grounds upon which this opinion is hazarded. In the first place, the very structure of the general government contemplated one partly federal and partly national. It not only recognized the existence of State governments, but perpetuated them, leaving them in the enjoyment of a large portion of the rights of sovereignty, and giving to the general government a few powers, and those only which were necessary for national purposes. The general government was, therefore, upon the acknowledged basis, one of limited and circumscribed powers; the States were to possess the residuary powers. Admitting, then, that it is right, among a people thoroughly incorporated into one nation, that every district of territory ought to have a proportional share of the government; and that among independent States, bound together by a simple league, there ought, on the other hand, to be an equal share in the common councils, whatever might be their relative size or strength (both of which propositions are not easily controverted); it would follow that a compound republic, partaking of the character of each, ought to be founded on a mixture of proportional and equal representation. The legislative power, being that which is predominant in all governments, ought to be above all of this character; because there can be no security for the general government or the State governments without an adequate representation, and an adequate check of each in the functions of legislation. Whatever basis, therefore, is assumed for one branch of the legislature, the antagonist basis should be assumed for the other. If the House is to be proportional to the relative size, and wealth, and population of the States, the Senate should be fixed upon an absolute equality, as the representative of State sovereignty. There is so much reason and justice and security in such a course than it can with difficulty be overlooked by those who sincerely consult the public good, without being biassed by the interests or prejudices of their peculiar local position. The equal vote allowed in the Senate is, in this view, at once a constitutional recognition of the sovereignty remaining in the States, and an instrument for the preservation of it. It guards them against (what they meant to resist as improper) a consolidation of the States into one simple republic; and, on the other hand, the weight of the other branch counterbalances an undue preponderance of State interests tending to disunion. Another and most important advantage arising from this ingredient is the great difference which it creates in the elements of the two branches of the legislature." (Story, Comm. on the Const. §§ 697-9.)

"The state legislatures ought to have some means of defending themselves against encroachments of the national government. And what better means can we provide than to make them a constituent part of the national establishment? No doubt there is danger on both sides; but we have only seen the evils arising on the side of the state governments. Those on the other side remain to be displayed; for congress had not power to carry their acts into execution, as the national government will now have." (Geo. Mason, in the Philadelphia Convention, 7th June, 1787.)

"The Senate of the United States is the only upper legislative chamber in the world that has the strength to resist the will of the electorate for a considerable period of time. It represents the Federal principle in the government, and, besides its legislative, has important executive functions." (Foster, Comm. I. p. 457.)

"The name of Senate is taken from a body which ruled ancient Rome; and its prototype was the body of senior warriors with whom the king or chieftain held his councils of war; but in its legislative functions it resembles the Roman tribunate more closely than its name-father, and its immediate model was the House of Lords." (*Id.* p 459)

"We may imagine very easily in a moment's reflection what would have been the condition of this country at this moment had the Senate of the United States been constituted on a different principle. If the size and populations of the several States had

been the test of representation in the Senate of the United States, I think it is not too much to say, in sober minded truth, that this Republic would not have endured until now. Many and many have been the times when, if the right of the Senators of each State to resist and defeat the current of popular passion and prejudice which arises sometimes in the action of the popular body, the House of Representatives, had failed to exert itself, as it would have failed if the Senate had been constituted as the national House of Representatives, discord and revolution would almost certainly have caused the dismemberment of the Union." (Senator George F. Edmunds, cited in Foster, Comm. vol. I. p. 467.)

"Although there has been no need of its interposition to protect the small from any encroachment by the larger States, until the Civil War the Senate was more conspicuously the guardian of State rights in general. Their advocates maintained the position that the body was an assembly of ambassadors from sovereign States. During Washington's administration, North Carolina directed her senators to execute a deed ceding land to the United States: Senator Tazewell, of Virginia, declined Jackson's offer of a place in the cabinet, and said:—'Having been elected a senator, I would as soon think of taking a place under George IV. if I was sent as minister to his court, as I would to take a place in the cabinet.' Insistence has frequently been made upon the right of State legislatures to instruct their senators in Congress. In 1808, John Quincy Adams resigned after voting for the embargo in opposition to the wishes of his constituents. A senator, in 1828, after arguing against the Tariff of Abominations, said, 'as the organ of the State of Kentucky he felt himself bound to surrender his individual opinion, and express the opinion of his State.' John Tyler, in 1836, before he was President, resigned his place in the Senate because the Virginia legislature had instructed him to vote in favour of the expunging resolution, which he could not conscientiously approve. These doctrines are now abandoned The Senators consider themselves as members of an ordinary legislative body. They pay no more attention to the instructions of State legislatures than do members of the House; and in fact, since their terms are longer, they are more inclined to disobey them." (Foster, Comm. I. pp. 494-6.)

"A survey of its position throughout the history of the United States shows that the Senate has maintained, almost without interruption, the respect of the American people, and that it has vindicated the wisdom of its creation; while State senates are usually more despised than State houses of assembly. It has been shorn of but a single power, that to originate general appropriation bills, which the House has, by their continuous rejection when sent there, refused to permit it to exercise successfully, although the Senate has more than once recorded a protest asserting its prerogative: but in practice, through its power of amendment, the loss is rather nominal than real." (*Id.* 496.

"What I mean is an upper chamber, call it what you may, which shall have within itself the only conservatism possible in a democracy—the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character—which are the only qualities we can expect to collect and bring into one body in a community young and inexperienced as Australia." (Sir Henry Parkes, in the Federal Convention, 1891; Convention Debates, p. 26.)

"If the Australian people desired unity, it would, perhaps, be a question open to discussion whether the Senate should or should not be an elected body, but when they desire Union only, it is essential that there should be in the Federal Government some body representing the Provinces as such; some body sufficiently strong, from the nature of its constitution, to uphold the rights of the Provinces whom it represents. What other body than an elected Senate can be suggested? It is no answer to point out objections to an elected Senate, unless you are prepared to suggest some other mode of appointment which is open to less objections. If there is to be some outward and visible sign of recognition of State rights, if the 'natural' desire of the small States is to be given effect to, how can it be better effected than by equal representation in the Senate? Their 'desires' will have to be ascertained, and consent obtained before any Union can be formed, and we must never forget the saying of Solon, who, when asked if he had given the Athenians the best possible laws, replied, 'I have given them the best they can bear.' As Mr. Bagehot himself remarks, a Federal Senate, a second House which represents State unity, has this advantage: it embodies a feeling at the root of society—a feeling which is older than complicated politics, which is stronger a thousand times over than common political feeling; the local feeling, 'my shirt,' says the Swiss State patriot, 'is nearer to me than my coat.' An elected Senate in which each State is equally represented is a guarantee that no law will be passed, not only without the consent of the majority of the people, but also without the consent of a majority of the States. By the election of Senators by each State for each State you insure the respect and attachment of the State as a whole, not only for the particular Senators they have elected, but also for the whole federal constitution of which they form a part." (Sir R. C. Baker; Manual for use of Convention of 1891, p. 61.)

"All Federal Governments have their Senates or Councils of the States, and in all of them the Senate is based upon the principle that in a Federation the States must be represented as well as the people. The principle, if not as old as the hills, goes as far back as the Achæan League, where each city, independent of its size, had one vote. And the reason why the principle is universal is not far to see. It is probable that no small States would care to link their fortunes with large States if they were liable to be out-voted and ignored by virtue of the superior population of their greater brethren. Certainly the American States would never have set aside their loose confederation, unworkable as it was, if it had not been for this method of alleviating their fears, and of extinguishing their jealousies. In their Senate each State, the great and the pigmy, is equal. We shall undoubtedly to a large extent have to recognize this principle here." (Mr. Howard Willoughby, Australian Federation [1891] p 58.)

"The individualism of the States after Federation is of as much interest to each colony as the free exercise of national powers is essential to that aggregation of colonies which we express in the term Federation. If the one trenches upon the other, then, so far as the provinces assert their individuality overmuch, the fear is an approach to a mere loose confederation, not a true Federation. The fear on the other hand is, if we give the power to encroach—that is if we represent the federated people only, and not the States in their entities, in our Federation—then day by day you will find the power to make this encroachment will be so gladly availed of that, day by day and year by year, the body called the Federation will more nearly approach the unified or 'unitarian' system of government. We cannot adopt any form of government the tendency of which will be, as time goes on, to turn the constitution towards unification on the one hand, and towards a loose confederacy on the other. We must observe that principle, or else we do not observe the charge laid upon us by the enabling Act, which lays on us the duty to frame a 'Federal' Constitution under the Crown. So, therefore, I take it there must be two Houses of Parliament, and in one of these Houses the principle of nationhood, and the power and scope of the nation, as constituted and welded together into one by the act of Federation, will be expressed in the National Assembly, or House of Representatives, and in the other Chamber, whether it is called the Council of the States, the States Assembly, or the Senate, must be found not the ordiuary checks of the Upper House, because such a Chamber will not be constituted for the purposes of an Upper House; but you must take all pains, not only to have a Parliament consisting of two Chambers, but to have it constituted in those two Chambers in such a way as to have the basic principle of Federation conserved in that Chamber which is representative of the rights of the States; that is that each law of the Federation should have the assent of the States as well as of the federated people. If you must have two Chambers in your Federation, it is one consequence of the Federation that the Chamber that has in its charge the defence of State interests will also have in its hands powers in most matters co-ordinate with the other House." (Mr. Edmund Barton, Conv. Deb., Adel., pp. 21-23.)

"In all four legislatures [England, Germany, France and the United States] the distribution of the representation in the upper houses is made with but little regard to the census of the population. In England and in the United States, no regard at all is paid to the principle of proportionality; in Germany, not much; in France, considerable. If there is any one controlling principle applicable to all these cases, it is the representation of local governmental organizations. In the Senate of the United States, this is the exclusive principle. In the German Federal Council, it is the dominant principle. In the French Senate, considerable regard is paid to the census of the population in determining the number of senatorial seats to be assigned to each *département;* but within the *département* the effect of this concession to proportionality is modified by a very great discrimination in favour of the less populous *communes* as regards the number of representatives accorded them in the electoral colleges. In England alone no regard seems at present to be paid to local governmental or administrative organizations in the distribution of the seats in the upper house. If we look, however, to history, we find that the representation of England in the House of Lords was originally very closely connected with the local organizations; while the number of seats in that house now occupied by representative peers from Scotland and Ireland is fixed by statute, and is thus defended against the power of the Crown on the one side, and the accidents of extinction on the other. These statutes are based far more upon territorial considerations than upon the idea of proportionality. We may say then, I think, that *the* principle controlling the distribution of seats in the upper houses of the legislatures of these typical systems is the representation of the local governmental or administrative organizations. This is a most valuable principle. It tends to preserve the real fruits of the historic development of the State. It gives opportunity for the exertion of a larger influence by the cultured minority; and it gives more security to the rights of that minority. Many of the greatest statesmen have been brought forward through the influence of this principle. The organizations which have not the

strength of numbers have been compelled to search diligently for their best talent in order to maintain, in fact, their legal equality. The principle, however, is frequently assailed as mediæval and contradictory to the doctrine of popular sovereignty. From the view which we take of the province of legislation, viz., the interpretation of the reason of the State rather than the registration of the popular will, this objection appears irrelevant. Something more conclusive than the demand for proportionality must be adduced before we can be called upon to admit that this system of distributing representation is faulty. If the less populous community were always the more cultured, this would certainly be a better distribution than the principle of numbers could afford. It is because the less populous community may chance to be also the less cultivated that the system is in some degree unreliable. It would not, therefore, serve as the exclusive system of distribution, *i.e.*, the system for both legislative chambers. When, however, it is balanced by the principle of distribution according to population in the other house, there is every reason to believe that it contributes powerfully to the production of sound legislation, and that it is a most wholesome check upon the radical tendencies of mathematical politics." (Burgess, Political Sc. II. pp. 114-116.)

§ 68. "Chosen by the People of the State."

The senators for a State are to be chosen by those of "The People of the State" possessed of the qualifications prescribed by section 8. This provision marks a great advance in a democratic direction. The Commonwealth Bill of 1891, following the precedent of the Constitution of the United States, provided that the Senators for each State should be directly chosen by the Houses of the Parliament of the State. In the Canadian Constitution the Senators are appointed by the Governor-General for life. The principle of popular election, on which the Senate of the Commonwealth is founded, is more in harmony with the progressive instincts and tendencies of the times than those according to which the Senate of the United States and the Senate of Canada are called into existence. In the Convention which drafted the Constitution of the Commonwealth not a single member was found in favour of a nominated Senate. It was generally conceded, not only that a chamber so constituted would be of an obsolete type and repugnant to the drift of modern political thought, but that, as a Council of States, it would be an infirm and comparatively ineffective legislative body. A few members were, indeed, for a time in favour of a Senate elected by the State legislatures; but they eventually abandoned that view as the debate progressed, and as the strong volume of authoritative opinion, and the overwhelming mass of evidence opposed to the manner in which the Senate of United States is chosen, was presented and developed.

The mode of choosing Senators embodied in the American Constitution was adopted in times and under circumstances quite different from those of the present; but even in the Philadelphia Convention which drafted that Constitution there were wise and far-seeing men who advocated the election of Senators directly by the people. "The States," contended James Wilson, one of the Representatives of Pennsylvania, "are in no danger of being devoured by the national government; I wish to keep them from devouring the national government. Their existence is made essential by the great extent of our country. I am for an election of the second branch by the people in large districts, subdividing the districts only for the accommodation of voters." (Bancroft's History of the Constitution of the U.S. 2nd vol. p. 30.)

As we have already seen, the functions of the Senate are of a double kind: first as a chamber of revision and review in matters of general legislation; and, secondly, as a chamber to represent the particular views, opinions, and interests of the States, in matters admittedly within the sphere of the federal authority but respecting which differences might arise, as well as for the purpose of resisting proposals not within the sphere of the federal authority. For the purpose of exercising powers such as these it was contended, with unanswerable force, that the Senate of the Commonwealth could and should be chosen by the process of popular election, and that there was no occasion to vest the choice in the State legislatures. In Australia there was a particular reason, in addition to the democratic one, why the American precedent should not be followed. In

two of the six Australian colonies, namely, Queensland and New South Wales, the Upper Houses were nominated by the Crown, and not elected by the people; and the same was the case in New Zealand. It would be highly undesirable for Federal Senators to be elected by any Legislature, one branch of which would not be elected by the people, and, therefore, would not be responsible to the people. It would also be highly desirable that the senators representing the various States should be elected on a uniform basis, but there would be no such uniformity if some senators were elected by nominated Chambers and others by Chambers deriving their existence directly from the people. The struggle in Queensland over the Federal Enabling Bill was an object lesson of the difficulties to be encountered where there were two Chambers of a different basic Constitution. In Queensland the Legislative Assembly distinctly denied the right of the nominated Upper House to take part in the election of members to be sent to the Federal Convention. That was the whole contest. In the same way we might expect even more formidable objections to be taken to the Constitution of a Federal Senate partly elected by nominee Chambers. In addition to these considerations there was a gathering mass of testimony before the Convention as to the unsatisfactory manner in which the American system of senatorial elections was conducted.

"In one respect alone is there any sign of a popular demand for a change in either the functions or the construction of the Senate. A movement is now on foot to secure a constitutional amendment transferring the election of senators from the State legislatures to the people; and on account of the facilities for intrigue and bribery which are afforded by the present method, it is not unlikely that such a change would be beneficial. But the Senate of the United States will probably endure as long as any second legislative chamber upon the earth" (Foster, Comm. I. p. 498.)

"A proposal recently made to amend the Federal Constitution by taking the election of senators from the legislatures in order to vest it in the people of each State, is approved by some judicious publicists, who think that bad candidates will have less chance with the party at large and the people than they now have in bodies apt to be controlled by a knot of party managers. A nomination made for a popular election will at least be made publicly, whereas now a nomination for an election by a legislature may be made secretly." (Bryce, The American Commonwealth, I. pp. 96 and 97; Senator Mitchell's article in the Forum, June 6, 1896.)

"The method of election to the Senate or second Chamber is a matter that will be thrashed out in the Committee and upon the discussion of the Bill. There are some who think the only way to preserve definite responsibility is to have the election by the people of the quota of each State to the Senate. There are others who think that could be well and best done by the election of the quota of each State by its legislature; there are others, too, who think that there should be a difference in suffrage between the electorate which chooses the States Council and the National Assembly. It should not be our purpose now to lay down definite lines upon any one of those subjects, because they are really questions which should be decided only after we become acquainted with each others' views in this debate and upon the discussion in Committee, and when the Bill is being discussed. It is then, and then only, that we shall be fully in possession of the reasons which underlie each others' views, and be able to say how far we can demand concessions in return." (Mr. Edmund Barton, Conv. Deb., Adel., p. 22.)

§ 69. "One Electorate."

One of the arguments in favour of the election of senators by the State Legislatures was that thereby the corporate and undivided representation of the States in the Senate was secured. It was, however, considered that the advantage of unified State representation in the Senate could be secured quite as effectually by the system, now provisionally embodied in the Constitution, of "one State one Senatorial electorate." As soon as it was decided that the senators should be elected by the people and not by the legislatures, the view was pressed with great force that the people of each State, in choosing senators for the State, should vote as one constituency. If a State were divided into electorates, and if locality became the guiding principle of selection, the special purpose for which the Senate was constituted would be obscured. That purpose is that each State should be represented as a whole, as one entity, and not in divisions or sections. Voting as electors of one great constituency, it is contended, the people of a State will not be

influenced by local sympathies and parochial interests; at any rate not to the same extent as if they were required to vote in provincial groups. It is believed that the process of voting in one common electorate is calculated to promote the selection of the best men whose services are available—men of broad views, established reputations, and extended experience, such as should be elected members of the Senate. There would be a better chance of giving effect to what Sir Henry Parkes, in 1891, described as the only conservatism possible in a democracy—the conservatism which arises from official position, length of experience, and weight of character. (Mr. E. Barton, Conv. Deb., Adel., p. 669; Mr. H. B. Higgins, Conv. Deb., Syd., pp. 369-70.)

A serious objection raised to the system of "one State one Senatorial electorate" was, that the expense necessarily involved in contesting an election extending over a whole State would be so great that only rich men would become candidates for the Senate, and that poor men of talent and capacity would be excluded. It was, however, denied that such would be the case. On the contrary, it was contended that the largeness of the electorate and the vast number of voters to be canvassed or appealed to would render it impossible for even a rich man to secure a seat in the Senate by lavish expenditure; he would have a better chance of doing so in a small or moderately large electorate. A man of limited means who had the confidence of the public would have a better chance of being successful than a millionaire who did not possess that confidence. It was mentioned during the debate that, on the occasion of the election of members for the Federal Convention, it was found that democratic candidates of moderate means had no difficulty in taking part in the campaign, on equal terms with conservative candidates, backed by wealth and social position. If the well-to-do candidates spent more money, it was because they were expected to do so; it did not follow that the expenditure of money gained them many more votes. Mr. Trenwith was proud to mention the fact that his expenses in connection with the Federal Convention election did not exceed £4.

The next objection was that the election of senators was a matter of State concern, and that each State should be allowed to decide whether its senators should be chosen by the people voting in one or several divisions. It was also feared that popular election would tend to place in large cities, towns, and centres of population the dominating influence in Senatorial elections, to the prejudice of the people in the country districts who, through want of organization, would not be able to exercise an influence proportionate to their numbers. It was accordingly proposed at the Sydney sittings of the Convention to amend the "one State one electorate" plan adopted at Adelaide, and to allow each State, if it thought fit, to split its territory into as many senatorial electorates as would be consistent with the application of the rotation principle.

The proposed modification was strongly opposed by most of the leading members of the Convention. It was pointed out that the amendment, if adopted, might endanger the principle of State representation in the Senate, with which the sectional election of Senators would be inconsistent. Local representation was adequately provided for in the House of Representatives. In the Senate the principle of locality, as the basis of representation, should be ignored, and corporate representation should be insisted upon. Under no circumstances, it was argued, should the matter be left to the discretion of the State Parliaments. It was not a matter of solely local concern. It was absolutely necessary that there should be uniformity in the electoral system by which senators were to be chosen; because the mode in which senators were chosen in one State might substantially affect the people in other States. If the power to cut up a State into senatorial districts were granted to the State Parliaments it might lead to "gerrymandering;" by a careful adjustment of the boundaries of districts, and the grouping of populations in those districts, a State Parliament would be able to unduly colour the political principles of the senators returned for the State. (Mr. H. B. Higgins, Conv. Deb., Syd., p. 369.)

With reference to the suggested possibility of cities, towns, and centres of population exercising a predominating influence as against voters in rural districts, it was

pointed out that the Parliament of each State was empowered to make laws prescribing the method of choosing Senators for that State (sec. 9). In the exercise of that power the State Parliaments, if they thought fit, would be able to introduce a system of preferential voting, providing for the representation of minorities, which would completely dispose of the objection referred to. (See Note § 77, "Methods of choosing Senators")

§ 70. "Queensland."

The circumstances which conspired to prevent the representation of Queensland in the Federal Convention are detailed in the Historical Introduction, pp. 162, 187, 193. At the Conference of Premiers which met at Melbourne in January, 1899 (see Historical Introduction, p. 218, *supra*), Mr. Dickson, the Premier of Queensland, pleaded hard for an amendment in the Constitution enabling the Parliament of that colony, if it became an Original State, to divide it into divisions for the election of Senators and to determine the number of Senators for each division. The Conference decided that, although this concession would involve a departure from the fundamental principle, yet the Conference, considering the special circumstances of Queensland, its vast territory and scattered population, coupled with the fact that its population seemed to be naturally growing and developing in three divisions which may hereafter become separate States, and considering also that Queensland had not been represented in the Convention and was therefore derived of the opportunity of having her views and interests adequately considered, decided to recommend the insertion of the special provision which now stands as the second paragraph of the section.

That Queensland would be an Original State was ensured by the affirmative vote of the people of that colony on 2nd September, 1899, and confirmed by the Address to the Queen subsequently passed by both Houses of the Queensland Parliament.

This power of the Parliament of Queensland only exists "until the Parliament of the Commonwealth otherwise provides." The Parliament of the Commonwealth has, therefore, the power to require that the State of Queensland shall be represented in the Senate as a corporate whole.

§ 71. "Original State."

An Original State is defined by Clause 6 as a State which is part of the Commonwealth at its establishment. An Original State is entitled, as a constitutional right, to equal representation in the Senate and other special privileges which need not necessarily be conceded to new States. The Federal Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit (sec. 121). The fact that new States are not entitled as of right to equal representation shows that the system is not founded on a logical principle, but that it is a political compromise or contrivance regarded as one of the conditions precedent to the establishment of the Commonwealth.

§ 72. "Equal Representation . . Shall be Maintained."

The immobility of the principle of the equal representation of Original States in the Senate is assumed to be secured by the combined operation of this section and section 128, which provides that no alteration diminishing the proportionate representation of any State in either House of the Parliament, shall become law unless the majority of the electors voting in that State approve the proposed law. Referring to the corresponding section of the Constitution of the United States, Dr. Burgess says:—

"The principle of representation in the Senate is State-equality. The Constitution secures this equality even against amendment in the ordinary manner. That is, the state, the sovereignty, as it was organized back of the Constitution, undertakes to secure the principle of State-equality in the Senate, against the state, the sovereignty, as

organized within the Constitution. This is confused and unnatural. It is not possible that this restriction could stand against a determined effort on the part of the state within the Constitution to overthrow it. It is a relic of confederatism, and ought to be disregarded. It may be good political science now and in the future that the principle of State-equality should prevail in the Senate, but the state as organized in the Constitution must be the final judge of this. No Constitution is complete which undertakes to except anything from the power of the state as organized in the Constitution. Such a Constitution invites the reappearance of a sovereignty back of the Constitution, *i.e.*, invites revolution." (Burgess, Pol. Sc. II. p. 49.)

§ 73. "Chosen for a Term of Six Years."

The members of the Senate of the United States are elected by the State Legislatures for a fixed term of six years, subject to the rotation system by which one-third retire every two years. In Canada the senators, appointed by the Governor-General, hold their seats for life. In Switzerland the cantons determine the tenure of the members of the Council of States. Members of the Federal Council of Germany hold their seats at the will of the Executive Governments of the States. The Commonwealth Bill of 1891 proposed that the tenure of senators to be elected by the Legislatures should be six years, subject to the retirement of one-half the senators every three years. The same term and tenure for Senators have been embodied in the present Constitution. The length of the legal term of a senator is, therefore, twice that of the potential term of a member of the House of Representatives. The reason for this difference in length of term is that, in theory, the Senate is designed to be a continuous body, and that Senators ought to have a longer duration of membership, in order to give them greater independence and better opportunities for deliberation in dealing with proposed legislation, so that they may, if necessary, even protect the people themselves. (Foster, Comm. I. 469.)

§ 74. "Certified by the Governor."

Executive Control of Senate Elections.—By sec. 12, the Governor of each State is charged with the duty of issuing writs for the election of senators; and this section enacts that the names of the senators chosen for each State must be certified by the Governor to the Governor-General. This provision was supported in the Convention as helping to preserve the essence of State unity. (Sir John Downer, Conv. Deb, Syd., 393; see also note, § 94, *infra.*)

The Constitution, while it gives the Federal Parliament wide legislative powers in respect of the mode of election and laws relating to elections of senators, seems to vest the administrative conduct of the elections wholly in the States. The State Parliaments are to fix the times and places of the elections; the State Governments are to issue the writs and certify the result of the polls. The power to issue the writs involves the power to appoint returning officers, who will be State officials, and whose duty will be to appoint deputies, to fix polling places, to advertise, to hold the elections at the times and places prescribed by State laws, and to return the writs to the Governors of their respective States. The method of election (sec. 9) and the laws relating to elections (sec. 10), except as to the times and places of elections, may be prescribed by the Federal Parliament; but the executive control remains constitutionally vested in the States.

Expenses of Senate Elections.—From the proposition that the Senate elections are conducted and controlled by State officials, it seems to follow logically that the expenditure in connection with these elections must be defrayed by the States. The returning officers, being State officials, must look to their own Governments for their expenses; and if the States have a free hand as to the number of polling-booths, the advertisement of the elections and so forth, it would be manifestly unreasonable that the Federal Government should be under an obligation to pay any bills which may be incurred, however extravagant; and no such obligation appears to be imposed by the Constitution.

At the same time, the Constitution does appear to contemplate that the Federal Government shall have the *power* to defray these expenses. Sec. 83 provides that the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary "for the holding of the first elections for the Parliament," not merely for the House of Representatives. It would seem, therefore, that the Federal Government, though it is under no obligation to defray the expenses of senate elections, has the power to re-imburse the States for expenses reasonably incurred. Whether it exercises this power, or leaves each State to bear its own expenses, is perhaps not of much moment, because the aggregate amount of the re-imbursement would come out of the surplus divisible among the several States. The re-imbursement to each State would probably be made, if made at all, on a uniform population basis; and as it would then be charged against each State as federal expenditure on the same basis, the result would be unaltered.

In connection with elections for the members of the House of Representatives, the Federal Government will appoint returning officers and make arrangements for the conduct of electoral proceedings throughout the Commonwealth, and pay the necessary expenses. It will be possible on certain occasions—for instance, at the first election and after a double dissolution—for the Federal authorities and the State authorities to concur in the holding of elections for both Houses on the same day. As the election of representatives in a State will be conducted on the same suffrage as the election of senators for the State, it may be possible for the Federal authorities and the State authorities to join in the expense of providing one common electoral roll for Federal elections in each State.

Qualification of electors.

8. The qualification of electors[75] of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.[76]

Historical Note.—This provision (except the words prohibiting plural voting) was introduced at the Adelaide session in the same form, as part of the preceding clause. In Committee, the words "but in the choosing of senators each elector shall have only one vote" were added on Mr. Barton's motion. (Conv. Deb., Adel., p. 670.) Lest it should be contended that this would prevent an elector from casting votes for two or more candidates, this was afterwards amended by adding the words "for as many persons as are to be elected"—a phrase which later on was rejected in favour of "each elector shall vote only once." A provision was also added that "if any elector votes more than once, he shall be guilty of a misdemeanour." (Conv. Deb., Adel., pp. 675, 1189-90, 1210.)

At the Sydney session, a suggestion by the Legislative Assembly of South Australia, to the effect that senators should be elected in all the States on the basis of one adult one vote, was negatived by 32 votes to 13. A suggestion by the Legislative Council of Tasmania, to leave out the provision as to misdemeanour, was supported on the ground that the words were unnecessary, because a breach of a statutory prohibition was always a misdemeanour. Moreover, it was thought inadvisable to load the Constitution with penal provisions. The amendment was agreed to by 28 votes to 16. A suggestion by the Legislative Council of Victoria, to prevent disfranchisement of existing voters, was formally negatived, with a view to making Mr. Holder's clause (sec. 41) apply to both Houses. (Conv. Deb., Syd. [1897], pp. 416-20.) At the Melbourne session, after the fourth report, the provision was placed as a separate clause.

§ 75. "Qualification of Electors of Senators."

The qualification of electors of senators in each State is the same as the qualification of electors of representatives in each State. This qualification is defined in sec. 30, a reference to which is necessary to explain the meaning of the expression "That which is prescribed by this Constitution or by the Parliament." In sec. 30 the Constitution prescribes that the qualification of electors of representatives shall be, in each State, that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State. This therefore is the Constitutional provision for the qualification of electors of both Houses. But by virtue of the words "Until the Parliament otherwise provides" this constitutional provision may be altered by the Parliament, without the necessity of recourse to the process of amendment of the Constitution under sec. 128. The Parliament may pass a suffrage law for the Commonwealth, superseding at all Federal elections the State suffrages, subject to the restriction prescribed by section 41. The Parliament cannot, however, prescribe one suffrage for the Senate and another for the House of Representatives. Whatever suffrage it prescribes for the House of Representatives will, by virtue of this section, be the suffrage for the Senate also. (For Notes on Suffrage see § 122, *infra*.)

§ 76. "Each Elector shall Vote only Once."

By this provision a federal elector is forbidden to vote more than once at any senatorial election. Without such an inhibition it might have been possible for an elector to record his vote in every electoral division throughout a State, in which his name was registered in the State rolls, and to which he could journey on the day of polling. The possibility of plural voting at a senatorial election would not, owing to the magnitude of the constituency, be so great as at a general election of members of the House of Representatives in which the constituencies would necessarily be smaller and more numerous. The application of the restriction to the election of members of both Federal Chambers is a strong proof of the liberal policy which guided and influenced the deliberations of the Federal Convention.

The mode of enforcing the inhibition formed the subject of some debate in the Convention. At the Adelaide session a provision was added to the effect that if an elector voted more than once at the same election he should be guilty of a misdemeanour. At the Sydney session a recommendation was received from both Houses of the Tasmanian Legislature that the penalizing words should be omitted, as being foreign to a Constitution, although no objection was raised to another section (46) which created an offence and provided a penalty. In supporting the omission of the words, Sir P. O. Fysh urged, at the Sydney Convention, that the bill should not embrace anything except what was necessary for the framing of the Constitution, and that any matters which belonged to the criminal law, or the electoral laws of the States, had better be left as they were. As far as the criminal law was concerned, it should not be part of the Constitution. (Conv. Deb., Syd., p. 417.)

"There seemed to be a considerable number of members at Adelaide who wished to have this provision about a misdemeanour inserted, and it was inserted in accordance with the wish of the majority. I am, myself, of opinion that so far as you can you should leave the Constitution to deal simply with matters of necessary machinery. I am not, myself, strongly in favour of a provision of this kind, and I think it can otherwise be provided for; but I am entirely in the hands of the Committee. If there is such a desire on the part of the Committee, I shall not object to the retention of these words, although I admit the force of the argument that the Constitution Act is not the place for making offences against the criminal law, or for prescribing penalties. That is perfectly true; but the object in the first instance seemed to be to obtain a statement of this kind in the Constitution. The object seemed to make it plain on the face of the Constitution that whoever offended against the law of one man one vote should be in danger of the police. I think I pointed out in Adelaide, and hon members mostly agreed with me, that where a man does wilfully and deliberately what is against the express provisions of an Act, it is a misdemeanour, and there is no necessity to place that in an Act of Parliament." (Mr. Edmund Barton, *id.* p. 417.)

On a division the words declaring plural voting at a senatorial election to be a misdemeanour were struck out. A breach of a direct statutory prohibition, however, is a misdemeanour. (See Note, § 123, *infra*.)

Method of election of senators. Times and places.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators[77], but so that the method shall be uniform for all the States[78]. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

The Parliament of a State may make laws for determining the times and places of elections of senators[79] for the State.

UNITED STATES.—The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.—Const., Art. 1, Sec. iv., subs. 1.

HISTORICAL NOTE.—Clause 10, Chap. 1., of the Commonwealth Bill of 1891 was as follows:—

"The Parliament of the Commonwealth may make laws prescribing a uniform manner of choosing the senators. Subject to such laws, if any, the Parliament of each State may determine the time, place, and manner of choosing the senators for that State by the Houses of Parliament thereof." (Conv. Deb., Syd. [1891], p. 599.)

At the Adelaide session, 1897, the same clause was adopted with the omission of the words "by the Houses of Parliament thereof." In Committee, Mr. Deakin suggested "method" as preferable to "manner," but no amendment was moved. (Conv. Deb., Adel., pp. 672-4.)

At the Sydney session, a suggestion by both the Houses of the Parliament of Tasmania, to leave the manner of choosing senators to the States altogether, was negatived. A suggestion by the Legislative Assembly of Victoria, to insert "the times, places, and" before "a uniform manner," in order to enable the Federal Parliament to legislate as to the times and places of elections, was agreed to. (Conv. Deb., Syd. [1897], pp. 987-8.)

At the Melbourne session, after the fourth report, the clause was altered to its present shape, the determination of times and places being again left to the States. In Committee, Mr. Symon pointed out that this was an alteration in substance; but no amendment was moved. (Conv. Deb., Melb., pp. 2445-7.)

§ 77. "Method of Choosing Senators."

The method of choosing senators in each State may, in the first instance, be prescribed by the Parliament of each State. The Parliament of the Commonwealth, however, may at any time after the first election of senators pass laws prescribing the "method of choosing senators," subject to the restriction that such method shall be uniform for all the States. The question which at once presents itself for consideration is the meaning of the expression "method of choosing."

"Method of choosing" clearly does not include the sub-division of the State into electorates, because sec. 7 gives this power solely to the Federal Parliament. Nor does it include the fixing of the times and places of elections; because sec. 9 reserves this power absolutely to the State Parliaments. The power to prescribe the method of choosing senators is also limited by the constitutional provision that "each elector shall vote only once."

Subject to these express constitutional provisions, it would seem that the power to prescribe the method of choosing senators extends to the regulation of the whole process of election, including the mode of nomination, the form of writs and ballot papers, the mode of voting, the mode of counting votes, &c. The section would thus enable the State Parliaments provisionally, and the Federal Parliament ultimately, to prescribe the mode in which an elector should record his vote, *e.g.*, whether he should vote for as many candidates as there are vacancies to be filled at the election, or whether he should have the option of "plumping" for a less number of candidates or of concentrating his vote, or whether he should mark some or all of the candidates in the order of his preference. Provision could thus be made for the introduction of some system of preferential or alternative voting and the representation of minorities.

"Method of choosing" would probably also include general regulations as to the conduct of elections. Under the power conferred on the Congress of the United States to prescribe the "times and manner of holding elections for senators and representatives," a statute has been passed providing for the holding of federal revision courts and the appointment of "supervisors of elections" to attend and scrutinize the registration of electors and the recording of votes, with power to arrest persons guilty of fraud against the election laws, and if necessary to summon the *posse comitatus* to their aid. (Burgess, Political Sc. ii. 44.)

In the absence of State or federal laws prescribing the "method of choosing senators," the senators for a State would be chosen according to the method prescribed by "the law relating to elections for the more numerous House of the Parliament of the State." (See Notes, § 124, *infra.*)

"I take it this deals more with the manner in which you carry out your elections, and that the provision in a Constitution that a State shall be one electorate in voting as an entity of the Constitution is not a matter of minor degree as are these summed up in the phrase 'manner of choosing.' If these matters come before the courts the courts cannot have any difficulty." (Mr. Edmund Barton, Conv. Deb., Adel., p. 673.)

"The definition which Mr. Barton has rather implied than given of the word 'manner' raises a doubt in my mind as to whether the word 'manner' is also wide enough to cover all alteration in the system of voting, if so desired. If 'manner' relates rather to the conduct of an election and the general provisions made for taking votes, is it wide enough to cover also, and to a certainty, a variety of systems of voting which might perhaps be indicated by the word 'method?' Would it not be desirable to take care that those States which think fit to adopt a system of proportional voting for the representation of minorities shall have power to do so, and that the Parliament of the Federal Commonwealth shall also be able to adopt such a system if it thinks desirable?" (Mr. A. Deakin, *id.* p. 673.)

"There are only two limitations to the subjects which may come under the head of 'manner of choosing.' One is that the member is to be chosen by the people of the States as one electorate. That cannot be altered. The other is that the qualification shall be as stated for the House of Representatives, and one man shall have one vote. Those two things are expressly provided for, and therefore the 'manner' cannot touch them. They really put the very basis upon which the Senate is elected. But the manner of conducting elections must embrace everything else, and the manner of choosing, surely, would include the method in which the votes are to be recorded. The method in which votes are recorded must allow for representation of minorities, alternative votes, or any other system." (Mr. R. E. O'Connor, *id.* p. 673.)

"It would be perfectly open, for instance, for every Parliament to provide for the Hare system of election. The tenth clause provides that the Parliament may, in the first instance, prescribe an uniform manner applicable to every State, of choosing members for the Senate; but, subject to such provision, the Parliament of each State may decide how to choose members of that body. It reserves such a power to the Parliaments of the States. But there is reserved to the Federal Parliament a power of control, which might well be exercised, in the case of certain difficulties or misdeeds arising, to take the matter into its hand." (Mr. Edmund Barton, *id.* p. 673.)

§ 78. "Uniform for all the States."

"Uniform" means the same in all the States; not different methods in different States. (Head Money Cases, 112 U.S. 580.) Where a Federal Legislature is authorized to pass "uniform laws" it is not merely enabled to pass laws the operation of which

shall be uniform, but to establish uniform laws on the subject throughout the union. This uniformity is incompatible with state legislation on that part of the subject to which the federal law may extend. (Sturges *v.* Crowninshield, 4 Wheat. 123-194.)

§ 79. "Times and Places of Elections of Senators."

This sub-section further strengthens the control of the States over the election of senators. The Parliament of a State may, by legislation, determine the times when, upon the occasions arising under the Constitution, elections of senators for the State shall take place; it may also determine the places at which polling booths for the reception of votes for the election of senators shall be held. These powers are permanently and exclusively vested in the States. The election of senators will, of course, take place on the occurrence of the events prescribed by the Constitution, such as the triennial election of senators, when half the number of senators retire according to the process of rotation defined by section 13; and such as a general election of the Senate following a dissolution thereof under section 57. Under a similar section in the American Constitution it has been held that when the legislature of a State has failed to "prescribe the times, places and manner" of holding elections, the Governor may, in case of a vacancy, designate in his writ of election the time and place, when and where such election will be held; but that a reasonable time should be allowed for the promulgation of the notice. (Hoge's Case, Cl. and Hall [U.S.], 135; cited Baker Annot. Const. 6.)

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections[80] for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Historical Note.—At the Adelaide session, the following words (taken from the corresponding clause of the Commonwealth Bill of 1891, relating to the House of Representatives) were introduced as paragraph 2 of the preceding clause:—

"Until such determination, and unless the Parliament of the Commonwealth otherwise provides, the laws in force in the several States for the time being, relating to the following matters, namely: The manner of conducting the elections for the more numerous House of the Parliament of the State, the proceedings at such elections, returning officers, the periods during which elections may be continued, and offences against the laws regulating such elections, shall, as nearly as practicable, apply to elections in the several States of members of the Senate." (Conv. Deb., Adel., pp. 674-6.)

At the Sydney session, a suggestion by both Houses of the Parliament of Tasmania, to omit "and unless the Parliament of the Commonwealth otherwise provides," so as to make the power of the States permanent, was negatived. (Conv. Deb., Syd., 1897, pp. 988-9.)

At the Melbourne session, the paragraph was omitted, with a view to placing the provision as to both Houses in a single clause (44 AA). (Conv. Deb., Melb., pp. 1827, 1855.) After the fourth report, however, it was determined to deal with each House separately; the clause was restored in shorter and more general terms, and clause 44 AA was omitted. (See also sec. 31.)

§ 80. "Laws in Force in Each State . . Relating to Elections."

This section provides that in the election of senators for a State the laws for the time being in force in such State relating to elections for the more numerous House of Parliament of the State shall, so far as practicable, be applied. To this general enactment there are two limitations; one being that such electoral machinery laws are to be applicable to senatorial elections only until the Parliament otherwise provides; and the second being that the operation of the section is to be "subject to this Constitution." The latter phrase seems to cover two cases; (1) express provisions in the Constitution relating to elections—such as the prohibition against plural voting, and the provision that until the Parliament otherwise provides, each State shall be one electorate; and (2) laws passed by the States under the authority of the Constitution—such as laws determining the time and places of elections and provisional laws prescribing the method of choosing senators. Accordingly the section is merely provisional and temporary. It may be superseded in part by State legislation, under sec. 9, and superseded altogether by federal legislation.

The words "until the Parliament otherwise provides," seem, by virtue of sec. 51—xxxvi., to give the Federal Parliament (subject of course to the express limitations imposed by the Constitution) a general power to legislate as to "laws relating to elections" for the Senate—words which have a wider scope than the words "laws prescribing the method of choosing senators." The executive conduct of the elections, however, will remain with the States. (See Note, § 74, *supra*.)

Section 31 of the Constitution, making preliminary application of State election laws to the choice of members of the House of Representatives, is the same in substance as the section now under review. Both sections, as originally framed, enumerated in detail the particular branches of the electoral law, to which they were intended to apply (see Historical Note, *supra*); but at the Melbourne session of the Convention this enumeration was replaced by general words.

The omission of the particular words, instead of weakening, rather strengthens the section by rendering it more general, and less restricted than the original one. The section, as it stands, is most comprehensive, and applies, to senatorial elections in a State, all State laws relating to the conduct of and proceedings at elections of members of the popular Chamber in that State; the appointment of returning officers, their deputies and assistants, and their respective powers and duties; the publication of the mandate contained in the senatorial writs; the preparation of voters' rolls; the preparation of ballot papers; the nomination of candidates; the conditions of nomination—such as the signature of nomination papers by a certain number of electors, and the lodging of a deposit with each nomination paper as a guarantee of *bona fides*; the withdrawal of nominations; the notification of the time and places of polling as fixed by State laws under section 9; the recording of votes by secret ballot on the day of polling; the proof of qualification and proof of identity of voters; questions to be answered or oaths taken by persons seeking to vote whose qualification or identity may be challenged; the maintenance of order at the polling places; the time of opening and closing thereof; the counting of votes, the certification of returns, and the declaration of the poll.

Failure to choose senators[81].

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Historical Note.—Clause 11, chap. I., of the Commonwealth Bill of 1891 was as follows:—

"The failure of any State to provide for its representation in the Senate shall not affect the power of the Senate to proceed to the despatch of business."

At the Adelaide session, 1897, the clause was adopted in the same words; and at the Melbourne session, after the fourth report, it was altered to its present form.

§ 81. "Failure to Choose Senators."

This section must be read in conjunction with the quorum section, which enacts that the presence of at least one-third of the whole number of senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers (sec. 22). Accordingly the Senate will be capable of being duly constituted for the despatch of business if at least one-third of the States under the system of equal representation have provided for their representation in that body; the failure of two-thirds of the States to return the quota of senators to which they are entitled under the Constitution would not paralyse the legislative action of the Senate, and the absent and unrepresented States would be bound by laws passed whilst the statutory quorum was present, just as legally as if they were fully represented. The Constitution of the United States of America requires an absolute majority of the members of the Senate to constitute a quorum (Art. I. sec. 5, sub-sec. 1), and there is no section corresponding to the above one stipulating that unrepresented States are bound as effectively as those which have elected Senators. In the case of Cohens v. Virginia, 6 Wheat. 264, it was said that if a majority of States should refuse to elect senators the government of the United States of America would necessarily come to an end. Applying that principle to the Constitution of the Commonwealth it might be contended that there would be a deadlock in the Federal Government if more than two-thirds of the States failed to elect senators. The risk of such a failure, however, is very remote.

This section contains the only legal and effective provision made by the Constitution for the prompt and regular return of senators by the States. The whole carriage of senatorial elections is vested in the State authority; the Federal Government can exercise no control or supervision over them. The Governor of each State issues the writ for a senatorial election; the election is conducted by State officers; the Governor of the State, on the return of the senatorial writ to him, has to certify to the Governor-General the names of senators duly chosen for his State. There is no time limited within which the certification has to be made. The fact that a quorum of the Senate may proceed to the despatch of business, notwithstanding any neglect or delay on the part of a State to provide for its representation, will be a strong inducement and incentive for the prompt holding of elections and the return of senators to fill vacancies as they arise.

Issue of writs.

12. The Governor of any State may cause writs to be issued[82] for elections of senators for the State. In case of the dissolution of the Senate[83] the writs shall be issued within ten days from the proclamation of such dissolution.

HISTORICAL NOTE.—At the Adelaide sessions, 1897, in committee, Mr. Barton introduced a clause (11A) as follows:—

"For the purpose of holding elections of members to represent any State in the Senate, the Governor of the State may cause writs to be issued by such persons in such form and addressed to such returning officer as he thinks fit."

Mr. Isaacs thought that the writs ought to be issued by the Governor-General, as in the case of writs for the House of Representatives. Mr. Holder moved an amendment to provide that the writs should be issued by the Governor-General in Council; but this was negatived. (Conv. Deb., Adel., pp. 1149-50.)

At the Sydney session, a suggestion by the Legislative Assembly of Victoria to omit the clause was not adopted. (Conv., Syd., 1897, p. 989; and see *id.* pp. 391-4.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 82. "Writs to be Issued."

As we have already seen, the whole executive supervision and conduct of a senatorial election in each State, from the issue of the writ to the certification of returns, is, subject to certain restraints, vested in the State authority. The only restrictive mandate imposed on the Governor of a State is, that in case of a dissolution of the Senate, he must issue the writ within ten days from the proclamation of such dissolution. No express provision has been made as to the limit of time within which the writ issued by the Governor of a State should be returned to him. Section 5 provides that the Parliament shall be summoned to meet, after a general election, not later than thirty days after "the day appointed" for the return of the writs. As we have pointed out in our notes on that section, "the day appointed" there referred to means the time fixed by the Governor-General in Council for the return of the writs for the election of members of the House of Representatives. There is no express or implied power vested in the Governor-General in Council to appoint a day for the return of the senatorial writs or for the certification of names of senators chosen.

§ 83. "Dissolution of the Senate."

The liability of the Senate of the Commonwealth to dissolution, in the circumstances and under the conditions stipulated in section 57, is an important feature in its constitution, which strikingly differentiates it from its great model and prototype—the Senate of the United States of America. It has been said that the American Senate is a continuous body, always in existence, and that its permanency and the length of the terms of its members have given it a dignity possessed by no other legislative body now in existence. (Foster's Comm. I. 493.) The Senate of the Commonwealth has been deprived of that principle of undisturbed continuity. The system of retirement by rotation makes the Senate of the Commonwealth, in theory, a continuous body; but its liability to dissolution is, to some extent, inconsistent with that theory. At the same time, when the conditions prescribed by section 57 and the various safeguards surrounding the exercise of the power therein conferred are considered, it will appear that the dissolubility of the Senate is quite consistent with the teachings of political science and the drift of modern political thought, and that what it loses by an occasional break in continuity it will gain in representative character, public esteem and legislative usefulness.

Rotation of senators.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators[84] chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the

expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator[85] shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

UNITED STATES.—Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year; so that one third may be chosen every second year.—Const., Art. I., sec. 3, sub-sec. 2.

HISTORICAL NOTE.—Clause 13, Chap. I., of the Commonwealth Bill of 1891 was substantially the same except that it was provided that the Senators for each State "shall be divided by lot into two classes." (Conv. Deb., Syd. [1891], pp. 599-603.) At the Adelaide session, 1897, the clause of 1891 was adopted almost verbatim, and in Committee verbal amendments were made. (Conv. Deb , Adel., pp. 676-9, 1190.) At the Sydney session, Mr. Glynn objected to the principle of rotation, as preventing the Senate ever being in touch with public opinion. (Conv. Deb., Syd. [1897], p. 989.) Drafting amendments were also made. At the Melbourne session, Mr. Deakin moved the omission of the words "by lot." He thought that either provision should be made for the three lowest on the poll to retire first, or the Senate should be left to manage the matter itself. The amendment was carried. (Conv. Deb., Melb., pp. 1928-9.) Drafting amendments were made before the first report and after the fourth report.

§ 84. "The Senate shall divide the Senators."

The Senate will be a continuous body so far as its continuity is not broken by a dissolution under sec. 57. It may be assumed that such a break will only occur on rare and abnormal occasions in the history of the Commonwealth. Permanency of succession being its natural condition, arrangements have to be made for the periodical retirement of batches of senators so as to give effect, as far as possible, to the provisions of the Constitution; which provides that whilst senators shall be chosen for a term of six years, half of them shall retire every three years. Six years of service is the maximum term for which all senators are elected, but the policy of the Constitution is to cause the retirement of half the senators for each State every three years instead of all the senators every six years. If all the senators were to retire at the same time there would be no element of continuity in the constitution of the Senate. By the rotation principle that advantage is secured, whilst there will also be, at short intervals, an infusion of either fresh blood or restored vitality in the *personnel* of the Senate by the return, every three years, of newly chosen senators, or by the re-election of former senators strong in the confidence of their respective States. As the members of the first Senate, and of every Senate elected after a dissolution, are elected at the same time, they would, but for this section, be all entitled to six years tenure of office so far as not interfered with by a dissolution. For the purpose of securing the retirement every three years of a moiety of the senators for each State, an arbitrary provision has been adopted that one-half of the senators for each State in the first Senate, and every Senate succeeding a dissolution,

shall vacate their seats at the expiration of three years from the beginning of their term of service. The Constitution does not itself specify the method of determining which half of the senators, for each State, shall retire at the end of half their terms of service. It requires the Senate to divide the senators for each State into two classes, as nearly equal in number as practicable, and declares that the places of senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the end of the sixth year; the Senate may divide them by lot or it may divide them according to some recognized principle; it may place the three senators for each State who stood highest on the poll in one class, entitled to six years, and place the other three senators for each State in the other class entitled to three years of office.

The words "as nearly equal in number as practicable" are intended to include the possible contingency of the number of senators for each State being altered, under section 7, to an odd number; or of a new State being accorded an odd number of senators. So long as the number of senators for each State remains even, the equality will of course be exact.

In the Draft Bill of 1891, as well as in the Bill as settled in the Adelaide and Sydney sessions, the Senate was authorized to divide the senators into two classes by lot. At the Melbourne session, the words "by lot" were omitted. The Senate has now, therefore, the unrestricted right to divide the senators for each State into two classes in such manner as it thinks fit. The purpose of the amendment is shown by the following extracts from the debates of the Convention:—

"The amendment I suggest need not occupy more than a moment or two in discussion. It is a blot on the face of a measure of this kind to require that the division of the senators into two classes after the first election shall be made by lot. I could understand that device being adopted in the absence of any other means of determining which senators should have the longer period. But the poll itself ought to afford, or be taken to afford, a reasonable indication of the wishes of the electors in this respect, and it is a probable injustice, as well as a mistake, to fall back on the antique method of settling questions of the kind. I move, therefore, the omission of the words 'by lot,' which will leave it absolutely at the discretion of the Senate itself to determine, after it meets, on what method the division shall take place. If the Drafting Committee think fit, they can adopt the method of providing that the three highest on the poll should have the six years' tenure. If that be the sense of the Convention, I will now simply submit my motion." (Mr. Alfred Deakin, Conv. Deb., Melb., p. 1928.)

"I think a great deal can be said in favour of the view the Hon. Mr. Deakin has placed before the Convention. In a constitutional matter of this kind we ought not to resort to deciding a question by lot unless there are no other means of determining the matter. If the Convention are willing to agree to the amendment, it might be left to the Drafting Committee to decide whether any provision for the division of the Senate should take place, or whether the matter should be left to the senators themselves." (Mr. R. E. O'Connor, *id.* p. 1928.)

Under the corresponding section of the Constitution of the United States of America the following procedure was adopted:—

"On the original organization of the Senate, May 14th, 1789, a committee was appointed to consider and report a mode of carrying into effect this constitutional provision. In accordance with their report, the senators then sitting were arbitrarily divided into three classes, the first including six members, and the second and third seven each. Three papers, numbered 1, 2 and 3 respectively, were rolled up and put into a box by the secretary; and then one senator from each class drew a number. The class which drew number 1 vacated their seats at the expiration of the second, the class which drew number 2 vacated their seats at the end of the fourth, and those who drew number 3 at the end of the sixth year. This plan, on account of the number then present at the Senate, left the first class, who vacated their seats at the expiration of the second year, one less in number than each of the other two. To prevent any unnecessary inequality in the classes, when the senators from New York appeared, two lots, one numbered 3, that of the small class, and one blank, were placed in the box. After each senator had drawn a lot, the one who drew number 3 was placed in the small class; and the other drew again from the box containing numbers 1 and 2, taking his place in the class whose number he drew. When the senators from North Carolina appeared, there were then two classes of equal numbers, and one with a number in excess of each. The numbers of the equal classes were put in the box. Then each

senator drew one and was classed according to the number he drew. The classes were then equal in number. Accordingly, when the senators from Rhode Island appeared, papers numbered 1, 2 and 3 respectively, were again placed in the box, from which each senator drew one. The proceedings continued according to these successive methods until the admission of the senators from Washington, North Dakota and South Dakota at the same time. The same three numbers were then placed in the box, and drawn by one senator from each of the new States. The secretary then placed in the ballot-box two papers of equal size, numbered 1 and 3 respectively. Each of the senators from the State which had thus drawn number 1 drew out a paper and was assigned in accordance with the number he drew. The secretary then placed in the ballot-box numbers 1, 2 and 3, and each of the senators from the State which had drawn number 2 drew a lot from the box. They were assigned in accordance with the number drawn by each; and the remaining lot with a blank was again placed in the box and the senators from the remaining State drew from them. He who drew a number was assigned to the class represented by it; and he who drew a blank drew again from the box, which then contained the other two numbers, and was assigned according to the number drawn. When the senators from Idaho, Montana, and Wyoming were admitted at the same time, the same proceedings took place. A custom has been thus established which will be followed in the future." (Foster's Comm. I. p. 483-4.)

"The classification is settled by lot when the senators first appear from the new States, in the mode adopted in the first classification, so as to prevent two vacancies occurring in the same State at the same time." (Journal Senate, May 15, 1789, 26th ed., 1820; Baker, A.C. p. 7.)

"The provision for the election of members by rotation was adopted unanimously at the suggestion of Gorham and Randolph. Penn's Frame of Government for Pennsylvania had provided that in the Council one-third of the members should be elected every year, and at the time of the Convention the upper houses of New York, Virginia, and Delaware, as well as of the first-named State, were filled in a similar manner. The idea is said to have been borrowed from the senates of the cities in the Netherlands, who had taken it from Venice." (Foster's Comm. I. p. 471.)

"The rotation principle was in great favour among the Republicans of the seventeenth century. The earliest mention of it in English political history occurs in a pamphlet published by James Harrington—author of 'The Commonwealth of Oceana'—in 1660, which he entitled 'The Rota: or a Model of a Free State, or Equal Commonwealth.' The nature of the scheme may be gathered from Anthony Wood's account of the *Rota Club*, established by Harrington and his friends:—'The model of it was that the third part of the Senate or House should rote out by ballot every year (not capable of being elected again for three years to come), so that every ninth year the Senate would be wholly altered. No magistrate was to continue above three years, and all to be chosen by ballot. This club of Commonwealthsmen lasted till about 1659.' (Athenæ Oxon. vol. 11, p. 591.) Milton, who favoured a perpetual Senate, pointed out an objection to this scheme in his pamphlet on 'The Ready and Easy Way to Establish a Free Commonwealth,' published shortly after Harrington's appeared:—'For it appears not how this (retirement by rotation) can be done without danger and mischance of putting out a great number of the best and ablest, in whose stead new elections may bring in as many raw, unexperienced, and otherwise affected, to the weakening and much altering for the worse of public transactions.'" (G. B. Barton, Notes on the Draft Bill, 1891, p. 25.)

"The Senate resembles the Upper Houses of Europe, and differs from those of the British colonies and of most of the States of the Union, in being a permanent body. It does not change all at once, as do bodies created by a single popular election, but undergoes an unceasing process of gradual change and renewal, like a lake into which streams bring fresh water to replace that which the issuing river carries out. This provision was designed to give the Senate that permanency of composition which might qualify it to conduct or control the foreign policy of the nation. An incidental and more valuable result has been the creation of a set of traditions and a corporate spirit, which have tended to form habits of dignity and self-respect. The new senators, being always in a minority, are readily assimilated; and though the balance of power shifts from one party to another, according to the predominance in the State legislatures of one or other party, it shifts more slowly than in bodies directly chosen all at once, and a policy is therefore less apt to be suddenly reversed." (Bryce, Amer. Comm. I. p. 99.)

§ 85. "The Term of Service of a Senator."

After the Senate first meets, and after each first meeting following a dissolution, the senators are classified according to the scheme in the first paragraph in this section; thereupon the place or seat of each senator is identified with a term of service annexed to it. That term is not exhausted by the death, disqualification or resignation of the

senator. His successor is elected to occupy the place or seat for the remainder of the term. By this paragraph of the section the precise date of the beginning of each term of service is defined. The beginning of a term does not depend upon such uncertain events as the date of the election, the return of the writs, or the swearing in of senators, but on the words of the section itself. On the occasion of the first election of senators, after the establishment of the Commonwealth, the term of service is deemed to have begun on the first day of January preceding the day of election. On the occasion of every general election of senators, the term of service is deemed to have begun on the first day of January preceding the day of election. But, in the case of senators elected to fill places or seats which will become vacant by effluxion of time, the term of service is deemed to begin on the first day of January following the day of election. The new term of service will thus begin at the expiration of the preceding term; although the elections will take place during the currency of the term. Hence it may arise that there will be senators actually in office, their term being unexpired, and senators elect, chosen to succeed the senators in office, but whose terms do not begin until the first day of January following their election.

Further provision for rotation[86].

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Historical Note.—A clause, in substantially this form, was inserted as a drafting amendment at the Melbourne session, before the first report. After the fourth report it was amended, by the substitution of "may" instead of "shall as soon as may be."

§ 86. "Further Provision for Rotation."

The number of senators for each State may be increased or diminished at any time by the Federal Parliament, subject to the condition that equal representation of the several Original States must be maintained, and that no Original State shall have less than six senators (sec. 7). Whenever this is done, such further arrangements must be made as may be necessary to maintain regularity in the rotation.

Casual vacancies.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State[87] for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term[88], or until the election of a successor[89] as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified[90], the Governor of the State[91], with the advice of the Executive Council thereof[92], may appoint a person to hold the place until the expiration of fourteen days

after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators[93] for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor[94] of the State to the Governor-General.

UNITED STATES.—And if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.—Const. Art. I. sec. 3, sub-sec. 2.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891 (which provided for the election of Senators by the Parliament of States) clause 13, Chap. I., was as follows :—

"If the place of a Senator becomes vacant during the recess of the Parliament of the State which he represented, the Governor of the State, by and with the advice of the Executive Council thereof, may appoint a Senator to fill such vacancy until the next session of the Parliament of the State, when the Houses of Parliament shall choose a Senator to fill the vacancy."

In Committee, it was suggested that it might be better that a vacancy should continue until the State Parliament met, rather than that the nominee principle should be allowed, even temporarily, to invade the Senate. Mr. Barton moved the omission of the provision for a temporary appointment, but this was negatived. (Conv. Deb., Syd. [1891]. pp. 600-5.) At the Adelaide session (the Bill having provided for the direct election of Senators) the clause was first drafted as follows :—

"If the place of a member of the Senate becomes vacant before the expiration of his term of service, the Houses of Parliament of the State he represented shall, sitting and voting together, choose a successor, who shall hold office only during the unexpired portion of the term. And if the Houses of Parliament of the State shall be in recess at the time when the vacancy occurs, the Governor of the State, with the advice of the Executive Council thereof, may appoint some person to fill the vacancy until the beginning of the next session of the Parliament of the State."

In Committee, the clause was postponed, in order that the Drafting Committee might consider some suggestions that had been made for enabling a senator to be chosen by the people at the next general election, State or Federal, in the State. It was desired to have the vacancy filled by direct election as soon as possible; but the expense of holding a special election throughout the State was an obstacle. (Conv. Deb., Adel., pp. 579-80.) Later on the clause was passed substantially in its present form. (Conv. Deb., Adel., pp. 1948-9, 1101.) Drafting amendments were made at the Sydney session; and also at the Melbourne session before the first report, and after the fourth report.

§ 87. "The Houses of Parliament of the State."

If a vacancy arises in the representation of any State in the Senate, the Houses of Parliament of the State, being in session at the time when the vacancy is notified, are enjoined to choose a person to hold the place provisionally, that is to say until (1) the expiration of the constitutional term or (2) the election of a successor at the next triennial election of senators or at the next election of representatives, whichever event

first happens. The vacancies contemplated by this section are casual or extraordinary vacancies, arising from accidents, such as death, disqualification or resignation, and not those vacancies which take place at the regular expiration of senatorial terms. In thus choosing persons, to provisionally fill vacant places, the members of the Houses of Parliament of the State must sit and vote together—that is to say, the choice is made at a joint sitting of the Chambers, at which the vote of a majority prevails.

Under the Constitution of the United States of America (Art. I. sec. 3) which provides that the Senate "shall be composed of two senators from each State chosen by the legislature thereof," it has been decided that the two Houses of the State Legislature might, by joint resolution adopted by both of them, without the consent of the State Governor, provide for the manner in which a senatorial election should take place; that the State Constitution could not limit the power of the legislature in that respect The practice was adopted in several States of electing senators in joint convention of the two legislative Houses, in case the Houses acting separately had failed to make a choice. (Foster's Comm. I. p. 473.)

In 1866 an Act of Congress was passed for the regulation of senatorial elections. It provides that, if the two Houses of a State legislature are unable to agree in the choice of a senator, a joint assembly of the two Houses shall be held, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both Houses being present and voting, shall be declared duly elected. Under this statute it has been held that an election is valid when made in a joint convention by a majority of the members of both Houses, in the absence of a quorum of one of them. (Foster's Comm. I. p. 475.)

§ 88. "The Expiration of the Term."

This expression means the end of the period of service, whether it be the three years of a senator of the first class or the six years of a senator of the second class; it is an event that depends on no fortuitous circumstances, being determined by the Constitution itself, which provides that all terms shall expire on the thirty-first day of December, either three years from the beginning thereof or six years from the beginning thereof. The exact date on which the term, annexed to each senatorial seat, begins and ends is fixed by section 13. Every term, whether for three years or six years, begins on the first day of January of some year, and necessarily ends on the thirty-first day of December in some year, except when the terms of all senators are prematurely ended by a dissolution of the Senate. "The expiration of the term," if it happens before a successor has been elected, renders the election of a successor unnecessary, because the senators elected for the ensuing term, at the ordinary triennial election, then take their seats.

§ 89. "Election of a Successor."

The choice of a person, by the Houses of Parliament of a State, to take the place of a senator who has ceased to act, is not regarded by the Constitution as the election of a successor; it is merely a provisional arrangement to save the expense of a special State election. The time for the triennial election of senators might be close at hand, in which case the vacancy would be filled without any appreciable additional expense. If, however, the usual triennial election of senators is preceded by a general election of members of the House of Representatives, an equally convenient and prompter method of filling the extraordinary vacancy is available. The legislative selection is only operative until the expiration of the term or the election of a successor, whichever first happens; it is merely an *ad interim* appointment, in order to save the State from being short of a senator, on the one hand, and to save the State the cost of a special election, on the other; the legislative appointee is not a successor of the deceased, disqualified, or resigned, senator, but merely a temporary holder of the office, pending the election of a successor by the people of the State.

Triennial senatorial elections are held at times partly determined by the Constitution, and partly by the State legislatures. Those times are determined by the Constitution, to the extent that triennial senatorial elections to fill places to become vacant must be held during the last year of the term of service; sec. 13. The exact date, within that year, of such elections, is not fixed by the Constitution. The Parliament of each State is empowered to make laws determining the times of elections of senators for the State; sec. 9. The only restriction on the State power is the one above quoted.

§ 90. "When the Vacancy is Notified."

When a casual vacancy happens in the representation of a State in the Senate, it is the duty of the President to notify the occurrence of such vacancy to the Governor of the State interested. If the President is absent from the Commonwealth at the time it is the duty of the Governor-General to notify the vacancy. (Sec. 21.) The happening of this vacancy should, no doubt, be promptly notified by the Federal to the State authorities, so as to enable the latter to take steps at once to fill it. Until the receipt of the statutory notification, that cannot be done; hence a delay in the notification would delay a choice by the State legislature or an appointment by the State Executive to fill the place until the election of a successor. It is a principle of the Constitution that the representation of States in the Senate should be maintained, as far as possible, with unbroken continuity, and that no State should be, for any time longer than absolutely necessary, short in its representation and consequently deficient in its political strength in the Council of States.

§ 91. "The Governor of the State may . . . appoint."

If the Houses of Parliament of the State, in the representation of which a casual vacancy occurs, are not in session at the time when it is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place for a temporary period; that is until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, under the power conferred by the second paragraph of this section The clear limitations of this section should prevent many questions arising, such as have arisen under the Constitution of the United States. According to one American precedent the Executive of a State may appoint a senator to fill an anticipated vacancy before it actually occurs. (Case of Uriah Tracey, Taft's Senate Election Cases, p. 3; Foster, I. p. 488.) In Lanman's Case, however, it was held that the Governor of a State cannot, during the recess of the legislature, appoint a senator to fill an expected vacancy (Cl. and Hall [U.S.], 871; Baker, Annot. Const. 7) It has also been held that the Governor of a State may receive the resignation of a member of the House of Representatives of the United States and cause a new election to be held to fill the vacancy without waiting to be notified of the vacancy by the House. (Mercer's Case, Cl. and Hall [U.S.], 44; Edwards' Case, *id.* 92; Baker, Annot. Const., p. 6.) No such controversies could arise under the Australian Constitution, under which it is obvious that the State Legislature would have no jurisdiction to choose, or the State Executive to appoint, a senator *pro tempore* until the actual receipt of a notification of the vacancy from the Federal authorities.

§ 92. "With the Advice of the Executive Council."

These words were inserted to make it plain that the provisional appointment of senators, though vested in the Governor of the State, as head of the State Executive, is not one which he should make according to his own personal judgment and discretion, but that it is, in fact, a political appointment to be made by the State Executive, according to the principle of ministerial responsibility. Such an appointment, made on the advice of a State ministry, having the confidence of the State Parliament, would

probably be one which the Houses of the State Parliament would make if they were in session at the time. It may be pointed out, however, that even if the words at the head of this note had not been inserted in the clause the result would have been precisely the same ; no State Governor would venture to make such an important appointment without the advice of his responsible ministers. The words have been inserted in strict conformity with constitutional usage ; as the section creates a new power and function the addition of the words "with the advice of the Executive Council" could not possibly involve an infringement of any established prerogative of the Crown. (See § 60, *supra.*)

§ 93. "The Next Election of Senators."

These words refer to the next choice of senators, by the suffrages of the people of the State, on the occasion of a triennial election to fill places about to become vacant by effluxion of time. It is to be noted that there is no special section in the Constitution enacting, in so many words, that there shall be an election of senators, by popular vote, every three years ; that follows as the necessary result of a combination of sections. Thus section 7 provides that senators shall be chosen for a term of six years. This is qualified by section 13, which provides for the classification of the senators for each State after every general election of senators, according to which half of them will retire every three years. By section 9 the Parliament of each State has exclusive power to make laws determining the times of elections of senators for the State, subject to the condition that elections to fill vacant places must be made in the year at the end of which the places are to become vacant. The expressions "choosing of senators," "choosing the senators," "election of senators," "next election of senators," which occur in Part II. of the Constitution, allude to the triennial elections to fill places about to become vacant, as well as to general elections consequent on a dissolution.

At "the next general election of members of the House of Representatives," or at "the next election of senators for the State," whichever first happens, if the senatorial term has not then expired, the provisional appointment of "a person to hold the place" is superseded by "the election of a successor" to hold the place from the date of his election until the expiration of the term. The election of a successor to a deceased or resigned senator, for the balance of the term, may thus possibly take place at a triennial election, at the same time when three senators of the class in which the vacancy has occurred are elected for the ensuing term which begins on 1st January of the following year. In such a case, it will of course be competent for the temporary holder of the place to be a candidate for the balance of the term and also a candidate for the new term which begins on the expiration of the current term.

§ 94. "Certified by the Governor."

In the United States, the returns from the State authorities, declaring that a certain person has been elected senator, are only *primâ facie* evidence of qualification. (Spaulding *v.* Mead, Cl. and Hall [U.S.] 157 ; Reed *v.* Cosden, *id.* 353.) The refusal of the State executive to grant a certificate does not prejudice the right of a person entitled to a seat. (Richards' Case, Cl. and Hall [U.S.] 95 ; Baker, Annot. Const. pp. 10, 11. See Note, § 74, *supra.*)

Qualifications of senator.

16. The qualifications of a senator[95] shall be the same as those of a member of the House of Representatives.

UNITED STATES.—No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected be an inhabitant of that State for which he shall be chosen.—Const. Art. I., sec. 3, subsec. 3.

CANADA.—The qualifications of a Senator shall be as follows:—

(1.) He shall be of the full age of thirty years.

(2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

(3.) He shall be legally or equitably seised as of freehold, for his own use and benefit, of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture, within the Province for which he is appointed, of the value of four thousand dollars over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same:

(4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities:

(5.) He shall be resident in the Province for which he is appointed:

(6.) In the case of Quebec, he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division.—B.N.A. Act, 1867, sec. 23.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891 the qualifications prescribed for a Senator differed in three respects from those of a member of the House of Representatives:—(1.) He must have been of the age of 30 years—as against 21 years for the other House; (2.) He must have been resident in the Commonwealth for five years—as against three in the other House; (3.) He must, if not natural-born, have been naturalized for five years—as against three years for the other House. In Committee there was some debate as to the qualifications of residence and naturalization. (Conv. Deb, Syd. [1891] pp. 605-10.)

At the Adelaide session, 1897, the clause was introduced substantially in its present form. In Committee, Mr. Walker moved an amendment requiring that a Senator should be of the age of 25 years, but this was negatived. (Conv. Deb., Adel., p. 1191.)

At the Sydney session, a suggestion by the Legislative Council of Victoria, to add "with the exception that he must be of the full age of 30 years" was negatived by 29 votes to 4; and a suggestion by both Houses of the Parliament of Tasmania, requiring that Senators should be of the age of 25 years, was also negatived. (Conv. Deb., Syd. [1897] pp. 989-90.) The words "the same as" were added as a drafting amendment.

§ 95. "The Qualifications of a Senator."

Until altered by the Parliament the qualifications of a senator, being the same as those of a member of the House of Representatives, will be as follows:—

(i.) He must be of the full age of 21 years.

(ii.) He must be an elector entitled to vote at elections of the House of Representatives, or qualified to become an elector.

(iii.) He must have been for three years at least a resident within the limits of the Commonwealth as existing at the time when he is chosen.

(iv.) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a colony which has become or becomes a State, or of the Commonwealth, or of a State.

In addition to these positive qualifications a senator must not be the subject of any of those disabilities enumerated in sections 44 and 45.

The federal constitution having fixed the qualification of members of the Federal Legislature, no additional qualification can be added by the State Legislatures. (Barney *v.* McCreery, Cl. and H. [U.S.] 176; Turney *v.* Marshall, 1 Cong. El. Cas. [U.S.] 167; Trumbull's Case, *id.* 618.) The constitution of Illinois (1848) provided that the judges of the Supreme and Circuit Courts of the States should not be eligible to any other office of public trust or profit in that state, or in the United States, during the term for which they should be elected, nor for one year thereafter. The Federal House of Representatives held this provision of the constitution of Illinois void, in so far as it applied to persons elected members of the said House. (Turney *v.* Marshall, *supra;* Trumbull's Case, *supra.* Baker, Annot. Const. p. 5.)

Returns from the State authorities, showing that a certain person has been elected senator, are *prima facie* evidence of qualification only. (Spaulding *v.* Mead, Cl. and Hall, 157; Reed *v.* Cosden, *id.* 353.) The refusal of the Executive of the State to grant a certificate does not prejudice the right of any person entitled to a seat. (Richards' Case, Cl. and Hall, 95; Baker, Annot. Const. pp. 10, 11.)

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President[96] of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

UNITED STATES.—The Vice-President of the United States shall be President of the Senate.—Const. Art. I. sec. III. sub-sec. 4.

CANADA.—The Governor-General may from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.—B.N.A. Act, 1867, sec. 34.

HISTORICAL NOTE.—The clause in the Commonwealth Bill of 1891 was substantially the same, with additional provisions that "The President shall preside at all meetings of the Senate; and the choice of the President shall be made known to the Governor-General by a deputation of the Senate." In Committee, Sir John Bray moved to omit the words "by a deputation of the Senate," but this was negatived. (Conv. Deb., Syd., 1891, pp. 610-1.) At the Adelaide session, 1897, the clause of 1891 was adopted verbatim. At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 96. "Choose a Senator to be the President."

The Lord Chancellor or Lord Keeper of the Great Seal of England is the Prolocutor or Lord Speaker of the House of Lords by prescription. It is singular, says May, that the President of that deliberative body is not necessarily a member of it. It has even happened that the Lord Keeper has officiated for years as Speaker without being raised to the peerage. (May's Parl. Prac., 10th ed., 1893, p. 184.) Under the Constitution of the United States the Vice-President of the Republic is elected by popular suffrage, at the same time as the President; he is next in succession to the President, and is *ex officio* the presiding officer of the Senate. The Republican Senate, like the aristocratic House of Lords, has no voice in the selection of its official head. By the Canadian Constitution the Governor-General is authorized from time to time to appoint a senator to be Speaker of the Senate and to remove him and appoint another in his stead. The Constitution of

the Commonwealth vests in the Senate itself the power of choosing and removing its President. The President is not elected for any particular term, but he will cease to hold office (1) if he ceases to be a senator; (2) if he is removed from office by a vote of the Senate; (3) if he resigns his office.

The duties of President are those usually assigned to and exercised by the presiding officers of legislative bodies; among these may be—to maintain order and decorum; to enforce the rules of debate; to recognize a senator who wishes to speak and thus to give him the floor; to put the question before the Senate; to ascertain and declare the will of the Senate, either on the voices, or as the result of a division; to appoint tellers to take a division; to supervise the officers of the House and see that the votes and proceedings are properly recorded, so far as those duties are not otherwise regulated by the standing orders of the Senate, passed in conformity with the Constitution. (Foster, Comm. I., p. 501.) One function in particular appears to be recognized as the particular privilege of the presiding officer of the Upper House of every Parliament constructed on the British model; it is the right to present to the representative of the Crown a joint address of both Houses. According to the English practice, when a joint address is to be presented by both Houses to the Queen, the Lord Chancellor and the House of Lords and the Speaker and the House of Commons proceed in state to the palace at the time appointed. On reaching the palace the two Houses assemble in a chamber adjoining the throne room, and when her Majesty is prepared to receive them the doors are thrown open and the Lord Chancellor and the Speaker advance, side by side, followed by the members of the two Houses respectively. The Lord Chancellor reads the address and presents it to her Majesty, who then returns an answer, and both Houses retire. (May, 10th ed. p. 430.) More important, however, than such ceremonial functions will be the duty of the President of the Senate to assist in the enforcement of the law of the Constitution, and in particular to see that the privileges of the Senate, such as those contained in sections 53, 54, 55, and 56, are not invaded.

The Constitution makes no express provision for the salary of the President. The Federal Parliament, however, has ample power to appropriate a salary for the office under section 51—xxxix.

Absence of President.

18. Before or during any absence of the President[97], the Senate may choose a senator to perform his duties in his absence.

Historical Note.—In the Commonwealth Bill of 1891, the clause began "In case of the absence of the President." In the Adelaide Bill of 1897 these introductory words were omitted. At the Sydney session, the words "Before or during any absence of the President" were introduced as a drafting amendment.

§ 97. "Absence of the President."

This section makes provision for the appointment of a senator to act during the absence of the President. The Constitution is silent on the subject of permanent executive officers of the Upper House. The Senate of the Commonwealth, unlike the Senate of the United States, has been assigned no voice in the appointment of the officials necessary to carry on the business of the House. Until federal legislation deals with the matter, such appointments can be made only by the Executive Government of the Commonwealth. The chief officers of the Upper House, generally, are the Clerk of the Parliaments, the Gentleman Usher of the Black Rod, and the Assistant Clerk. The Clerk of the Parliaments has to make true entries and records of the things done and passed in the Parliaments. The Clerk Assistant has to attend to the table, with the

Clerk, and to take minutes of the proceedings and orders of the House. The Gentleman Usher of the Black Rod has to assist in the introduction of members, and other ceremonies; he is sent to desire the attendance of the members of the Lower House at the opening and proroguing of Parliament. He also executes orders for the commitment of parties guilty of breaches of privilege and contempt. (May, 10th ed. p. 194.)

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign[98] his place, which thereupon shall become vacant[99].

CANADA.—A senator may, by writing under his hand addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.—B.N.A. Act, 1867, sec. 30.

HISTORICAL NOTE.—A similar clause is in the Constitutions of all the Australian colonies. In the Commonwealth Bill of 1891 the clause was substantially in the same words; at the Adelaide session of the Convention in 1897 it was introduced and passed as it now stands.

§ 98. "A Senator may . . resign."

The seat of a senator is vacated by a resignation addressed to, and delivered to, the Governor of his State. It does not depend upon notice of acceptance. (Bledsoe's Case, Cl. and Hall [U.S.], 869; Baker, Annot. Const. p. 7.)

§ 99. "Shall become Vacant."

The Queensland Constitution Act, 1867, sec. 23, provides that if a member of the Legislative Council should, for two successive sessions of the Legislature of the colony, fail to give his attendance in the Council without the permission of Her Majesty or of the Governor of the Colony, signified by the Governor to the Council, his seat in the Council shall become vacant. A Councillor absented himself during the whole of three sessions, having previously obtained leave of absence for a year, which period of time, in the event, covered the whole of the first and part of the second session. The Privy Council held that his seat was vacated on the ground that the permission did not cover two successive sessions. (Att.-Gen. [Queensland] *v.* Gibbon, 12 App. Cas. 442.)

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

CANADA.—The place of a senator shall become vacant . . . if for two consecutive sessions of the Parliament he fails to give his attendance in the Senate.—B.N.A. Act, 1867, sec. 31.

HISTORICAL NOTE.—A similar clause is in the Constitutions of all the Australian colonies. In the Commonwealth Bill of 1891, the clause was the same except that the absence specified was "for one whole session of the Parliament," and that the permission of the Senate was to be "entered on its journals." (Conv. Deb., Syd. [1891], p. 611.) At the Adelaide session, 1897, it was introduced in the same words. In Committee, on Mr. Gordon's motion, "two consecutive months of any session" was substituted for "one

whole session" (Conv. Deb., Adel., p. 680.) At the Sydney session, a suggestion by the Tasmanian House of Assembly to substitute "thirty consecutive sitting days in any session" was negatived. At the Melbourne session, after the fourth report, the words "entered on its journals" were omitted.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

HISTORICAL NOTE.—The clause in the Commonwealth Bill of 1891 was substantially in the same words, and was adopted verbatim at the Adelaide session (1897). (Conv. Deb., Adel., p. 680.) At the Sydney session Mr. Glynn suggested that there should be a resolution of the Senate declaring the vacancy. This, however, was thought unnecessary. The word "forthwith," before "notify," was omitted as unnecessary. (Conv. Deb., Syd. [1897], pp. 990-1.) At the Melbourne session, before the first report, a drafting amendment was made.

Quorum[100].

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

UNITED STATES.—A majority of each House shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.—Const. Art. I., sec. 5, sub-s. 1.

CANADA.—Until the Parliament of Canada otherwise provides, the presence of at least fifteen senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.—B.N.A. Act, 1867, sec. 35.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891 the clause was in the same form, with the addition, after "senators," of the words "as provided by the Constitution." At the Adelaide session, 1897, the clause was introduced in the same form, except that the words "until the Parliament otherwise provides" were omitted. In Committee, on Mr. Gordon's motion, the words "as provided by this Constitution" were omitted. (Conv. Deb., Adel., p. 682.) At the Sydney session, on the motion of Mr. Higgins, the words "until the Parliament otherwise provides" were inserted. (Conv. Deb., Syd. [1897], pp. 991-2.)

§ 100. "Quorum."

"The [American] Constitution does not expressly provide as to how the presence of a quorum shall be determined; but it seems to me to imply, in the power of each House to force the presence of members in order to form a quorum, that physical presence is the test, whether or no the members present all act. Such has not been the general practice, however, to this time. It has been regarded as necessary that a quorum shall not merely be present, but shall also act." (Burgess, vol. II, p. 55.)

For discussion of the principle of the quorum, see Note, § 137, *infra*.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote[101]. The President shall in all cases be entitled to a vote[102]; and when the votes are equal the question shall pass in the negative.

UNITED STATES.—Each senator shall have one vote.—Const, Art. I., sec. 3, sub-s. 1.

[The President] shall have no vote, unless they be equally divided.—Art. I., sec. 3, sub-s. 4.

CANADA.—Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.—B.N.A. Act, 1867, sec. 36.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, the clause was substantially the same. In Committee, Sir Samuel Griffith explained that the provision that the President should have a vote was to secure the full representation of the State to which he belonged. (Conv. Deb., Syd. [1891], pp. 611-2.) At the Adelaide session, 1897, the clause was adopted in the same form. In Committee there was a short discussion of the provision for the President's vote. (Conv. Deb., Adel., pp. 682-3.) At the Melbourne session, before the first report, the words "and each senator shall have one vote" were transferred from clause 7.

§ 101. "Each Senator shall have one Vote."

"Members of the Senate vote as individuals, that is to say, the vote a senator gives is his own and not that of his State. It was otherwise in the Congress of the old Confederation before 1789; it is otherwise in the present Federal Council of the German Empire, in which each State votes as a whole, though the number of her votes is proportioned to her population. Accordingly, in the American Senate, the two senators from a State may belong to opposite parties; and this often happens in the case of senators from States in which the two great parties are pretty equally balanced, and the majority oscillates between them. Suppose Ohio to have to elect a senator in 1886. The Democrats have a majority in the State legislature; and a Democrat is therefore chosen senator. In 1888 the other Ohio senatorship falls vacant. But by this time the balance of parties in Ohio has shifted. The Republicans control the legislature; a Republican senator is therefore chosen, and goes to Washington to vote against his Democratic colleague. This fact has largely contributed to render the senators independent of the State legislatures, for as these latter bodies sit for short terms (the larger of the two Houses usually for two years only), a senator has during the greater part of his six years' term to look for re-election not to the present, but to a future State legislature." (Bryce, vol. i., 97.)

§ 102. "The President shall . . be entitled to a Vote."

The object of providing that the President, unlike the Speaker of the House of Representatives, shall be entitled to a vote in all cases, is that the State which he represents may not be deprived of the benefit of the constitutional privilege of equal representation. He is not given a casting vote as well, because that would give his State more than equal representation. Some other provision had, therefore, to be made for the case of an equality of votes; so the Constitution declares that in that event the question shall be resolved in the negative. This is based upon the universally recognized principle that affirmative action, in any legislative body, must be supported by a majority.

PART III.—THE HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House of Representatives[103] shall be composed of members directly chosen by the people of the Commonwealth[104], and the number of such members shall be, as nearly as practicable[105], twice the number of the senators[106].

The number of members chosen in the several States shall be in proportion to the respective numbers of their people[107], and shall, until the Parliament otherwise provides[108], be determined, whenever necessary[109], in the following manner :—

(i.) A quota shall be ascertained[110] by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators :

(ii.) The number of members to be chosen in each State[111] shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota ; and if on such division there is a remainder greater than one-half of the quota[112], one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least[113] shall be chosen in each Original State.

UNITED STATES.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.—Const. Art. I., sec. 2, sub-sec. 1.

Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers. . . . The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative.—*Id.* Art. I., sec. 2, sub-sec. 3 ; and see Amendment xiv.

CANADA.—The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.—B.N.A. Act, 1867, sec. 37.

On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be readjusted by such authority, in such manner, and from such time, as the Parliament of Canada from time to time provides, subject, and according to the following rules :

(1.) Quebec shall have the fixed number of sixty-five members :

2.) There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained) :

(3.) In the computation of the number of members for a Province a fractional part not exceeding one-half of the whole number requisite for entitling the Province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number:

(4.) On any such readjustment the number of members for a Province shall not be reduced, unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the Province is ascertained at the then latest census to be diminished by one-twentieth part or upwards:

(5.) Such readjustment shall not take effect until the termination of the then existing Parliament.—B.N.A. Act, 1867, sec. 51.

SWITZERLAND.—The National Council is composed of representatives of the Swiss people, chosen in the ratio of one member for each 20,000 persons of the total population. Fractions of upwards of 10,000 persons are reckoned as 20,000. Every Canton, and in the divided Cantons every half Canton, chooses at least one representative.—Swiss Const., Art. 72.

HISTORICAL NOTE.—Chapter I. of the Commonwealth Bill of 1891 contained the following clauses:—

24. "The House of Representatives shall be composed of members chosen every three years by the people of the several States, according to their respective numbers; and until the Parliament of the Commonwealth otherwise provides, each State shall have one Representative for every 30,000 of its people.

"Provided that in the case of any of the existing colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, and Western Australia, and the province of South Australia, until the number of the people is such as to entitle the State to four Representatives, it shall have four Representatives."

27. "When upon the apportionment of Representatives it is found that after dividing the number of the people of a State by the number in respect of which a State is entitled to one Representative there remains a surplus greater than one-half of such number, the State shall have an additional Representative."

29. "A fresh apportionment of Representatives to the States shall be made after each census of the people of the Commonwealth, which shall be taken at intervals not longer than ten years. But a fresh apportionment shall not take effect until the then next general election."

In Committee, the question of apportionment was shortly discussed. (Conv. Deb., Syd., 1891, pp. 612-3, 639.) At the Adelaide session, 1897, the Bill as introduced provided for a quota based on a "two to one ratio" of the Houses, the clause being as follows:—

"The House of Representatives shall be composed of members directly chosen by the people of the several States, according to their respective numbers; as nearly as practicable there shall be two members of the House of Representatives for every one member of the Senate.

"Until the Parliament otherwise provides, each State shall have one member for each quota of its people. The quota shall, whenever necessary, be ascertained by dividing the population of the Commonwealth as shown by the latest statistics of the Commonwealth by twice the number of the members of the senate; and the number of members to which each State is entitled shall be determined by dividing the population of the State, as shown by the latest statistics of the Commonwealth, by the quota.

"But each of the existing colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, and Western Australia, and the province of South Australia, shall be entitled to five Representatives at the least."

The "apportionment" clause of the Bill of 1891 was also introduced verbatim. On the motion to go into Committee, the new provision was explained by Mr. Barton. (Conv. Deb., Adel., pp. 435-7.) In Committee, it was explained again by Mr. O'Connor. Sir Geo. Turner objected to the clause, both as being too rigidly mechanical, and as checking the due increase of representatives with the increase in population. Mr. Glynn approved of it, as the alternative of a fixed quota would soon lead to so large a House that the provision for a minimum representation of the smaller States would become valueless. Mr. Higgins argued that there was no possible connection between the numbers of the two Houses, and opposed the scheme because it seemed to be leading up to a proposal for a joint sitting. Mr. Reid approved of it for the same reason, and also because it would tend to prevent an inordinate growth of the size of the House. Mr. Isaacs' objection was that the States where the growth of population was least

would suffer a decrease in their representation. Mr. O'Connor pointed out that the numbers of the House of Representatives might be increased at any time by increasing the number of senators for each State. Sir John Downer supported the clause as preventing the effacement of the Senate by an undue expansion of the House of Representatives. Mr. Deakin thought the ratio excellent to begin with, but thought that the clause might prove unduly rigid, and suggested that the words "Until the Parliament otherwise provides" should be placed at the beginning. Sir Geo. Turner accordingly moved to insert those words before the words "as nearly as practicable," but this was negatived by 26 votes to 9. Mr. Solomon then proposed that representation in the House of Representatives should be upon a sliding scale, instead of according to population; but this was not taken seriously and was negatived without division. Mr. Reid proposed to reduce the minimum from "five" to "four," but subsequently withdrew the amendment. (Conv. Deb., Adel., pp. 683-715.) At a later stage the clause was verbally amended. (*Id.* p. 1191.)

At the Sydney session, a suggestion by the Legislative Assemblies of New South Wales and Victoria, to omit the "two to one ratio," and insert a provision that, until the Parliament otherwise provides, each State shall have one representative for every 30,000 of its people, was negatived, after considerable debate, by 26 votes to 17. A verbal correction was made. (Conv. Deb., Syd. [1897], pp. 420-53.)

At the Melbourne session, before the first report, the clause was verbally amended. After the first report, an amendment was carried, on Mr. O'Connor's motion, by which the words "chosen by the people of the Commonwealth" were substituted for "chosen by the people of the several States;" and the quota and re-apportionment provisions were recast into a separate clause, 24A, but in substantially their present form. Sir George Turner then proposed again to omit the "two to one ratio," and substitute a provision that until the Parliament otherwise provides, each State shall have one Representative for every 50,000 of its people. This was negatived, after debate, by 25 votes to 10. The re-apportionment clause was then struck out, being provided for in the quota clause. (Conv. Deb., Melb., pp. 1827-38.) After the fourth report, the two clauses (24 and 24A) were condensed into one, with verbal alterations.

§ 103. "The House of Representatives."

As the Senate is the legislative organ representing the States, so the House of Representatives is the legislative organ representing the nation. This appears from the exact words of the Constitution. The Senate is composed of an equal number of senators "for each State," directly chosen by the people of the State (sec. 7). The House of Representatives is composed of members directly "chosen by the people of the Commonwealth," and the number of members chosen in the several States is required to be in proportion to the respective numbers of the people. In one chamber the States are equally represented. In the other chamber the people are proportionately represented. The Senate represents the States as political units. The House represents the people as individual units.

In declaring that the House of Representatives is chosen by the "people of the Commonwealth," the Constitution follows the precedent of Switzerland, which declares that the National Council represents "the Swiss people;" whereas the House of Representatives in the United States is "chosen by the people of the several States"—a phrase which does not so clearly express its national element.

In our review of the meaning of the phrase, "Federal Commonwealth" (Note, § 27 *supra*), we have seen that the Commonwealth is a community created on the model of a national State with a federal structure;—National in uniting the people, Federal in uniting the States, and, for certain purposes, maintaining the autonomy and individuality of each State, and assigning to each State a share in the dual system of government. It is hardly necessary once more to emphasize the principle that the Commonwealth

as a political State should not be confused with the Federal Government. The Federal Government, consisting of three divisions—the legislature, the executive, and the judiciary—is charged with the duty of exercising certain defined powers and functions, assigned to it by the Commonwealth in and through the Constitution.

The Federal Government is only one part of the dual system of government by which the people are ruled ; the other parts of the dual system are the State Governments, charged with the duty of exercising the residuary powers and functions of government, reserved to them by the Commonwealth in and through the Constitution.

The House of Representatives is one of the two Chambers of the legislative organization of the Federal Government. It gives particular force and expression to what may be described as the national principle of the Commonwealth. In that great assembly the national principle will find full scope and representation. Its operation and tendency will be in the direction of the unification and consolidation of the people of the Commonwealth into one integrated whole, irrespective of State boundaries. In its constitution it represents "the people of the Commonwealth," as distinguished from "the people of the States." The natural bent and inclination of its policy will, therefore, be to regard its constituents as one united people ; one in community of rights and interests ; one in their title to the equal protection of the law ; one in the claim to fair and beneficent treatment ; one in destiny. On the other hand, the Senate, as well as the High Court, will tend to check any unconstitutional encroachments on the reserved realm of provincial autonomy. If in both chambers the people had been represented in proportion to their numbers, the practical result would have been the establishment of a unified government, in which the States, as political entities, would have been absolutely unrecognized, and would have been soon reduced to a subordinate position. The Convention was entrusted with no such duty, under the Enabling Acts by which it was called into existence ; its mandate was to draft a Constitution in which the federal, as well as the national elements, were recognized.

The House of Representatives is not only the national chamber ; it is the democratic chamber ; it is the grand depository and embodiment of the liberal principles of government which pervade the entire constitutional fabric. It is the chamber in which the progressive instincts and popular aspirations of the people will be most likely to make themselves first felt. This characteristic is not founded on any difference in the franchise of the House of Representatives from that of the Senate, because both franchises are the same ; it arises from the fact that, by the Constitution, it is expressly intended to be such a House, and that by its organization and functions it is best fitted to be the arena in which national progress will find room for development.

The House of Representatives of the Commonwealth bears a close resemblance to the House of Representatives of the United States of America, and occupies the corresponding position in the scheme of government.

The House of Commons and the House of Representatives Compared.—We will now proceed to draw attention to certain features in the constitution and functions of the House of Representatives in which it resembles the House of Commons, and certain other features and functions in which it differs from that historic Chamber :—

Resemblance.—The members of both the House of Commons and the House of Representatives are elected by the people, voting in national constituencies, and consequently they represent national elements. They both exercise supreme supervision over the finances. This is secured by the exclusive power of originating proposed laws appropriating public money and imposing taxation, and in the inability of the House of Lords in all cases, and of the Senate with certain exceptions, to amend such proposed laws. This control of the finances will tend to carry with it the predominant control of the Executive, and hence the system known as Responsible Government.

Differences.—The House of Commons is the National Chamber of the Empire, exercising in conjunction with the other branches of the Imperial Parliament unlimited,

unchallengeable sovereign authority. The House of Representatives is the National Chamber of the Commonwealth, which is merely an outlying portion of the Empire, the Parliament of which is endowed only with restricted and enumerated powers, delegated to it through the Federal Constitution by the parent Parliament. The House of Representatives is a division of a subordinate law-making body, whose mandates are of the nature of by-laws, valid whilst within the jurisdiction conferred upon it by the Constitution, but invalid if they go beyond the limits of such jurisdiction. (Dicey, Law of the Const. p. 137.)

Another important point of difference between the House of Commons and the House of Representatives has been pointed out by Dr. Burgess. Since the reform and revolution of 1832, the House of Commons, he says, has occupied a double position in the English system. It is one branch of the legislature, and it is also the sovereign organization of the State. In the former capacity it has no more power than the House of Lords; in the latter it is supreme over the King and the Lords. The great result of the reform movement of 1832 is, he contends, that the people became politically organized in the House of Commons. In other words, the organization of the State, within the Constitution, is now the same as was its organization back of the Constitution. The House of Commons, newly elected after a dissolution on a particular principle, or measure, is the political people organized through their representatives in that House. There is thus, he says, a correspondence between the revolutionary organization of the State, back of the Constitution, and its continuing organization within the Constitution. (Burgess, Political Sci. vol. i. p. 95; vol. ii. pp. 38-9.) At the beginning of its constitutional career, the House of Representatives will not occupy such a commanding relative position as the House of Commons, for the reason previously stated that its powers are limited by the Constitution. Its capacity to initiate reforms with a view to the acquisition of further power is, however, with the exceptions mentioned in sec. 128, unbounded. It cannot, like the House of Commons, through ministers having its confidence, intimidate or coerce the Upper House and the Crown to agree to a proposed amendment of the Constitution; the ultimate determination of all such constitutional proposals is vested in a body of persons, defined by the Constitution as a majority of the electors of the Commonwealth voting, including majorities in more than half the States. Such majorities constitute the *quasi*-sovereign organization of the Commonwealth, considered as a political State. But the House of Representatives can originate such constitutional proposals, and cause them to be submitted to the Federal electors for their decision; and it cannot be doubted that the influence of the members of such a strong chamber in securing an affirmative vote in favour of its proposals will be very powerful indeed.

§ 104. "The People of the Commonwealth."

Attention may be drawn to the above expression "the people of the Commonwealth" for the purpose of contrasting of it with another, to be found in section 7, "the people of the States." (Note, § 68, *supra*.) A federation is, as we have already seen, defined by some authorities as a State having a dual system of government; (see "Federal," § 27, *supra*); hence, in a federation it is said there is a dual citizenship. It follows that each natural-born or naturalized subject of the Queen permanently residing within the limits of the Commonwealth is entitled to be considered as a citizen of the Commonwealth, and, at the same time, a citizen of the State in which he resides. Every such person thus owes a double duty, and can claim a double right; a duty to the Commonwealth, as the great community embracing all the people, to yield obedience to its laws, to assist in its defence, and to take part in promoting its interests; a right to claim from the Commonwealth the equal protection of its laws, and to share in the honour and advantage of its rule. Such a person also owes a duty to the particular State in which he resides, regarding that State as a part of the Commonwealth, guaranteed to possess and enjoy certain privileges and immunities; a duty to obey its laws, and at the same time to assist in

defending the State domain against unconstitutional invasion ; a right to demand from the State the equal protection of the laws of the State. In one capacity such a person is described by the Constitution as one of "the people of the Commonwealth ;" in the other he is one of "the people of a State." From this dual citizenship, and, in order to assist in its preservation, every person living under such a form of government has a duality of political rights and powers. He is entitled, not only to assist in carrying on the government of his State, as a part of the Commonwealth, but to assist in the government of that wider organization of the nation itself. In the latter work, taken and considered by itself, he has also a dual right and power ; viz., to join in returning members to the House of Representatives in which centralizing, consolidating, nationalizing, and progressive elements of the community are represented, and also to assist in returning members to the Senate, in which the moderating, restraining, conserving and provincial elements of the community are represented. The duty of a citizen having these dual functions, and of the Federal Parliament so dually constituted, will be to reconcile and harmonize all these apparently conflicting yet necessary and inevitable forces.

§ 105. "As Nearly as Practicable."

These words are not intended to allow the Parliament a discretionary latitude in fixing the number of the members of the House of Representatives, but to provide for the slight variation that may be caused by the provision for the minimum representation of a State, and also by the provision for representing fractions of a quota. According to the mode provided in this section for determining the number of members, the "quota" of representation is to be ascertained by pure arithmetic. So far, the words, "as nearly as practicable" are unnecessary. But the quota so obtained, though it of course divides exactly into the population of the Commonwealth, is not likely to divide exactly into the population of each State. There will probably be fractions in each State, arithmetically entitled to a fraction of a member ; and whether these fractions are ignored altogether, or whether provision is made—as in this section—for assigning a member to any fraction greater than one-half the quota, the result may be to slightly disturb the "two to one ratio." A further, and, at present, more considerable element of disturbance is the provision that each State shall have at least five representatives. On a population basis, Tasmania is at present only entitled to three representatives : and her two additional members, not being allowed for by the quota calculation, go to increase the number of members beyond the "two to one ratio."

The Parliament, when it makes "other provisions" for determining the number of members, will be bound by the constitutional provision to make their number "as nearly as practicable twice the number of the senators ;" and the clear intention is that the absolute ratio should only be departed from, so far as may be necessary to adjust fractional and minimum representation.

§ 106. "Twice the Number of the Senators."

There is a constitutional limit to the number of members of the House of Representatives, viz., that it shall be, as nearly as practicable, twice the number of the senators ; in other words there must be two representatives to one senator. This provision was described in the course of the Convention Debates as the "two to one ratio." In this respect, the rule regulating the numerical strength of the Australian House of Representatives differs both from that of the American House of Representatives and from that of the Canadian House of Commons.

Under the American Constitution the first House of Representatives consisted of 65 members, of which there was one for every 30,000 of the qualified inhabitants. Congress was given general power to apportion representatives among the several States according to their respective numbers, and could therefore increase the number of representatives without reference to the number of senators. This power was subject to one

limitation; viz., that there should never be more than one representative for every 30,000 inhabitants. After the census of 1790 the first Congressional apportionment took place. The number of representatives was increased to 106, which, divided among the aggregate population, gave one representative for every 33,000. After the census of 1810 the number of representatives was raised to 183, which, divided among the population, gave one for every 35,000. In 1820 the number of representatives was was brought up to 213, which gave one to every 40,000. In 1830 the representatives were increased to 242, or one for every 47,700. In 1840 the representatives were reduced to 223, or one for every 70,680. In 1850 the representatives were increased to 233, or one for every 93,000. (Sheppard's Constitutional Text Book, 1863.) In the latest Apportionment Act, based on the census of 1890, the number of representatives was fixed at 357, which gave one representative to every 173,900. (Statesman's Year Book, 1899, p. 1130.) So, as the population went on increasing, the number of members to divide among the population has from time to time increased. The increase of members, however, does not proceed in proportion to the increase of the population. The proportion of representatives to population has been gradually diminished, from one representative for every quota of 30,000 in 1789, to one representative for every quota of 173,900 in 1890.

The British North America Act, 1867, sec. 37, provided that the Dominion House of Commons should at first consist of 181 members, of whom 82 were assigned to Ontario, 65 to Quebec, 19 to Nova Scotia, and 15 to New Brunswick. By sec. 52 of the same Act power was given to the Parliament of Canada to increase the number of the members of the House of Commons, subject, however, to the condition that the proportionate representation prescribed by the Act should not be thereby disturbed. The basis for re-adjustment after each decennial census is that Quebec shall always have the fixed number of 65 members, and that each of the other Provinces shall be assigned the number of members which bears the same proportion to its population as the number 65 bears to the population of Quebec—a fractional part exceeding half a quota being regarded as a whole quota. (See p. 445, *supra.*)

On the basis of the census of the Dominion taken in April, 1891, and in accordance with a redistribution bill passed in 1892, the House of Commons consists of 213 members —92 for Ontario, 65 for Quebec, 20 for Nova Scotia, 14 for New Brunswick, 7 for Manitoba, 6 for British Columbia, 5 for Prince Edward Island, and 4 for the North-West Territories. The ratio of members to population is now one to 22,688. (Statesman's Year Book, 1899, p. 221.)

In the Draft Bill of 1891 it was provided (as in the Constitution of the United States) that there should be one representative for every 30,000 of the population of the Commonwealth, but that this quota should be alterable by the Federal Parliament; there was no provision made for any maximum number of members. As the population increased, the representation could be increased by an additional member for every 30,000.

It has been estimated that, if the Commonwealth had been established in 1897 and the House of representatives constituted on the basis of one member for every 50,000 of the population, that House would have consisted of about 71 members, of which New South Wales would have had 26, Victoria 24, Queensland 9, South Australia 7, Tasmania 3, Western Australia 2. In 1901, on the assumption that the past rates of increase of population continued, New South Wales would have 32, Victoria 27, Queensland 13, South Australia 9, Western Australia 4, and Tasmania 3. total 88. According to the same average of increase the House of Representatives would, by the year 1941, have a total of 446 members. (Mr. R. E. O'Connor, Conv. Deb., Adel., 1897, p. 685.)

This Constitution places no limit on the power of the Parliament to increase the size of the House of Representatives, except that the Senate must be increased in the same proportion, so as to preserve the "two to one ratio." It, however, effectually prevents any such rapid automatic increase as is foreshadowed in the calculations above

referred to. The number of representatives depends upon the number of senators, and the number of senators does not increase automatically at all. The number of senators may, however, be increased in two ways—either by increasing the number of senators for each State or by increasing the number of States.

The Parliament may increase or diminish the number of senators for each State, provided that equal representation of the original States shall be maintained and that no Original State shall have less than six senators (sec. 7). The number of senators may also be increased by the admission or establishment of new States (sec. 121). There are thus two methods by which the number of senators may be increased ; (1) by an Act of the Federal Parliament increasing the number of senators for each existing State, and (2) by an Act of the Federal Parliament, admitting or establishing a new State or States and thus introducing additional senators. Accordingly, though apparently the number of representatives is determined by the number of Senators, yet the fact that the number of senators may be increased to any extent by the Parliament makes the number of the House of Representatives equally elastic (see Note, § 116, *infra*).

This " two to one ratio " is a rigid element and basic requirement of much importance and significance ; it is embedded in the Constitution ; it is beyond the reach of modification by the Federal Parliament, and can only be altered by an amendment of the Constitution. It was adopted after due consideration and for weighty reasons. It was considered that, as it was desirable, in a Constitution of this kind, to define and fix the relative powers of the two Houses, it was also but fair and reasonable to define their relative proportions, in numerical strength, to each other, so as to give that protection and vital force by which the proper exercise of those powers could be legally secured. It was considered extremely necessary to prevent an automatic or arbitrary increase in the number of members of the House of Representatives, by which there would be a continually growing disparity between the number of members of that House and the Senate ; and to give some security for maintaining the numerical strength, as well as the Constitutional power, of the Senate. It was argued that if the number of the members of the Senate remained stationary, whilst the number of the members of the House of Representatives were allowed to go on increasing with the progressive increase of population, the House would become inordinately large and inordinately expensive, whilst the Senate would become weak and impotent. It was said that to allow the proportion of the Senate towards the House of Representatives to become the merest fraction, would in course of time lead practically to the abolition of the Senate, or at any rate, to the loss of that influence, prestige, and dignity to which it is entitled under the Constitution. In reply to the argument founded on the danger of disparity, arising between the number of members of the Senate and the number of members of the House of Representatives, attention was drawn to the Constitution of the United States of America, under which Congress had unlimited power to increase the number of members of the House, without increasing the number of senators ; which power had not been recklessly or improvidently exercised. The power and status of the Senate had not been prejudiced by the gradual increase in the number of representatives. In answer to this, it was contended that the Senate of the United States of America had maintained its position in the Constitution largely owing to its possession of certain important judicial, legislative and executive powers, which had not been granted to the Senate of the Commonwealth, such as the sole power of trying cases of impeachment ; the power to ratify or to refuse to ratify treaties made by the President with foreign nations ; and the power to refuse to confirm executive appointments made by the President. These powers were the main sources of the strength of the American Senate, which prevented any wide disparity in numbers between it and the House of Representatives from causing it to drift into the insignificance of a small committee or board. The Senate of the Commonwealth, being deprived of such powers, should be protected against the danger of disparity in numbers. As regards the necessity, which might hereafter arise, of increasing the number of representatives to meet the demands of an increased and

increasing population, it was not likely that the Senate would deny an increase in the House of Representatives when it secured an increase itself. (Conv. Deb., Adel., pp. 435-7, 683-98; Sydney, pp. 429-52.)

§ 107. "In Proportion to the Respective Numbers of Their People."

The number of members chosen by the people of the Commonwealth in the several States is to be in proportion to the respective numbers of their people. The words of the corresponding section in the Constitution of the United States of America (Art. I. sec. ii. sub-sec. 3), are, that representatives shall be apportioned among the several States of the Union "according to their respective numbers," provided that their representation should not be greater than the proportion of 1 to 30,000. In the Draft Bill of 1891, part III. sec. 24, it was proposed that representatives should be chosen by the people of the several States, "according to their respective numbers," provided that their representation should not be greater than 1 to 30,000. In the Constitution of the United States it was further provided that each State should have at least one representative; and, until the first enumeration was made, the number of members for each State was specified in the Constitution itself.

Every scheme of apportionment, founded on a fixed ratio, such as one representative for every 30,000 inhabitants, was open to the objection that in almost every State there would probably be thousands of persons constituting a fraction of the given number, who would be absolutely unrepresented in the House. This was the actual experience of the United States of America. Accordingly, different methods of providing for and dealing with these fractions were suggested and tried. The first apportionment Bill was introduced into the House of Representatives in 1790. It gave one representative for every 30,000 inhabitants, and made no provision for the representation of the remaining fractions; thus a State containing a population of one million would be assigned 33 representatives, representing 990,000 in the million, leaving 10,000 unrepresented. The Senate amended the Bill by allowing additional representatives to the States having the largest fractions; the House concurred in the amendment, but the Bill was eventually vetoed by President Washington. (Marshall's Life of Washington, vol. V. pp. 320, 323; cited Foster's Comm. vol. I. pp. 394-7; Webster's Report of the Senate, 1832, cited Foster, pp. 436-8.)

Accordingly, the basis of apportionment in the United States ignored fractions altogether until 1842, when a new rule was adopted on the lines of Daniel Webster's Report to the Senate, made ten years previously. The new rule made the provision as to fractions which is adopted by this Constitution, and the purpose of which cannot be explained more clearly than in the words of Webster's Report:—

"It may be clearly expressed in either of two ways. Let the rule be, that the whole number of the proposed House shall be apportioned among the several States, according to their respective numbers, giving to each State that number of members which comes nearest to her exact mathematical part, or proportion; or, let the rule be, that the population of each State shall be divided by a common divisor, and that, in addition to the number of members resulting from such division, a member shall be allowed to each State whose fraction exceeds a moiety of the divisor." (Webster's Report, cited Foster's Comm., vol. 1. p. 445.)

§ 108. "Until the Parliament Otherwise Provides."

These words empower the Parliament to alter the provisions of sub-sections 1 and 2, which deal with the manner of determining the number of members chosen in the several States. This power of alteration is, however, confined within very narrow limits by the permanent and absolute provisions of the section. The rules which are determined absolutely by the section, and which the Parliament has no power to alter, are:—

(1.) That the whole number of members shall be, as nearly as practicable, twice the number of the senators :

(2.) That the number of members chosen in the several States shall be in proportion to the respective numbers of their people :

(3.) That five members at least shall be chosen in each Original State.

The provisions for ascertaining the quota, and for dealing with the question of fractions, may only be altered subject to those absolute rules; so that the power of the Parliament to alter the basis of apportionment is very small.

§ 109. "Be Determined Whenever Necessary."

The Constitution does not expressly say by whom this determination is to be made. Whenever it is "necessary" to re-apportion the members, the only data needed are the "latest statistics of the Commonwealth," showing the population of the Commonwealth, and of each State. Given those figures, the rest is mere arithmetic; and according to the maxim—"*Id certum est quod certum reddi potest*"—the numbers are then already determined.

Parliamentary authority would, however, appear to be required for two purposes: —(1) To provide for the preparation of the latest statistics, and to identify those statistics by law; and (2) to declare when re-apportionment is "necessary." As the statistics are at the root of the representative system, it is important that they should be clearly recognized and identified by Act of Parliament; and even when that has been done, it would be most undesirable that the Executive should be left to decide for itself whether re-apportionment were necessary.

The Constitution does not prescribe any regular interval for re-apportionment, nor does it require that re-apportionment should take place at every general election, if later statistics are available; it merely provides that apportionment shall be made "whenever necessary," and that when so made it shall be according to the latest statistics. The Parliament is apparently left to judge for itself when the necessity arises. The only reliable basis of population statistics is a census; and it may be presumed that the Parliament will provide for a periodical—probably a decennial—census, and will require that after each census the number of members for each State shall be determined afresh. Such determination, when made, will of course not take effect till the next general election.

§ 110. "A Quota shall be Ascertained."

The quota is that number of the aggregate population of the Commonwealth which, considered as a unit, is entitled to one member in the House of Representatives. It is obtained by dividing the population of the Commonwealth by twice the number of senators. The population is that shown in the latest statistics. The number resulting from the division, the quotient, is called the quota. This is the ratio of representation, there being one representative for every quota of the population of the Commonwealth. The method of obtaining the quota may be shown as follows :—

Twice the number of senators.	Population of Commonwealth.	Quota
72	3,717,700	51,635 (or exactly, 51,634·72)

It seems clear that strict accuracy requires that the quota should be calculated out to an exact decimal fraction. To neglect the fraction might, in occasional instances, just make the difference of a representative more or less. Thus, suppose that the exact quota were 50,000·4, and that the population of one of the States were 1,025,001. If the

quota were taken at its integral value, 50,000, the State would be entitled to 21 representatives—20 in respect of 1,000,000 inhabitants, and one more in respect of the remainder of 25,001, which is greater than one-half of the quota. But if the quota is taken at its exact value the remainder will only be 24,993, or less than one-half the quota, and the State will only be entitled to 20 representatives.

This method of ascertaining the quota may be altered by the Federal Parliament and another substituted. But the "two to one ratio," and the rule requiring the distribution of representatives chosen in the several States in proportion to the respective numbers of their people, cannot be interfered with except by an amendment of the constitution.

§ 111. "Members to be Chosen in each State."

The quota being ascertained, it becomes a mere matter of arithmetic to determine the number of representatives to be chosen in each State. The quota, say fifty thousand, is divided among the population of the State as shown by the latest statistics of the Commonwealth. The result of the division is the number of representatives to be chosen in the State—subject, however, to the provision that each State shall have at least five representatives, and subject also to the provision as to fractions.

§ 112. "A Remainder Greater than One-half of the Quota."

It is provided that if, in any such division of the quota among the population of the State, the remainder left is greater than one-half of the quota, one more member shall be chosen in the State. This expresses, in a legal form, what has been the recognized practice in the United States of America, of late years, of dealing with such fractions of a quota. (See Webster's Report on Apportionment; Foster's Comm. I. p. 434; and note, § 107, *supra*.) The Canadian Constitution contains a similar direction.

§ 113. "Five Members at Least."

With fifty thousand as the quota, Tasmania and Western Australia would be entitled to only two or three members each in the National Chamber. This was considered such an insignificant representation that provision was made that there should be a minimum number of five members in each State.

Provision as to Races disqualified from Voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified[114] from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

UNITED STATES.—When the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.—Amendment XIV.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, clause 26, Chap. I., was as follows:—

"When in any State the people of any race are not entitled by law to vote at elections for the more numerous House of the Parliament of the State, the representa-

tion of that State in the House of Representatives shall be reduced in the proportion which the number of people of that race in the State bears to the whole number of the people of the State."

In Committee, Dr. Cockburn suggested that the reduction should extend, not only to alien races, but to all male adults disfranchised. (Conv. Deb., Syd. [1891], pp. 637-9.) At the Adelaide session, 1897, the clause was introduced and passed as follows :—

"In ascertaining the number of the people of any State, so as to determine the number of members to which each State is entitled, there shall be deducted from the whole number of the people of the State the number of the people of any race not entitled to vote at elections for the more numerous House of the Parliament of the State."

At the Sydney session, 1897, a suggestion by both Houses of the New South Wales Parliament, to omit the clause, was explained by Mr. Carruthers as not expressing any objection to the principle of the clause, but as directing attention to an ambiguity. (Conv. Deb., Syd. [1897], pp. 453-4) At the Melbourne session, the clause was verbally amended before the first report. After the first report it was incorporated with clause 24. (Conv. Deb., Melb., pp. 1827-8.) After the fourth report, it was redrafted as it now stands. (*Id.* p. 2447.)

§ 114. "Disqualified."

This section is based on the fourteenth Amendment of the Constitution of the United States, cited above. That amendment was passed after the Civil War, in order to induce the Governments of the States to confer the franchise on the emancipated negroes, who were declared citizens of the United States. It was designed to penalize, by a reduction of their federal representation, those States which refused to enfranchise the negroes.

The effect of the section in this Constitution is that where, in any State, all the persons of any race—such, for instance, as Polynesians, Japanese, &c.—are disqualified from voting at elections for the popular Chamber in the State, the persons of that race resident in that State cannot be counted in the statistics used for ascertaining the quota.

Representatives in first Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election[115] shall be as follows :—

New South Wales	...	twenty-three ;
Victoria	...	twenty ;
Queensland ...	...	eight ;
South Australia ...	...	six ;
Tasmania... ...	...	five ;

Provided that if Western Australia is an Original State, the numbers shall be as follows :—

New South Wales	...	twenty-six ;
Victoria	...	twenty-three ;
Queensland ...	...	nine ;
South Australia ...	...	seven ;
Western Australia	...	five ;
Tasmania... ...	...	five.

Historical Note.—In the Commonwealth Bill of 1891, the clause was as follows:—

"The number of members to be chosen by each State at the first election shall be as follows: [*To be determined according to latest statistical returns at the date of the passing of the Act.*]"

At the Adelaide session, 1897, the clause was introduced and passed as follows:—

"Notwithstanding anything in section 24, the number of members to be chosen by each State at the first election shall be as follows: [*To be determined according to latest statistical returns at the date of the passing of the Act, and in relation to the quota referred to in previous sections.*]"

At the Sydney session, a suggestion by the Legislative Assembly of Victoria to omit reference to the quota was not put from the Chair, being consequential on other amendments already rejected. (Conv. Deb., Syd., 1897, p. 454.) At the Melbourne session, verbal amendments were made after the fourth report. In the Bill as introduced into the Imperial Parliament, the blanks were filled in, with the alternative provision in the event of Western Australia being an Original State.

§ 115. "The Number of Members . . . at the First Election."

On 21st February, 1900, a Conference of Statisticians, representing the colonies which had agreed to accept the Constitution, was held at Sydney for the purpose of determining, according to the latest available information, the number of representatives to which each of those colonies, on becoming States, would be entitled. The Conference, which was convened by Sir William Lyne, the Premier of New South Wales, on the suggestion of Mr. Allan McLean, the Premier of Victoria, was composed as follows:—

Member of Conference.	Office.	Colony Represented.
T. A. Coghlan	Government Statistician ...	New South Wales
James J. Fenton	Government Statist	Victoria
J. Hughes	Registrar-General	Queensland
L. H. Sholl	Government Statist, &c. ...	South Australia
R. M. Johnston	Registrar-General, &c. ...	Tasmania

It was nine years since the last census had been taken in Australia, and consequently it was necessary that computations on a uniform basis should be made and concurred in as to the population of each colony. The total population of each colony having been ascertained it was then necessary to deduct therefrom disqualified races under Sec. 25, and aboriginals under Sec. 127. The Conference does not seem to have been called upon to make any deductions on account of "the people of any race" under the first named section. No difficulty was experienced in deducting the aboriginal element. The result was that the Conference agreed to a resolution affirming that the population of the colonies was, on 31st December, 1899, as follows:—

Colony.	Population 31st December, 1899.
New South Wales...	1,348,400
Victoria	1,162,900
Queensland...	482,400
South Australia	370,700
Tasmania	182,300
Total	3,546,700

With five colonies forming parts of the Commonwealth the number of senators would be 30; twice the number of senators would be 60; 60 divided among the total population yielded a quota of 59,112 (or, to an exact fraction, 59,111·6). This quota divided among the population of each colony according to the provisions of sec. 24-ii., allowing for fractions and the minimum, gave the number of representatives for each as follows :—

State.	Population 31st December, 1899.	Number of Members.
New South Wales	1,348,400	23 (22·81)
Victoria	1,162,900	20 (19·67)
Queensland	482,400	8 (8·16)
South Australia	370,700	6 (6·22)
Tasmania	182,300	5 (3·08)
Total...	3,546,700	62

In the aforegoing apportionment it will be seen that New South Wales was entitled to a 23rd member by virtue of the remainder left, after the division, being more than one-half the quota Victoria, for a similar reason, received a 20th member. According to the quota Tasmania was entitled to only three members; by the minimum provision two members were added, raising its representation to five.

On 27th February these numbers were cabled by the Lieutenant-Governor of New South Wales (Sir Frederick Darley) to Mr. Chamberlain, for insertion in sec. 26 of the Bill. Before the Bill was introduced into the House of Commons, however, Mr. Chamberlain decided to provide for an alternative plan of distribution of members on the basis of the whole of the six colonies, including Western Australia, forming parts of the Commonwealth.

On the 27th April, Mr. Chamberlain cabled to the Acting-Governor of Western Australia, informing him that the Premiers of the federating colonies had declared that they had no authority to accept amendments in the Commonwealth Bill. "I cannot, in these circumstances," continued the message, "press the matter further, and I would now urge your Ministers earnestly to consider whether they should not, in the best interests of the Colony, as well as of Australia, make a resolute effort to bring the Colony into Federation at once. Western Australia, unless it joins as Original State, can only enter later on condition of complete intercolonial free trade. It will thus lose the temporary protection offered by Clause 95, and looking to present population of Colony, it may also be found difficult to secure such large representation as it would receive as Original State, and which will enable Colony to secure adequate protection for all its interests in Federal Parliament. Your Ministers will also, of course, take into consideration effect of agitation of the Federalist party, especially in goldfields, if Western Australia does not enter as Original State. In the circumstances, it appears to me of utmost importance to future of Western Australia that it should join at once, and as your Ministers have done their best to secure modifications desired by Parliament, I would urge them to take early steps for summoning new Parliament, and laying position fully before it, with a view to the action necessary for ascertaining wishes of people as to entering Federation. If they agree to this course a clause will be inserted in Bill providing that if people have intimated desire to be included before issue of Her Majesty's Proclamation, Western Australia may join as Original State." (House of Com. Pap., May, 1900, p. 71-2.)

A reply to this cable was sent by Sir. A. O. Onslow on 2nd May, in which, after thanking Mr. Chamberlain for his great efforts on behalf of Western Australia, he said—

"Parliament has been summoned, on your suggestion, for the 17th May, when an enabling Bill will be introduced by Premier providing for the immediate submission of the Federation Bill to the people. Ministers gratefully accept your offer to make provision in the Imperial Act for Western Australia to enter as an Original State should the wishes of the people be expressed in favour of Federation before the Queen's Proclamation is issued." (House of Com. Pap., p. 75.)

On 4th May Mr. Chamberlain cabled to the Governors of New South Wales, Victoria, Queensland, South Australia, and Tasmania, informing them of the offer made by Her Majesty's Government to provide in the Commonwealth Bill for admission of Western Australia as an Original State, if the wishes of the people of that Colony should be expressed before the Queen's Proclamation; that the Government of Western Australia had accepted the offer, and would introduce a Bill to provide for an immediate Referendum. It was necessary that an agreement should be arrived at as to the change of figures in Clause 26, should Western Australia join. "I shall," concluded the message, "be glad to learn as soon as possible what figures are agreed on." (House of Com. Pap., p. 77.)

The materials available for a fresh computation of the number of members were those agreed to by the Conference of Statists held in Sydney in February, and the official estimate of the population of Western Australia, which was supplied by the Registrar-General of that colony. The population of Western Australia, exclusive of aborigines, was computed at 171,000, making the total population of Australia 3,717,700. With six colonies joining the Union the quota was reduced from 59,112 to 51,635 (or, to an exact fraction, 51,634·72). This new quota divided among the population of the various colonies gave the following apportionment:—

State.	Population on 31st December, 1899.	Number of Members.
New South Wales	1,348,400	26 (26·11)
Victoria	1,162,900	23 (22·52)
Queensland	482,400	9 (9·34)
South Australia	370,700	7 (7·18)
Tasmania	182,300	5 (3·53)
Western Australia	171,000	5 (3·31)
Total	3,717,700	75

The number of members apportionable among six colonies, as shown in the above table, was cabled to the Secretary of State for the Colonies, and was by him embodied in the proviso to sec. 26 of the Constitution as introduced into the House of Commons. The wisdom of this provision has been fully vindicated by subsequent events. The Constitution was, by authority of the Parliament of the colony, referred to the people of Western Australia on 31st July. The result of the poll was:—

Yes	44,800
No	19,691
Majority for the Constitution	25,109

The referendum in Western Australia was a remarkable incident in the history of the colony as well as in the history of Australian Federation. It was the first time in which adult women participated in the political franchise in that colony, a right which was freely exercised, and, as it proves, not adversely to the consummation of Continental union. By the vote of 31st July, Western Australia joins the Commonwealth as an Original State.

The figures which appear in the above table, in parenthesis, show that Victoria is entitled to its 23rd member and Tasmania to its 4th member by virtue of there being, after division, a remainder greater than one-half of the quota. Tasmania is entitled to its 5th member and Western Australia to its 4th and 5th members by virtue of the provision that no Original State shall have less than five members.

Alteration of number of members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing[116] the number of the members of the House of Representatives.

CANADA.—The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed.—B.N.A. Act, 1867, sec. 52.

HISTORICAL NOTE.—Clause 30, chap. I. of the Commonwealth Bill of 1891 was as follows:—

"The number of members of the House of Representatives may be from time to time increased or diminished by the Parliament of the Commonwealth, but so that the proportionate representation of the several States, according to the numbers of their people, and the minimum number of members prescribed by this Constitution for any State, shall be preserved."

At the Adelaide session, 1897, the clause was introduced and passed as follows:—

"Subject to the provisions of this Constitution, the number of the members of the House of Representatives may be from time to time increased or diminished by the Parliament."

At the Melbourne session, verbal amendments were made after the fourth report.

§ 116. "Increasing or Diminishing."

The Federal Parliament, like the Canadian Parliament, is authorized to increase the number of members of the House of Representatives, but in both cases there is a constitutional limit to the exercise of that power. The Federal Parliament cannot increase the representatives to any number beyond that as "nearly as practicable twice the number of the senators" for the time being. When the senators for each State are increased by Federal legislation, then the number of members of the House of Representatives must be correspondingly raised to a number "as nearly as practicable twice the number of the senators."

The provision for equal representation of all the Original States in the Senate makes it impossible to increase the senators for one Original State without a similar increase for all the others. It follows that any alteration made by increasing the number of senators for each Original State must increase the whole number of senators by a number which is some multiple of the number of Original States; and the corresponding increase in the House of Representatives will be twice that number. Except therefore by admitting or establishing new States, the House of Representatives can only be enlarged by a number which is some multiple of twice the number of States. For instance, the number of Original States being six, the number of members of the House of Representatives can—except as stated—only be increased by twelve, or twenty-four, or thirty six, or some other multiple of twelve.

Duration of House of Representatives.

28. Every House of Representatives shall continue for three years[117] from the first meeting of the House, and no longer, but may be sooner dissolved[118] by the Governor-General.

CANADA.—Every House of Commons shall continue for five years from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General) and no longer.—B.N.A. Act, 1867, sec. 50.

HISTORICAL NOTE.—In the Constitutions of the Australian colonies, the duration of the Legislative Assembly has sometimes been computed from the day of the return of the writs, and sometimes from the day of the first meeting. By the Constitution Acts of New South Wales, Queensland, Tasmania, and New Zealand, the duration of the Legislative Assemblies of those colonies was formerly five years from the day of the return of the writs; but by amending Acts in each of those colonies the duration is now reduced to three years from the day of the return of the writs. (See Triennial Parliaments Act, 1874 [N S.W.], 37 Vic. No. 7; Constitution Amendment Act, 1890 [Q.], 54 Vic. No. 3; Constitution Amendment Act, 1890 [Tas.], 54 Vic. No. 58; Triennial Parliament Act, 1879 [N.Z.].) In Western Australia, under sec. 14 of the Constitution Act of that colony, the duration of the Legislative Assembly is four years from the day of the return of the writs. In Victoria, under sec. 19 of the Constitution Act of that colony, the duration of the Legislative Assembly was formerly five years from the return of the writs; but in 1859, by the Victorian Act 22 Vic. c. 89, sec. 2 (now re-enacted in the Constitution Amendment Act, 1890, sec. 127), the duration was limited to three years from the day of the first meeting. In South Australia, under the Constitution Act of that colony, the duration of the House of Assembly is three years from the day on which the House "shall first meet for the despatch of business."

In the Sydney Convention of 1891, the clause as first drawn followed the practice in vogue in a majority of the colonies by providing for a duration of three years "from the day appointed for the return of the writs for choosing the House." In Committee, Sir John Bray pointed out that in some of the colonies the writs were made returnable on different days, and as long as the elections were governed by the Electoral laws of the States there would be confusion. Sir Samuel Griffith urged that the practice in some of the colonies was erroneous, and that in England the writs were invariably returnable on the same day. After debate, the clause was amended, on Sir John Bray's motion, to make the duration date from "the day appointed for the first meeting of the House." (Conv. Deb., Syd. [1891], p. 643-52.)

At the Adelaide session, 1897, the clause as introduced provided for a duration of "four" years from the date appointed for the first meeting of the House. In Committee, on Sir. Geo. Turner's motion, this was altered to "three" years. (Conv. Deb., Adel., p. 1031.) At the Sydney session, a suggestion by the Legislative Assembly of Western Australia, to make the term four years, was negatived. (Conv. Deb., Syd., 1897, p. 463.) At the Melbourne session, the clause was verbally amended after the fourth report.

§ 117. "Shall Continue for Three Years."

DEMISE OF THE CROWN.—Under the law as it existed prior to the Revolution of 1688, the English Parliament, elected and duly constituted under the writs issued by one reigning sovereign, continued in existence from session to session until a change took place in the succession to the Crown, unless it was previously terminated by the prerogative act of Dissolution. There was no legal provision for its termination by effluxion of time. Its continuity depended only on the life or pleasure of its Royal originator—the King or Queen by whom the writs for its election were issued. It was a principle of the common law, that the created power terminated with the demise of the creating power.

By the Act 6 and 7 Wm. and Mary c. 2, commonly known as the Triennial Act (1694), it was for the first time in English history declared that no Parliament should have any continuance longer than for three years only, at the farthest. The Act 1 Geo. I. c. 38 (1715), known as the Septennial Act, after reciting the Triennial Act, declared that the then existing Parliament and all future Parliaments "shall and may respectively have continuance for seven years and no longer" from the day appointed by the writ of summons for the meeting of Parliament, unless the Parliament should be sooner dissolved by the Crown. That Act is still in force in Great Britain.

The Triennial Act was a limiting Act; the Septennial Act succeeded it as a limiting Act. Without one or the other of those Acts the duration of Parliament would have remained determinable only by the death or pleasure of the Sovereign. The Septennial Act provided that, no matter how long the sovereign reigned, a Parliament should not continue for longer than seven years. It did not declare that the Parliament should not expire with the death of the Sovereign. Hence the common law doctrine, as to the effect of the demise of the Crown on any Parliament in being, remained in full force.

The practice of summoning a new Parliament immediately after the occurrence of a change in the succession to the Crown was found to be inconvenient, and it was apprehended that danger might arise through there being no Parliament in existence in case of a disputed succession. It was therefore enacted by 7 and 8 Wm. III. c. 15, that the Parliament in being should, if sitting, continue for six months after the demise of the Crown, unless sooner dissolved, and if not sitting should meet on the day fixed by the prorogation; and that, in case there was no Parliament in being, the last preceding Parliament should be convened. By the Act 6 Anne c. 41, s. 4, it was enacted that Parliament should not be determined or dissolved by a demise of the Crown, but should continue and be able to act for six months thereafter and no longer, unless sooner dissolved by the Successor to the Crown. And now by the Act 30 and 31 Vic. c. 102, s. 51 (Representation of the People Act, 1867), the British Parliament is no longer affected in any way by the demise of the Crown.

The effect of a demise of the Crown on the duration of an Australian Legislature was considered by the Privy Council in the case of Devine *v.* Holloway, 9 Weekly Reporter, 642. In November, 1856, John Devine instituted a suit in the Supreme Court of New South Wales to eject Thomas Holloway and others from certain lands in that colony, which he claimed as heir-at-law of Nicholas Devine, who in 1830 died intestate and seised of the property. On 13th July, 1837, three weeks after the death of His Majesty William IV., and before news of that event had reached the colony, the Governor and Legislative Council of New South Wales, by virtue of authority conferred on him by the Act 9 Geo. IV. c. 83, made an Ordinance enacting that the provisions of the English Statute of Limitations, 3 and 4 Wm. IV. c. 27, should become law in the colony. In the ejectment suit the defendants pleaded the Statute of Limitations in bar of the plaintiff's claim, and being nonsuited he appealed to the Privy Council. On his behalf it was contended, *inter alia*, that the Colonial Act adopting the English statute was null and void on the ground that the Legislative Council ceased to exist with the death of William IV., and that in order to acquire a new legal life it ought to have been reconstituted in the name of Her Majesty. This contention was overruled by the Privy Council. It was held that the authority of the Governor and Legislative Council was not determined by the demise of the Crown. During the argument, Counsel for the appellant contended that neither the Act 1 Wm. IV. c. 4, which validated acts done by Governors of Plantations after the expiration of their Commissions by demise of the Crown, nor the Act 1 Anne c. 2, which continues all civil and military offices, applied to a colonial Legislature. Lord Cranworth, however, seems from the brief report to have based the decision of the Privy Council upon the Succession Act, 6 Anne c. 41. sec. 8, which provides that no civil or military office within the kingdoms of Great Britain or Ireland "or any of Her Majesty's Plantations" should become void by reason of the demise of the Crown, but that the holder of any such office should continue in office for

six months unless sooner removed ; and it was held that the authority of the Governor and Legislative Council was not determined by the demise of the Crown.

The Constitutions of the Australian Colonies, as originally assented to by the Crown, provided that the Commissions of the judges of the Supreme Court should continue in force notwithstanding the demise of Her Majesty or of Her heirs and successors. They contained no special provisions relating to the effect of a demise of the Crown with reference to the duration of the Legislatures thereby created. The New South Wales Constitution Act, however, contained one section (33) which shows that in the view of the framers of the instrument the Parliament thereby created was not to be dissolved by demise of the Crown. That section, after prescribing the oath of allegiance to the Queen to be taken by Members of the Legislative Council and Legislative assembly before they could sit or vote, went on to declare :—

"And whensoever the demise of Her present Majesty or of any of Her Successors to the Crown of the said United Kingdom shall be notified by the Governor of the colony to the said Council and Assembly respectively, the members of the said Council and Assembly shall before they shall be permitted to sit and vote therein take and subscribe the like oath of allegiance to the successor for the time being to the said Crown."

Section 4 of the Constitution Act of Queensland is the same in form and substance.

The Constitution Acts of Victoria, South Australia, and Tasmania, contain the usual sections formulating the oath of allegiance to the Queen to be taken by members of Parliament, but making no provision that upon the demise of Her Majesty they should take a like oath of Allegiance to Her Successor. It is open to argument whether the framers of these Constitutions acquiesced in the principle that the Legislatures should be terminated by demise of the Crown, or whether they were of opinion that the form of the instruments and the mode of constituting the proposed Legislatures rendered them free from the operation of the common law rule.

In 1876, however, the Parliament of Victoria passed an Act to amend the Electoral Act, 1865, and section 11 of the amending Act provided that the Parliament in being at any future demise of the Crown should not be determined or dissolved by such demise, but should continue so long as it would have continued but for such demise, unless it should be sooner prorogued or dissolved by the Governor. That section is now to be found in the Victorian Constitution Act Amendment Act, 1890, sec. 4. It was based on the Imperial Act 30 and 31 Vic. c. 102, s. 51. Upon the consideration of the clause in the Committee of the Legislative Assembly the Attorney-General, Mr. G. B. (afterwards Mr. Justice) Kerferd, was questioned by several legal members of the House as to its constitutional necessity. Mr. J. J. (now Judge) Casey thought the clause was unnecessary. He was of opinion that the rule of Common Law, that where a power was brought into existence by another power the created power terminated with the expiration of the creating power, did not apply to a colonial Legislature, the writs for the election of whose members were issued in the name of the Governor and not in the name of the Queen. Mr. Kerferd said that it was the opinion of some learned members of the legal profession that the clause was necessary. There certainly was a doubt about the matter, and in his opinion the doubt ought to be removed. However, he promised to consider the view submitted by Mr. Casey, and if it were clear beyond all doubt that the clause was unnecessary he would ask the House to strike it out at a subsequent stage. No further reference was subsequently made to the clause, which became law. (Vic. Parl. Deb., 12th Sept. [1876], vol. 24, p. 715.) On the authority of Devine *v.* Holloway, *supra*, it is submitted that the argument presented by Mr. Casey was a sound one, and that consequently there was no constitutional necessity for the passage of section 11 of the Electoral Act of Victoria, 1865. The fact that writs for the election of senators for each State are issued by the Governor thereof, and that writs for the election of members of the House of Representatives are issued by the Governor-General in Council, coupled with the further provision that senators are chosen for a fixed term of six years' duration and that the House of Representatives "shall continue

for three years" subject to being sooner dissolved by the Governor-General, and further the forms of oath or affirmation in the schedule, by which members of the Federal Parliament swear or declare allegiance "to Her Majesty Queen Victoria Her Heirs and Successors according to law," should be sufficient to bar the operation of the common law rule; and it therefore may be safely assumed that a demise of the Crown will not cause a dissolution of the Federal Parliament.

§ 118. "Sooner Dissolved."

The House of Representatives may continue in existence for three years from the day of its first meeting, but it may be "sooner dissolved" by the Governor-General. Its normal term is therefore a triennial one, and is the same as that of the Legislative Assembly of New South Wales, the Legislative Assembly of Victoria, the Legislative Assembly of Queensland, the House of Assembly of South Australia, the House of Assembly of Tasmania, and the House of Representatives of New Zealand, which are elected for three years, but are liable to be sooner dissolved by the Crown. The Legislative Assembly of Western Australia is elected for four years, and the House of Commons of Canada for five years; both, however, being liable to be sooner dissolved by the Crown. The American House of Representatives is elected for two years, but is not liable to dissolution before the expiration of its term.

The right to dissolve the House of Representatives is reserved to the Crown. This is one of the few prerogatives which may be exercised by the Queen's Representative, according to his discretion as a constitutional ruler, and if necessary, a dissolution may be refused to responsible ministers for the time being. A refusal to grant a dissolution would no doubt be a ground for the resignation of the Ministry whose advice was disregarded. Nevertheless, such refusal could not be challenged as unconstitutional. During the year 1899, three precedents occurred in Australia, which show that in the exercise of this power of dissolution the Representative of the Crown is not a mere passive instrument in the hands of his Ministers. It is well known that when an adverse vote was, on 7th September, 1899, carried against Mr. G. H. Reid in the Legislative Assembly of New South Wales, he advised Lord Beauchamp to dissolve the House. That advice the Governor did not feel justified in accepting, and accordingly Mr. Reid resigned, and Mr. (now Sir William) Lyne formed a new administration. On 28th November following, the Kingston Ministry suffered a defeat in the House of Assembly of South Australia. Mr. Kingston applied to Lord Tennyson for a dissolution, which being refused, he resigned, and a new Ministry was formed by Mr. Solomon. And on 1st December of the same year, when a vote of want of confidence was carried against Sir George Turner in the Victorian Assembly, he applied to Lord Brassey for a dissolution, which was refused; and he then resigned, Mr. Allan McLean being sent for. These recent precedents show that the Representative of the Crown, in the exercise of its undoubted prerogative to grant or refuse a dissolution, can wield an important influence in the life of a Ministry, and in the duration and possible action of a Parliament.

The difference between a grant and a refusal of a dissolution is: (1) A grant of a dissolution is an Executive act, to which the Crown assents, and for which the Ministry tendering the advice and doing the act are responsible to Parliament and the country; (2) a refusal to grant a dissolution is not an Executive act; it is a negation of one, for which the Representative of the Crown is alone responsible, although it is sometimes stated that the incoming Ministry assumes the responsibility of the refusal by undertaking to carry on the Queen's Government for the time being.

The leading characteristics of this prerogative, and the general principles according to which the discretionary power of the Crown to dissolve or to decline to dissolve is exercised, may be gathered from the authorities. (See Note, "Dissolve," § 63, *supra*.)

Electoral divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State[119] for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division[120]. A division shall not be formed out of parts of different States[121].

In the absence of other provision, each State shall be one electorate.

UNITED STATES.—The times, places, and manner of holding elections for . . representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.—Const., Art. I., sec. 4, sub-sec. 1.

SWITZERLAND.—The elections for the National Council . . . are held in federal electoral districts, which in no case shall be formed out of parts of different Cantons.—Const., Art. 73.

CANADA.—Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into electoral districts as follows.—B.N.A. Act, 1867, sec. 40.

HISTORICAL NOTE.—Clause 31, Chap. I. of the Commonwealth Bill of 1891 was as follows:—

"The electoral divisions of the several States for the purpose of returning members of the House of Representatives shall be determined from time to time by the Parliaments of the several States."

At the Adelaide session, 1897, the clause was introduced and passed as follows:—

"Until the Parliament otherwise provides, the electoral divisions of the several States for the purpose of returning members of the House of Representatives, and the number of members to be chosen for each electoral division, shall be determined from time to time by the Parliaments of the several States. Until division each State shall be one electorate."

At the Sydney session, a suggestion by the House of Assembly of Tasmania, to omit "Until the Parliament otherwise provides," and a suggestion by both Houses of the Victorian Parliament, to omit "until division each State shall be one electorate," were negatived. (Conv. Deb., Syd. [1897], pp. 454-5.) At the Melbourne session, after the first report, the clause was verbally amended on Mr. Barton's motion, and the words "No electoral district shall be formed out of parts of different States" were added. These words were taken from the Swiss Constitution *(supra)*, the necessity for them being due to the amendment already made in sec. 24, that members of the House of Representatives should be chosen not by "the people of the several States," but by "the people of the Commonwealth." (Conv. Deb., Melb., p. 1840.) After the fourth report, the clause was verbally altered.

§ 119. "The Divisions in each State."

The electoral divisions for the House of Representatives, in each State, may, until the Federal Parliament interposes and deals with the subject, be determined by the State legislatures, subject to the one restriction that a division is not to be formed out of parts of different States. In America a similar power has been exercised by the State legislatures without check for many years, and electoral divisions have been, for party purposes, carved out in a manner which led to grave scandal and dissatisfaction. This reprehensible manipulation of constituencies developed the art known as "Gerrymandering," so named because Essex, a district of Massachusetts was, for political reasons, so curiously shaped as to suggest a resemblance to a salamander, and Elbridge

Gerry was the governor of the State who signed the Bill. (See Bryce, Am. Comm. 2nd ed. I. p. 121.) The grossly unjust apportionment of population of districts, made by partisan majorities in State Legislatures, eventually led to the intervention of the Courts, and certain State laws which were clearly in violation of the equality enjoined in their respective Constitutions were held invalid. (Foster, Comm. I. p. 399.) A law of a State, relating to electoral divisions, could not be held unconstitutional unless it was contrary either to Federal law or to the Constitution of the State in which it was challenged. *(Id.)*

"By the Apportionment Act of 25th February, 1882, Congress required, as the general rule, that the members from each State shall be 'elected by districts composed of contiguous territory, containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of representatives to which such State' 'may be entitled in Congress, no one district electing more than one representative.' To the States is left, then, only the construction of such districts. Congress must find the constitutional warrant for this measure either in the clause which provides that 'representatives shall be apportioned among the several States,' &c., or in the clause which provides that Congress may prescribe regulations as to the times, places and manner of holding elections for representatives." (Burgess, Political Sc. II. p. 48.)

"I think it cannot be reasonably doubted that the power to determine the manner of holding the Congressional elections includes the power to prescribe the *scrutin d'arrondissement* or district ticket as against the *scrutin de liste* or general ticket, or *vice versa*; but does it include the power to require the States to construct the districts of contiguous territory and of as nearly equal population as is practicable? It is perhaps too late to raise any doubts upon this point. Congress has certainly gone no further than a sound political science would justify, indeed, not so far as a sound political science would justify." (*Id.* p. 49.)

§ 120. "Members to be Chosen for Each Division."

The electorates in each State contemplated by this section are territorial divisions of the Commonwealth. Members of the House of Representatives are to be chosen in territorial divisions, within each State, but the members so chosen are members for their respective divisions, as parts of the Commonwealth; they are not members "for the State." The senators are "for the States;" the representatives are "for each division." The divisions, altogether, constitute the Commonwealth. Consequently the House of Representatives is the Chamber in which the people of the Commonwealth, voting in Federal constituencies, are represented. In settling the number and boundaries of such divisions the State Parliaments are, for the time being, exercising a delegated authority; they are acting merely as legislative agents of the Federal Parliament, which may, at any time, interpose and undertake the work. This ultimate control over electoral divisions is another illustration of the national principles on which the House of Representatives is founded.

§ 121. "Out of Parts of Different States."

The Swiss Constitution similarly provides that federal electoral districts "shall in no case be formed out of parts of different Cantons." (Art. 73.) In the American Constitution, under which representatives are chosen "by the people of the several States," no electoral division could cross a State boundary; but in this Constitution, under which (following the Swiss example) representatives are to be chosen by "the people of the Commonwealth," it was desirable that this should be explicitly stated. At elections of the House of Representatives, therefore, State boundaries are merely recognized as boundaries of groups of electoral divisions—not as separating one people from another. This is a further index of the national character of the Constitution, and of the existence of a national citizenship. (See Notes, § 27, "Federal," *supra.*)

Qualification of electors.

30. Until the Parliament otherwise provides, the qualification of electors[122] of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once[123].

United States.— . . . the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.—Const. Art. I. sec. ii. subs. 1.

Canada.—Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to . . . the voters at elections of such members, . . . shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.—B.N.A. Act, 1867, sec. 41.

Switzerland.—Every Swiss who has completed twenty years of age, and who in addition is not excluded from the rights of a voter by the legislation of the Canton in which he is domiciled, has the right to vote in elections and popular votes. Nevertheless the Confederation may by law establish uniform regulations for the exercise of such right.—Const., Art. 74.

Historical Note.—In the Commonwealth Bill of 1891 the clause was as follows:—

"The qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification for electors of the more numerous House of the Parliament of the State."

In Committee, Mr. Deakin suggested that the Federal Parliament should have some power to fix a uniform qualification; but Sir Samuel Griffith urged the inconvenience of duplicating the electoral machinery, and thought that the States could be trusted here, as they were in America, to fix a democratic franchise. Dr. Cockburn moved to add:—

"But no property qualification shall be necessary for electors of the said House, and each elector shall have a vote for only one electoral district."

This was criticized, partly as an interference with the States, which might endanger Federation in some colonies, and partly as involving difficulties of administration. After discussion, Dr. Cockburn withdrew his amendment to make room for a proposal by Mr. Barton that the Federal Parliament should have power to prescribe a uniform federal franchise. Mr. Baker feared that this would be an impediment to Federation; whilst Mr. Wrixon opposed it as being national rather than federal. It was urged in reply that the federal franchise was a national matter; but the amendment was negatived without division. Dr. Cockburn's amendment was then negatived by 28 votes to 9. (Conv. Deb., Syd. [1891], pp. 613-37.)

At the Adelaide session, 1897, the clause was introduced as it now stands, except that the concluding words were: "But in the choosing of such members each elector shall have only one vote." The only debate was upon Mr. Holder's proposals for women's suffrage (see Historical Note, sec. 41). (Conv. Deb., Adel., pp. 715-32, 1193-7.) Similar amendments were made to those made in sec. 8 (Qualifications of electors of senators). (*Id.* pp. 1191, 1210.) At the Sydney session, a suggestion by the Legislative Assembly of New South Wales, to add "Provided that the Parliament may not enact that any elector shall have more than one vote," was negatived as being unnecessary. (Conv. Deb., Syd., 1897, pp. 455-7.)

§ 122. "The Qualification of Electors."

On the question of settling the franchise for the Lower House, two theories were advanced in the Convention, and each received support from federalists of different types and sympathies. One theory was that the franchise for both Houses should be treated as a State right, and that its determination should be constitutionally secured

to the States as an unassailable prerogative. On the other hand, the fixing of the franchise for the national Chamber was, by many members, considered a matter in which the Commonwealth was pre-eminently interested, and they contended that it should be placed within the control of the Federal Parliament. In support of this view it was argued that, in voting for members of the House of Representatives, electors exercise a public function relating to the Commonwealth, and not one relating to the State in which they reside; that the ultimate safety and destiny of the Commonwealth depend upon the forces which find representation in the national Chamber; that the Parliament, composed of members representing both the State element and the National element in the composition of the Commonwealth, should have the right, in the last resort, to decide who were sufficiently qualified to be entitled to the privilege of participating in the exercise of political power—the right to prevent the enfranchisement of those not mentally and ethnically qualified, and to enforce the enfranchisement of those nationalized by law and experience and able and willing to discharge the duties pertaining to the suffrage.

In the Constitution of the United States of America, as originally framed, the settlement of the franchise for the House of Representatives was made a State right. Each State was left free to fix for itself, within its own limits, its conditions of suffrage. (Bancroft, vol. ii. p. 128.) Each State had the exclusive power to regulate the right of suffrage and to determine who should vote at federal elections in the State. (Huber *v.* Reily, 53 Penn. St. 115; Morrison *v.* Springer, 15 Iowa, 345.) The States, it was said, were the best judges of the circumstances and temper of their own people. Accordingly, the rule was adopted, in language partly reproduced in the above section of this Constitution, that "The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States of the most numerous branch of their own legislatures." Owing, however, to the unjust and impolitic manner in which some of the States discriminated in franchise legislation, the Constitution has been, on several occasions, amended in order to remove glaring abuses and to redress monstrous wrongs. First came the Fourteenth Amendment, which declared that—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . . When the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of the State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment having been found ineffectual to secure the political enfranchisement of the negroes, the Fifteenth Amendment was passed, providing that the right of citizens of the United States to vote should not be denied or abridged by the United States or any State on account of race, colour, or previous condition of servitude, and that the Congress should have power to enforce this article by appropriate legislation. "The Fifteenth Amendment," says Dr. Burgess, "is negative language and does not directly confer upon any one the privilege of suffrage. It simply guards the individual against any discriminations in reference to the suffrage which may be attempted by the States, or by the government of the United States, on account of race, colour, or previous condition of servitude. This restriction, however, may indirectly confer suffrage: if, for example, a State law confers suffrage upon white persons having such and such qualifications, this provision of the fifteenth amendment would then operate to confer it upon other persons, not white, having the same qualifications." (United States *v.* Reese, 92 U.S. 214; Neal *v.* Delaware, 103 U.S. 370; Political Sc. II. p. 42.)

These amendments of the American Constitution, recognizing a national citizenship and forbidding discriminations in franchise legislation by the States, show the tendency

of the American Constitution to regard the franchise for the House of Representatives as a national question, in which the nation itself is concerned, and which the nation may at any time, by a further amendment, withdraw absolutely from the control of the States.

The Constitution of the Commonwealth, following the American precedent, starts with the electoral franchise in each State, prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State. But the Federal Parliament may at any time by appropriate legislation, and without an amendment of the Constitution, deal either partly or wholly with the question, and impose a franchise for Federal elections. In the exercise of this power, however, there is one restriction provided by clause 41 ; that no adult person who has or acquires a right to vote at elections for the Legislative Assembly of a State, shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Federal Parliament. In other words, the Federal Parliament can pass an enlarged and liberalized franchise for the whole Commonwealth ; but it cannot disqualify any adult person already entitled to a vote by the law of the State in which he or she resides. (See Note, § 139, *infra.*)

The qualifications of electors of the more numerous House of the Parliaments of the several States, and of the colony of New Zealand, may be here summarized.

New South Wales.—Every man of the age of 21 years, being a natural-born or naturalized British subject, unless disqualified, is entitled to be enrolled for the division of the Electoral District in which he resides, and to vote therein, provided that he holds an elector's right ; to obtain which he must have been resident in the colony for one year (or, if naturalized, for one year after naturalization) and resident in the District for three months. (Parliamentary Electorates and Elections Act of 1893 [56 Vic. No. 38].) Number of electors enrolled, July, 1898, 324,338.

Victoria.—Every man of the age of 21 years, being a natural-born British subject (which is deemed to include naturalized subjects resident for 12 months in the colony), and not disqualified, is entitled to vote in any division of an Electoral District for which he holds an elector's right, or in which he is enrolled upon a "roll of rate-paying electors." The qualification for an elector's right is either *(a) residential*—requiring residence for twelve months in the colony and for one month in the division of the District ; or *(b) non-residential*—requiring possession of freehold estate within the district to the value of £50 or the annual value of £5. (Constitution Act Amendment Act of 1890, secs. 128-135.) By the Constitution Act Amendment Act, 1899 (known as the Plural Voting Abolition Act), it is provided that, after the expiration of the present Parliament, no person shall vote in more than one Electoral District at any election, or more than once at the same election. Number of electors enrolled for 1898, 252,560.

Queensland.—Every man of the age of 21 years, being a natural-born or naturalized British subject or a denizen of Queensland, unless disqualified, is entitled to be entered on the roll for any Electoral District if qualified within the District in any of the following ways :—(1) Residence ; (2) Freehold estate of the value of £100 ; (3) Household occupation ; (4) Leasehold estate of £10 annual value, held for at least 18 months, or having 18 months to run ; (5) Pastoral license of £10 annual value. The qualifying period in the case of the residential, freehold, household, or pastoral qualification is six months ; or, if the claimant has previously been an elector, three months. There is no limit to the number of Districts in which an elector may be enrolled ; but no elector can claim a plural voting in any District. Aboriginal natives of Australia, India, China, or the South Sea Islands are not entitled to be enrolled, except in respect of a freehold qualification. (Elections Act of 1885 [49 Vic. No. 13] ; Elections Act of 1897 [61 Vic. No. 26].) Number of electors in 1897, 81,892.

South Australia.—All British subjects of the age of 21 years (men and women), inhabitants of South Australia, who have been registered upon any Assembly roll for six months, may vote for members of the Assembly. In the Northern Territory, immi-

grants under the Indian Immigration Act, 1882, and all persons except natural-born British subjects and Europeans or Americans naturalized as British subjects, are disqualified. (Electoral Code, 1896.) Number of votes on the roll for the year 1897, 134,886.

Western Australia.—Every person of the age of 21 years, being a natural-born or naturalized British subject, is entitled to be registered as a voter, if he or she has resided in the colony for six months, and is entitled to vote after being registered for six months; and is also entitled to a property vote in every District in which he or she has a freehold qualification of £50 capital value, a leasehold or household qualification of £10 a year, or a Crown lease or license of £5 a year. (Constitution Acts Amendment Act, 1899.) Number of electors on the roll for the year 1897 (before the extension of the franchise to women), 15,029.

Tasmania.—Every man of the age of 21 years, being a natural-born or naturalized British subject, or having letters of denization, or a certificate of naturalization, who has resided in Tasmania for 12 months, is entitled to vote in any District if (1) his name appears in the assessment roll as owner or occupier of any property within the District; or (2) if he resides in the District, and is in receipt of income, salary, or wages of £40 a year. Board and residence, clothing, and services, are deemed income; house allowance and rations are included in the computation of wages. There is no limit to the number of districts in which an elector may have a property qualification. (Constitution Act Amendment Act, 1896, No. 2 [60 Vic. No. 54].) Number of electors on the roll for the year 1898, 31,613.

New Zealand.—Every inhabitant of New Zealand (male or female) of the age of 21 years, resident for one year in the colony, and for 3 months in an Electoral District, is entitled to vote in the District. There is no plural voting. Electoral Act, 1893 [No. 18]; Electoral Act Amendment Act, 1896 [No. 49].) Number of electors on the roll for 1896, male, 196,925; female, 142,305; total, 339,230.

General Summary.—These different franchises may be shortly described as follows: —New South Wales and Victoria, one man one vote. Queensland, manhood suffrage, with plural votes for property. South Australia and New Zealand, one adult one vote. Western Australia, adult suffrage, with plural votes for property. Tasmania, a small property or income qualification, with plural votes for property.

Under this clause electors of a State who are qualified under the laws thereof to vote for representatives in the State legislature, have the right to vote for members of the Federal legislature, which has power, by law, to protect such persons in that right. (*Ex parte* Siebold, 100 U.S. 371; *ex parte* Clarke, 100 U.S. 399; United States *v.* Gale, 109 U.S. 65. Cited in Baker, Annot. Const. p. 4.)

The qualifications of electors of the more numerous branch of the State legislature are not necessarily uniform in the various American States. In some cases aliens, who have declared their intention to become citizens, may vote for representatives to the State legislature, and so are qualified to vote for representatives in the Federal legislature. "Electors" are not necessarily citizens. The State may confer upon aliens the right to vote within the State, but it cannot make them citizens of the United States. (Dred Scott *v.* Sandford, 19 How. 404-414, *id.* p. 4.)

§ 123. "Each Elector Shall Vote Only Once."

This is a constitutional assertion of the principle of "one elector one vote" at federal elections; it does not interfere with State elections. It will be observed that no penalty is specified for a breach of this inhibition. As noted under section 8 the framers of the section were of opinion that, as every breach of a public statute is a criminal offence, punishable as a misdemeanour at common law, where the statute makes no explicit provision as to the mode of punishment, it was not necessary to encumber the Constitution with a penalty. (R. *v.* Walker [1875] L.R. 10 Q.B. 355; R. *v.* Hall [1891] 1 Q.B. p. 767. See Note, § 76, *supra.*)

Application of State laws.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections[124] for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

UNITED STATES.—The times, places, and manner of holding elections for . . representatives, shall be prescribed in each State by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.—Const. Art. I, sec. iv., subsec. 1.

CANADA.—Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to . . . the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections . . . . and the execution of new writs, in case of seats vacated otherwise than by dissolution,—shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.—B.N.A. Act, 1867, sec 41.

HISTORICAL NOTE.—Clause 43, Chap. I. of the Commonwealth Bill of 1891, was as follows:—

"Until the Parliament of the Commonwealth otherwise provides, the laws in force in the several States, for the time being, relating to the following matters, namely: The manner of conducting elections for the more numerous House of the Parliament, the proceedings at such elections, the oaths to be taken by voters, the Returning Officers, their powers and duties, the periods during which elections may be continued, the execution of new writs in case of places vacated otherwise than by dissolution, and offences against the laws regulating such elections, shall respectively apply to elections in the several States of members to serve in the House of Representatives."

In Committee, Mr. Barton suggested omitting this list of matters, and substituting "elections for the more numerous House of the Parliament," but Sir Samuel Griffith thought that would be too wide, and no amendment was moved. (Conv. Deb., Syd. [1891], pp. 652-3.)

At the Adelaide session, 1897, the clause was introduced and passed in substantially the same form. At the Melbourne session, after the first report, the clause was omitted, and a new clause (44A) was inserted, practically in the words of this section, but dealing with elections for both Houses. (Conv. Deb., Melb., pp. 1840, 1855. See Historical Note, sec. 10). After the fourth report, the clause was restored in its present form.

§ 124. "Laws Relating to Elections."

The application of State laws in Federal elections has been already discussed under section 10 (see Note, § 80, *supra*.)

The implied power of the federal legislature is as much a part of the constitution as any of the expressed powers. Under this implied power it may provide by law for the protection of voters at elections of representatives, and may affix punishment for hindering or intimidating or maltreating voters intending to vote at such election. (*Ex parte* Yarbrough, 110 U.S. 651. Cited in Baker, Annot. Const. p. 9.)

At an election of burgesses for Parliament, the plaintiff, being entitled to vote, tendered his vote for two candidates; but such vote was refused, and notwithstanding those candidates for whom the plaintiff tendered his vote were elected, yet he brought an action against the constables of the Borough for refusing to admit his vote. It was decided that the action was maintainable, for it was an injury, though without any special damage. (Ashby *v.* White; Smith's Leading Common Law Cases, 9th ed. vol. i. p. 268.)

The provision of the laws relating to election of federal representatives which authorizes the deputy marshals to keep the peace at such election is constitutional. (*Habeas Corpus* Cases, 100 U.S. 371, 399. Cited in Baker, Annot. Const. p. 10.)

The federal legislature has power to fix penalties for violation of election laws, and for interference with electoral officers. In making electoral regulations, the federal legislature need not assume exclusive control. It has a supervisory power over the sub-

ject, and may either make entirely new regulations, or may supplement or modify the regulations made by the States. (*Habeas Corpus* Cases, 100 U.S. 371, 399, 404, 422. *Id.* p. 10.)

Rights and immunities created by or dependent upon the constitution can be protected by the federal legislature ; with which the determination of the form and manner of such protection lies. (United States *v.* Reese, 92 U.S. 214. *Id.* p. 10.)

Writs for general election.

32. The Governor-General in Council may cause writs to be issued[125] for general elections of members[126] of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

CANADA.—For the first election of members to serve in the House of Commons, the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit.—B.N.A. Act, 1867, sec. 42.

HISTORICAL NOTE.—Clause 42, Chap. I., of the Commonwealth Bill of 1891 was as follows :—

"For the purpose of holding general elections of members to serve in the House of Representatives the Governor-General may cause writs to be issued by such persons, in such form, and addressed to such Returning Officers, as he thinks fit."

At the Adelaide session, the clause was passed in the same form, with the addition of the words : "The writs shall be issued within ten days from the expiry of a Parliament, or from the proclamation of a dissolution." At the Sydney session, a verbal amendment suggested by the Legislature of Tasmania was negatived. (Conv. Deb., Syd. [1897], p. 463.) At the Melbourne session, on Dr. Cockburn's motion, the words "in Council" were added after "Governor-General." (Conv. Deb., Melb., pp. 1929-31.) Verbal amendments were made before the first report and after the fourth report.

§ 125. "The Governor-General in Council may Cause Writs to be Issued."

The question whether this section ought to have been framed so as to read that the writs should be issued by "the Governor-General" or by "the Governor-General in Council" was the subject of debate in the Convention. In the Adelaide Draft of the Constitution, the clause (then 41) provided that "the Governor-General" might cause writs to be issued. At the Melbourne Session Dr. Cockburn took objection to this form, and proposed to insert the words "in Council." He submitted that without the addition of these words it would appear that the issue of the writs was a prerogative act, which the Governor-General could direct to be done without the advice of the Executive Council. In reply to this it was suggested that at the time of the holding of the first Federal elections there might not be an Executive Council in existence, and the issue of the writs would, in that event, necessarily be a personal act of the Governor-General. This view, however, was not generally concurred in, as one of the first executive acts of the Queen's Representative after the establishment of the Commonwealth would be to send for some leading statesman to form a Federal Ministry, which would of course constitute the first Executive Council. It was pointed out that, even if the proposed words were not inserted, the Governor-General would not act in such a matter without the advice of his ministers. Eventually the words were added. (See Note, § 60, *supra*.)

§ 126. "General Elections of Members."

The writs for general elections of members will be issued by the Governor-General in Council, through one of the Ministers of State. They will be directed to Returning Officers appointed by the Governor-General in Council, and will contain all the instructions and authority usually embodied in documents of this description, prescribing among other things the date for the receipt of nominations of candidates, the date for the holding of the elections, and the date for the return of the writs.

"At the beginning of a Parliament, the Return Book, received from the clerk of the Crown, is sufficient evidence of the return of a member, and the oaths are at once administered. If a member be elected after a general election, the clerk of the Crown sends to the Clerk of the house a certificate of the return received in the Crown Office; and the member must obtain a certificate from the Public Bill Office of the receipt of that certificate for production at the table, before the Clerk of the house will administer the oath." (May, 10th ed. p. 165.)

Writs for vacancies.

33. Whenever a vacancy happens[127] in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

Historical Note.—The clause in the Commonwealth Bill of 1891 was substantially to the same effect, except that the Speaker, unless the House was not sitting, was only empowered to issue the writ "upon a resolution of the House." In Committee, Dr. Cockburn moved the omission of these words, but this was negatived. (Conv. Deb., Syd. [1891], pp. 641-3.)

At the Adelaide session, 1897, the clause was introduced in the same form. In Committee, Sir George Turner moved the omission of the words "upon a resolution of the House," and this time the amendment was agreed to. (Conv. Deb., Adel., pp. 734-5.) At a later stage the clause was consequentially amended. (Conv. Deb., Adel, pp. 1197-8.) At the Melbourne session, amendments were made before the first report and after the fourth report.

§ 127. "Whenever a Vacancy Happens."

Casual vacancies may happen, during the currency of each House of Representatives, by the death or resignation of a member, by the expulsion of a member for some offence not provided for by the Constitution, or by a member becoming subject to any of the disabilities mentioned in sections 44 and 45. When such vacancies arise the Speaker is authorized to issue writs for the election of new members. Such writs may be issued during a recess without the immediate authority of the House, in order that a representative may be chosen without loss of time by the division which is deprived of its member. (May, 10th ed. p. 599.)

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member[128] of the House of Representatives shall be as follows:—

(i.) He[129] must be of the full age of twenty-one years[130], and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident[131] within the limits of the Commonwealth as existing at the time when he is chosen:

(ii.) He must be a subject of the Queen[132], either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

United States.—No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.—Const., Art. 1., sec. 2, sub-sec. 2.

Canada.—Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to . . . the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly in the several Provinces . . . . shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.—B.N.A. Act, 1867, sec. 41.

Switzerland.—Every lay Swiss citizen who has the right to vote is eligible for membership in the National Council.—Const., Art. 75.

Historical Note.—In the clause as introduced at the Sydney Convention of 1891, the qualification was permanently fixed, the words "until the Parliament otherwise provides" being absent. The qualification was substantially the same, except that no period of residence or naturalization was required. In Committee, on Mr. Deakin's motion, a requirement of three years' residence within the Commonwealth was added; and on Mr. Cuthbert's motion, the same period of naturalization was prescribed. (Conv. Deb., Syd. [1891], pp. 639-40.)

At the Adelaide session, 1897, the clause was introduced and passed in substantially its present form. In Committee, Mr. Walker proposed to substitute "twenty-five years" for "twenty-one years," but this was negatived. (Conv. Deb., Adel., p. 733.) At the Sydney session, Mr. Lewis raised the question whether under this clause women would be eligible as members of the Parliament. A suggestion of the Legislature of Tasmania, requiring a member to be for three years a resident of the State for which he is chosen, was negatived. (Conv. Deb., Syd. [1897], pp. 457-8.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 128. "Qualifications of a Member."

An analysis of this section is given in the notes to sec. 16, which provides that the qualifications of a senator shall be the same as those of a member of the House of Representatives. (See Note, § 95.)

"The qualifications or positive requirements for holding a seat in the House of Commons are but three, viz.: the male sex, the full age of twenty-one years, and the quality of citizen or subject, either by birth or naturalization. The first of these requirements rests upon custom, which, therefore, either house might change through the exercise of its residuary power to judge of the qualifications of its members. The second and third, however, rest upon statutes of Parliament and cannot be modified by either house alone." (Burgess Political Sc. II. p. 69.)

The constitution having fixed the qualification of members, no additional qualification can be added by the States. (Barney *v.* McCreery, Cl. and H. 176; Turney *v.* Marshall, 1 Cong. El. Cas. 167; Trumbull's Case, *id.* 618.) The Constitution of Illinois (1848) provided that: "The judges of the Supreme and Circuit Courts shall not be eligible to any other office of public trust or profit in this State or the United States during the term for which they shall be elected, nor for one year thereafter." The House of Representatives of the United States held that this provision was void, in so far as it applied to persons elected members of the said house. (Turney *v.* Marshall, *supra*; Trumbull's Case, *supra*. Cited in Baker, Annot. Const. p. 5.)

The returns from the state authorities, showing or declaring that a certain person has been elected representative or senator in congress, are *prima facie* evidence of qualification only. (Spaulding *v.* Mead, Cl. and Hall, 157; Reed *v.* Cosden, *id.* 353.) And the refusal of the executive of the State to grant a certificate does not prejudice the right of one entitled to a seat." (Richards' Case, Cl. and Hall, 95. *Id.* p. 10.)

In determining qualification each house has the right to examine witnesses and require the production of papers, and may punish witnesses for contumacy. (Kilbourn *v.* Thompson, 103 U.S. 168. *Id.* p. 10.)

§ 129. "He."

The personal pronoun "he" here used in introducing the qualification of members, being in the masculine gender, naturally suggests the query whether women are disqualified by the Constitution. This cannot be answered without considering some of the other qualifications required. Thus, a member must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become an elector. Are persons having the right to vote and otherwise constitutionally qualified, entitled to be nominated for election irrespective of sex? If the pronoun "he" had not been made the subject of an express interpretation by an Imperial Act, there would be little doubt that males only would be qualified. By the Interpretation Act (1889), 52 and 53 Vic. c. 63, re-enacting 13 and 14 Vic. c. 21, commonly known as Lord Brougham's Act, it is declared (sec. 1) that "In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears, words importing the masculine gender shall include females." The Constitution of the Commonwealth being embodied in an Imperial Act may be fairly considered as capable of interpretation by the anterior Imperial Act. (See Note, § 330, *infra*.) If this be the true construction then "he" includes "she" unless the contrary intention appears.

The use of the Interpretation Act in the construction of an electoral law was considered in England in the case of Beresford Hope *v.* Lady Sandhurst (1889), 23 Q.B.D. 79. In this case the question was whether a woman was capable of being elected a member of the London County Council. It depended on the meaning of several Acts of Parliament connected by references to them in the Local Government Act of 1888. By sec. 2 of that Act it was provided, that a County Council should be constituted in like manner to the Council of a Borough divided into wards. Reference had, consequently, to be made to the Municipal Corporations Acts in order to ascertain who were qualified to vote for and to become members of the County Council. By the Municipal Corporations Act (1835), 5 and 6 Wm. IV. c. 76, s. 9, the municipal franchise was confined to "male persons of full age." In 1869 that section was repealed by the Act 32 and 33 Vic. c. 55, sec 1, which re-enacted it with the word "male" omitted. Sec. 9 of that Act declared that wherever therein "words occur which import the masculine gender the same shall be held to include females for all purposes connected with and having reference to the right to vote on the election of councillors, auditors, and assessors." The qualifications

of burgesses and councillors were further dealt with in the Consolidating Municipal Corporation Act, 1892; (45 and 46 Vic. c. 50), sec. 11, sub-sec. 2, which enacted that "a person shall not be qualified to be elected or to be a councillor unless he is enrolled and entitled to be a burgess;" whilst sec. 63 enacted that "for all purposes connected with and having reference to the right to vote at Municipal elections words in this Act importing the masculine gender include women." In this state of the law Lady Sandhurst was elected a member of the County Council. An application was made to the High Court to remove her from the office. On her behalf it was argued that the true effect of the Act of 1892 was to give a right to women to sit in the Municipal Councils, and therefore in the County Council: that as there was nothing to restrain the generality of the words, the provisions of Lord Brougham's Act should be applied, and as a woman was qualified to vote she was qualified to be elected.

The majority of the Court of Appeal (Coleridge, C.J., Cotton, Lindley, Fry, and Lopes, L.JJ.) were of opinion that, if the argument stood there, it could not be denied that there was a very strong case in support of Lady Sandhurst's claim; that there was much to be said in favour of applying the language of Lord Brougham's Act, and holding that as a woman was qualified to elect, although the masculine gender was used, she would be qualified also to be elected. Unfortunately for that argument, which by itself would be very strong, there was the 63rd section which appeared to exclude the operation of Lord Brougham's Act, by limiting the right of women to the right to vote and thus excluding the right to be elected. Lady Sandhurst was accordingly held to be unqualified. Lord Esher, M.R., entertained a stronger view than his learned colleagues, and said, that, but for sec. 9 of the Act of 1869, succeeded by sec. 63 in the Act of 1882, he would have come to the conclusion that women were not intended to be either electors or councillors, and that those sections clearly limited this qualification of women to that of electors.

In the Constitution of the Commonwealth there is no such section as that held to be fatal to Lady Sandhurst's claim. Consequently, it is quite possible that the Imperial Interpretation Act may be held to apply to the interpretation of the pronoun "he." If that be so, a woman qualified as an elector in South Australia, or in Western Australia, would be qualified to be elected a member of the Federal Parliament, not only in her own State, but in any other State. The question of qualification, whenever legally raised, will have to be determined by the Senate or by the House of Representatives respectively, as the case may arise in connection with the elections of members of those Houses (sec 47).

§ 130. "Of the Full Age of Twenty-one Years."

The Constitution of the United States of America, *supra*, provides that no person shall be a representative who is under the age of twenty-five years. The Canadian Constitution, *supra*, accepts, as the qualifying age of members elected in the several Provinces, the age fixed by the laws of the Provinces respectively; power being reserved to the Dominion Parliament to enact a uniform qualification.

"By standing order No. 12, the Lords prescribe that no lord under the age of twenty-one years shall sit in their house. By the 7 and 8 Will. III. c. 25, s. 8, a minor was disqualified to be elected to the House of Commons. Before the passing of that Act, several members were notoriously under age, yet their sitting was not objected to. Sir Edward Coke said that they sat 'by connivance; but if questioned would be put out'; yet on the 16th December, 1690, on the hearing of a controverted election, Mr. Trenchard, though admitted by his counsel to be a minor, was declared, upon a division, to be duly elected. And even after the passing of the Act of Will. III., some minors sat 'by connivance.' Charles James Fox was returned for Midhurst when he was nineteen years and four months old, and sat and spoke before he was of age; and Lord John Russell was returned for Tavistock a month before he came of age." (May, 10th ed. p. 28.

§ 131. "A Resident."

A resident is defined as one who dwells at a place which is his home or fixed abode for some time. An inhabitant is one who dwells permanently in a place, as distinguished from a transient resident or visitor. The term of residence within the limits of the Commonwealth, necessary to qualify a person to be a member of the Federal Parliament, is fixed by the Constitution at three years. It has been held that residence is not broken by a temporary absence if there is an *animus revertendi*. (Holborn Union *v.* Chertsey Union [1884] 54 L.J. M.C. 53.)

The Constitution of the United States of America, *supra*, provides that no person shall be a representative who is not, when elected, "an inhabitant of the State" in which he is chosen. The Constitution of the Commonwealth gives a wider qualification, by making a person who has resided for three years within the limits of the Commonwealth qualified to be a member. The requirement of a three years' residence within the limits of the Commonwealth is insisted on in order to secure the services of members substantially identified with the Commonwealth, but not necessarily identified for three years with any particular State, as "an inhabitant of that State."

The word "resident" in this Constitution is not synonymous with "inhabitant." An inhabitant of a State within the meaning of the American Constitution is one who in good faith is a member of the State and subject to its jurisdiction and to its laws, and entitled to all the privileges and advantages conferred thereby. (Electors *v.* Bailey, Cl. and H. 411) Mr. McCrary, referring to this distinction, says, "it would seem that the framers of the constitution were impressed with a deep sense of the importance of an actual *bona fide* residence of the representative among the constituency—a residence in the sense of actual living among them and co-mingling with them." (McCrary on Elections, § 289; Baker, Annot. Const. 5.)

The Constitution of the Commonwealth does not insist upon such a permanent residence in and identification with one State as a qualification of membership of the national Chamber. It recognizes citizenship, and residence within the Commonwealth for a period of three years, as a sufficient qualification, and one calculated to promote the view that a member of the national House is not a member for a State, or for the people of a State, but for a division which includes a quota of the people of the Commonwealth

"The choice of members of Congress is locally limited by law and by custom. Under the Constitution every representative and every senator must when elected be an inhabitant of the State whence he is elected. Moreover, State law has in many, and custom practically in all, States, established that a representative must be resident in the congressional district which elects him. The only exceptions to this practice occur in large cities where occasionally a man is chosen who lives in a different district of the city from that which returns him; but such exceptions are extremely rare. This restriction surprises a European, who thinks it must be found highly inconvenient both to candidates, as restricting their field of choice in looking for a constituency, and to constituencies, as excluding persons, however eminent, who do not reside in their midst. To Americans, however, it seems so obviously reasonable that I found very few persons, even in the best educated classes, who would admit its policy to be disputable." (Bryce, Amer. Comm. I. p. 186.)

"It is remarkable that the original English practice required the member to be a resident of the county or borough which returned him to Parliament. This is said to be a requirement at common law (witness the words '*de comitatu tuo*' in the writ for the election addressed to the sheriff); and was expressly enacted by the statute 1 Henry V. cap. 1. But already in the time of Elizabeth the requirement was not enforced; and in 1681 Lord Chief Justice Pemberton ruled that 'little regard was to be had to that ancient statute 1 Henry V. forasmuch as common practice hath been ever since to the contrary.' The statute was repealed by 14 Geo. III., cap. 50. (See Anson, Law and Custom of the Constitution, vol. i. p. 83; Stubbs, Constit. Hist. vol. iii. p. 424) Dr. Stubbs observes that the object of requiring residence in early times was to secure 'that the House of Commons should be a really representative body.' Dr. Hearn (Government of England) suggests that the requirement had to be dropped because it was hard to find the country gentlemen (or indeed burgesses) possessing the legal knowledge and statesmanship which the constitutional struggles of the sixteenth and seventeenth centuries demanded." (*Id.* p. 188.)

"The English habit of allowing a man to stand for a place with which he is personally unconnected would doubtless be favoured by the fact that many ministers are necessarily members of the House of Commons. The inconvenience of excluding a man from the service of the nation because he could not secure his return in the place of his residence would be unendurable. No such reason exists in America, because ministers cannot be members of Congress. In France, Germany, and Italy the practice seems to resemble that of England, *i.e.*, many members sit for places where they do not reside, though of course a candidate residing in the place he stands for has a certain advantage." (*Id.* p. 188.)

§ 132. "Subject of the Queen."

Natural-born Subjects.—At common law everybody, whose birth happens within the allegiance of the Crown, is a natural-born subject. "The character of a natural-born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents, the being born within the allegiance of the king constitutes a natural-born subject." (Per Kenyon, C.J., in Doe d. Durore *v.* Jones [1791], 4 T.R. p. 308; 2 R.R. 390.) This is still a ruling principle of our law. Children born in an English ship are born within the allegiance, and an ambassador's house is also reputed to be part of his sovereign's realm, so as to confer upon the children of the ambassador born therein the character of natural-born subjects. The status of the parents is of no account, provided only the offspring be born within the realm. "A child born of foreign parents, even during an accidental stay of a few days, is fully, and until the age of twenty-one years irretrievably, a British subject." (Hall, Foreign Jurisdiction, p. 20.) The character of a natural-born subject is not given to persons born in a place which, though rightfully part of the dominions of the British Crown, happens to be at the time of the birth in the military possession of an enemy. The learning, old and new, of the subject will be found very fully in Calvin's Case (1608), 7 Coke Reps. 1, 18A; Collingwood *v.* Pace (1656), 1 Vent. 413; De Geer *v.* Stone (1882), 22 Ch. D. 243; *Re* Stepney Election Petition, Isaacson *v.* Durant (1886), 17 Q.B.D. 54; Encyclopedia of the Laws of England, vol. ix. p. 57; Westlake, Private International Law, Chap. XV.

By statute, children born out of the British Dominions, whose fathers or whose paternal grandfathers were natural-born subjects, are, except in certain cases, entitled to the rights of natural-born subjects. (See Imperial Acts, 4 Geo. II. c. 21, ss. 1, 2; 13 Geo. III. c. 21; Notes, § 193, "Aliens," *infra.*)

Naturalized Subjects.—Naturalization is the procedure by which an alien or foreigner is made a subject or citizen of any State. It is a legal adoption by one State of a person who is the subject or citizen of another State, admitting him to take part in its national polity, and conferring on him the rights and privileges of a national-born subject or citizen. (See Note, § 194, "Naturalization," *infra.*)

"An alien is disqualified to be a member of either House of Parliament. The Act 12 and 13 Will. III. c. 2, declared that 'no persons born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents), shall be capable to be of the privy council, or a member of either House of Parliament.' The 1 Geo. I. stat. 2, c. 4, in order to enforce the provisions of the Act of William, required a special clause of disqualification to be inserted in every Naturalization Act; but as no clause of this nature could bind future Parliaments, occasional exceptions were permitted, as in the cases of Prince Leopold in 1816, and Prince Albert in 1840; and this provision of the 1st George I. was repealed by the 7 and 8 Vic. c. 66, s. 2. Later Naturalization Acts have since been passed, without such a disqualifying clause. And by the 33 and 34 Vic. c. 14, an alien to whom a certificate of naturalization is granted by the Secretary of State, becomes entitled to all political and other rights, powers, and privileges, and is subject to all the obligations of a British subject." (May's Parl. Prac. 10th ed. p. 27-8.)

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker[133] of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

CANADA.—The House of Commons, on its first assembling after a general election, shall proceed with all practicable speed to elect one of its members to be Speaker.—B.N.A Act, 1867, sec. 44.

In case of a vacancy happening in the office of Speaker by death, resignation, or otherwise, the House of Commons shall, with all practicable speed, proceed to elect another of its members to be Speaker.—*Id.* sec. 45.

The Speaker shall preside at all meetings of the House of Commons —*Id.* sec. 46.

HISTORICAL NOTE.—Similar provisions are in the Constitutions of all the Australian colonies. In the Commonwealth Bill of 1891, the clause was substantially to the same effect, with the addition of a provision that "the Speaker shall preside at all meetings of the House of Representatives; and the choice of a Speaker shall be made known to the Governor-General by a deputation of the House." At the Adelaide session, 1897, the clause was adopted in the same form; and at the Melbourne session drafting amendments were made before the first report and after the fourth report.

§ 133. "The Speaker."

"The note of the Speaker of the British House of Commons is his impartiality. He has indeed been chosen by a party, because a majority means in England a party. But on his way from his place on the benches to the Chair he is expected to shake off and leave behind all party ties and sympathies. Once invested with wig and gown of office he has no longer any political opinions, and must administer exactly the same treatment to his political friends and to those who have hitherto been his opponents, to the oldest or most powerful minister and to the youngest or least popular member. His duties are limited to the enforcement of the rules and generally to the maintenance of order and decorum in debate, including the selection, when several members rise at the same moment, of the one who is to carry on the discussion. These are duties of great importance, and his position one of great dignity, but neither the duties nor the position imply political power. It makes little difference to any English party in Parliament whether the occupant of the chair has come from their own or from the hostile ranks. The Speaker can lower or raise the tone and efficiency of the House as a whole by the way he presides over it; but a custom as strong as law forbids him to render help to his own side, even by private advice. Whatever information as to parliamentary law he may feel free to give must be equally at the disposal of every member." (Bryce, Amer. Comm. I. p. 134-5.)

"The duties of the Speaker of the House of Commons are as various as they are important. He presides over the deliberations of the house, and enforces the observance of all rules for preserving order in its proceedings; he puts every question, and declares the determination of the house. As 'mouth of the house,' he communicates its resolutions to others, conveys its thanks, and expresses its censure, its reprimands, or its admonitions. He issues warrants to execute the orders of the house for the commitment of offenders, for the issue of writs, for the attendance of witnesses in custody, for the bringing up prisoners in custody, and giving effect to other orders requiring the sanction of a legal form. He is, in fact, the representative of the house itself, in its powers, its proceedings, and its dignity. When he enters or leaves the house, the mace is borne before him by the Serjeant-at-arms; when he is in the chair, it is laid upon the table; and at all other times, when the mace is not in the house, it remains with the Speaker, and accompanies him upon all state occasions. The Speaker is responsible for

the due enforcement of the rules, rights, and privileges of the house, and when he rises he is to be heard in silence. In accordance with his duty, he declines to submit motions to the house, which obviously infringe the rules which govern its proceedings; such as a motion which would create a charge upon the people and is not recommended by the Crown; a motion touching the rights of the Crown, which has not received the royal consent; a motion which anticipates a matter which stands for the future consideration of the house, which raises afresh a matter already decided during the current session, or is otherwise out of order. If a proposed instruction to a committee be out of order, the Speaker explains the nature of the irregularity. Amendments by the Lords to a bill which trench upon the privileges of the House of Commons, are submitted to the Speaker; and, if occasion requires, he calls the attention of the house to the nature of the amendments, and gives his opinion thereon. The Speaker also has decided that motions, which were brought forward as a matter of privilege, did not come within that category." (May's Parl. Prac. 10th ed. p. 187-8.)

"In rank, the Speaker takes precedence of all commoners, both by ancient custom and by legislative declaration. The Act I. Will. and Mary, c. 21, enacts that the lords commissioners for the great seal 'not being peers, shall have and take place next after the peers of this realm, and the Speaker of the House of Commons.' By 2 and 3 Will. IV. c. 105, an Act for the better support of the dignity of the Speaker of the House of Commons, and by 9 and 10 Vic. c. 77, an Act relating to the officers of the house, it is provided that, in case of a dissolution, the then speaker shall be deemed to be the Speaker, for the purposes of those Acts, until a Speaker shall be chosen by the New Parliament." (*Id.* p. 190.)

Absence of Speaker.

36. Before or during any absence of the Speaker[134], the House of Representatives may choose a member to perform his duties in his absence.

CANADA.—Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the Chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall, during the continuance of such absence of the Speaker, have and execute all the powers, privileges, and duties of Speaker.—B.N.A. Act, sec. 47.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, the introductory words of the clause were "In case of the absence of the Speaker." In the clause so introduced and adopted at the Adelaide session, 1897, these introductory words were omitted. At the Sydney session, the clause was altered by the Drafting Committee to its present form. (See Historical Note, sec. 18.)

§ 134. "Absence of the Speaker."

"Formerly no provision was made for supplying the place of the Speaker by a deputy Speaker *pro tempore*, as in the Upper House, and, when he was unavoidably absent, no business could be done, but the Clerk acquainted the House with the cause of his absence, and put the question for adjournment. When the Speaker by illness was unable to attend for a considerable time, it was necessary to elect another Speaker, with the usual formalities of the permission of the Crown, and the royal approval. On the recovery of the Speaker, the latter would resign, or 'fall sick,' and the former was re-elected, with a repetition of the same ceremonies. In 1855, on the report of a select committee, standing order No. 83 was agreed to, which enabled the chairman of ways and means, as deputy Speaker, to take the chair during the unavoidable absence of the Speaker, and perform his duties. The provisions of this standing order received statutory authority by Act 18 and 19 Vic. c. 84." (May's Parl. Prac. 10th ed. p. 191.)

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place[135], which thereupon shall become vacant.

HISTORICAL NOTE.—In the Commonwealth Bill, 1891, the clause was in substantially the same form. At the Adelaide session, 1897, it was introduced and passed exactly as it stands.

§ 135. "Resign His Place."

"In England it is a settled principle of parliamentary law, that a member, after he is duly chosen, cannot relinquish his seat; and, in order to evade this restriction, a member who wishes to retire, accepts office under the Crown, which legally vacates his seat, and obliges the house to order a new writ. The offices usually selected for this purpose are the offices of steward or bailiff of her Majesty's three Chiltern Hundreds of Stoke, Desborough, and Bonenham; or the steward of the manors of East Hendred, Northstead, or Hempholme, which, though the offices have sometimes been refused, are ordinarily given by the Treasury to any member who applies for them, unless there appears to be sufficient ground for withholding them. The office is retained until the appointment is revoked to make way for the appointment of another holder thereof." (May's Parl. Prac. 10th ed. p. 605.)

"The obligation to serve and to continue to serve during the continuance of the Parliament has been relaxed, although by a different method. The Chiltern Hundreds continue, though in a different sense, to afford in the days of Victoria to unwilling legislators the protection which they afforded in the days of Edward the Second." (Hearn's Gov. of Engl. p. 533.)

Vacancy by absence[136].

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891 the clause was as follows:—

"The place of a member of the House of Representatives shall become vacant if for one whole session of the Parliament he, without the permission of the House of Representatives entered on its journals, fails to give his attendance in the House."

At the Adelaide session, 1897, the clause was introduced in substantially the same words; but in Committee, on Mr. Barton's motion, the words "two consecutive months of any session" were substituted for "one whole session." (Conv. Deb., Adel., p. 734.) At the Sydney session, a suggestion by the Legislature of Tasmania, to substitute "thirty consecutive sitting days in any session" was negatived. (Conv. Deb., Syd. [1897], pp. 460-1.) At the Melbourne session, after the fourth report, the words "entered on its journals" were omitted.

§ 136. "Absence."

It is an ancient constitutional rule that every person elected to serve in Parliament is bound so to serve. "Service in Parliament" was a duty which might be cast upon every person not expressly disqualified; this duty he could not decline or invade, and even the Crown could not exempt him from the obligation. It is a consequence of the same principle that members are bound to attend during the whole time that Parliament is sitting. Several Acts have been passed in England to enforce this duty; and though

the Crown does not now interfere, the House of Commons claims, and occasionally exercises, the right to compel the attendance of all its members by a "call of the House." (Hearn, Gov. of Eng. pp. 532-3.)

Where a statute provided that "if any legislative councillor shall for two successive seasons fail to give his attendance, without permission, his seat shall thereby become vacated," and a councillor absented himself during the whole of three sessions, having previously obtained a permission for a year, which period of time, in the event, covered the whole of the first and part of the second session: Held, that his seat was vacated, as the permission did not cover two successive sessions. (Att.-Gen. [Queensland] *v.* Gibbon, 12 App. Cas. 442; Dig. of Engl. Case Law, vol. 3, p. 493.)

Quorum[137].

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

UNITED STATES.— . . . a majority of each (House) shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties, as the House may provide.—Const. Art. I. sec. v. sub-s. 1.

SWITZERLAND.—In either Council a quorum is a majority of the total number of its members.—Const. Art. 87.

CANADA.—The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a member.—B.N.A. Act, 1867, sec. 48.

GERMANY.—To render action valid, the presence of a majority of the statutory number of members shall be required.—Const. Art. 28.

HISTORICAL NOTE.—Clause 39, Chap. I. of the Commonwealth Bill of 1891, was in the same words, and was adopted *verbatim* at the Adelaide session, 1897. In Committee at Adelaide, Mr. Carruthers contended that the quorum was too high, and suggested "twenty." This was negatived. (Conv. Deb., Adel., p. 735.)

§ 137. "Quorum."

The Constitutions of different countries vary widely as to the principle of the quorum and the mode of its determination. In the United States, in Switzerland, in Canada, and (as regards the Diet) in Germany, the quorum is fixed as a constitutional principle. In Great Britain, and France, on the other hand, the quorum is regarded as a matter of internal procedure, which each House determines for itself. This is regarded by Dr. Burgess as a defect, as it leaves to the caprice of an undefined number of members of each House the control over an important structural principle. (Pol. Science II., 124.) In the British colonies the British example has not been followed, the quorum being invariably prescribed in their Constitution Acts.

As to the proportion of members which should form a quorum, British and Continental ideas differ widely. On the Continent of Europe, and in the United States of America, the most general quorum is an absolute majority of members.

"In those cases where the quorum is fixed by the Constitutions there is substantial agreement upon the principle that the presence of a majority of the legal number of members in the House is necessary and sufficient to the transaction of legislative business. This principle is also adopted as a rule of procedure by both Houses of the French Legislature. The French Senate requires not only the presence of the majority of its members, but also their votes, for or against a motion. The quorum of the absolute majority, *i.e.*, the majority of the legal number of members, may be said to be the modern principle in general legislation. Its reason is that the majority represents in this respect the whole, and is vested with the powers of the whole. If this were not the principle, legislative action would be exposed to the tricks and stratagems of the minority to an unbearable degree." (Burgess, Pol. Science, ii. 124-5.)

In the British Parliament, on the other hand, the quorum of the House of Commons has, from very early times, been fixed at 40, and that of the House of Lords at 3; though the Houses now number respectively 670 and 586 members. Dr. Burgess points out that the fact that, under the British system, legislation is controlled by the Ministry, would make it unnecessary, and often inconvenient, to require a majority quorum. (Pol. Science, ii. 125.) In the Parliaments of British colonies the quorum fixed is invariably less than an absolute majority; being sometimes fixed at one-third, or one-fourth, and sometimes at an arbitrary number representing even a lower proportion.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

CANADA.—Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote.—B.N.A. Act, 1867, sec. 49.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, and in the Adelaide draft of 1897, the clause was in substantially the same form. At the Sydney session, a suggestion by the Parliament of Victoria was submitted, to add a proviso that "in case of a proposed amendment of the Constitution the Speaker may vote notwithstanding the votes are not equal, and in such cases he shall not have a casting vote." It was contended that in the important case of a constitutional amendment, where an absolute majority was required, the Speaker ought not to be deprived of the right to give a vote which might be required to make up the absolute majority. However, the amendment was negatived. (Conv. Deb., Syd. [1897], pp. 461-3.) At the Melbourne session, a drafting amendment was made after the fourth report.

PART IV.—BOTH HOUSES OF THE PARLIAMENT.

Right of electors of States.

41. No adult person[138] who has or acquires[139] a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either house of the Parliament of the Commonwealth.

HISTORICAL NOTE.—At the Adelaide session of the Convention, on the discussion of the qualification of electors of the House of Representatives (see Historical Note, sec. 30) Mr. Holder proposed that "every man and woman of the full age of 21 years, whose name has been registered as an elector for at least six months, shall be an elector." This was opposed as being likely to prejudice the prospects of the Constitution in the colonies where women's suffrage had not been adopted, and was negatived by 23 votes to 12.

Mr. Holder then, as a compromise, moved an amendment which contained the germ of the above section; namely, to add the words: "No elector now possessing the right to vote shall be deprived of that right." The object was to prevent the Federal Parliament, when declaring a uniform franchise, from depriving the women of South Australia

of the right to vote. Without such a provision, the apprehension was expressed that the women of South Australia might be deprived of the franchise by the Federal Parliament, and such a possibility might induce them to vote against the Constitution when submitted to the people. The proposal was at first objected to on the ground that it would embarrass and fetter the Federal Parliament in framing a uniform franchise; that it showed an unreasonable want of confidence in the Parliament; that the Parliament might be trusted not to do anything unreasonable or unjust. After some discussion the proposal was moulded into the following shape:—"But no elector who has at the establishment of the Commonwealth, or who afterwards acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall be prevented by any law of the Commonwealth from exercising such right at the elections for the House of Representatives." This was carried by 18 votes to 15. (Conv. Deb., Adel., pp. 715-32.)

Subsequently Mr. Barton endeavoured to secure the limitation of the clause to rights existing at the establishment of the Commonwealth, but Mr. Holder opposed this, contending that rights existing up to the time of the adoption of a federal franchise ought to be protected. The amendment was negatived; but Mr. Holder met one of Mr. Barton's objections by inserting the words "while the qualification continues," so as not to protect any right which had been withdrawn by the State. (Conv. Deb., Adel., pp. 1191-7.) At the Melbourne session, Mr. Barton moved to limit the protection to rights which any elector "at the establishment of the Commonwealth or afterwards has under the law in force in any State at the establishment of the Commonwealth." He pointed out that the clause as passed at Adelaide embodied certain anomalies which were not intended. He did not object to the provision that a person who at the establishment of the Commonwealth had a right to vote at State elections should retain a right to vote at Federal elections, and should not have that right taken away whilst he remained qualified as a State elector, even though the Commonwealth passed a law for a uniform suffrage. But under the clause as passed in Adelaide, a State might extend its franchise after the establishment of the Commonwealth—not only to women, but perhaps to all persons over sixteen years of age—and those persons would then acquire an inalienable right to vote at federal elections. He thought that went too far. Mr. Holder, however, and those who thought with him, were unable to accept this amendment. They wished to secure the franchise to women in every State which should adopt adult suffrage after the establishment of the Commonwealth, but before the fixing of a federal franchise. They were willing to meet Mr. Barton on the question of the infant vote, and finally he withdrew his amendment with a view to insert, after "afterwards," the words "being an adult." (Conv. Deb., Melb., pp. 1840-55.) Verbal amendments were made after the fourth report. (See Conv. Deb., Melb., pp. 2447-8.)

§ 138. "No Adult Person."

The intention of the section is that when the Federal Parliament adopts a federal franchise it may not deprive any adult person of the right to vote at Federal elections, who, at that time, has a right to vote at elections for the more numerous House of the Parliament of his or her State. The interpretation of the section, however, is a matter of considerable difficulty. The chief question is whether it merely preserves to individual persons a right to vote at Federal elections, notwithstanding that the general qualification prescribed by the Parliament does not include them; or whether it prevents the Parliament from prescribing any franchise for the Commonwealth which does not extend throughout the Commonwealth every franchise existing, with respect to adult persons in any State. The latter view—that Parliament cannot pass any but a uniform franchise, and that such uniform franchise must level up the franchise in every State to the level of the widest suffrage then existing—seems to have been held by several members of the Convention. (See Conv. Deb., Adel., pp. 715-25; 1191-7; Melb., pp. 1840-55.)

It would seem that the words of the Constitution do not justify this view. The power of the Parliament to deal with the qualification is derived from the provision in sec. 30 that "until the Parliament otherwise provides" the qualification of Federal electors in each State shall be that prescribed by the State for the electors of the Legislative Assembly of the State. By virtue of that provision, the Parliament has power (sec. 51—xxxvi.) to make laws for the peace, welfare, and good government of the Commonwealth with respect to the qualification of federal electors. The Constitution does not speak of a "uniform qualification" (except incidentally in sec. 128), and does not restrict the Parliament to prescribing a complete franchise or none.

It was even suggested by Mr. Higgins and Mr. O'Connor (Conv. Deb., Melb., pp. 1846-7) that, as a matter of strict law, the Parliament may prescribe different franchises in different States. This proposition seems much too broad; it would seem (see Note § 161, "Peace, Order and Good Government," *infra*) that a federal law cannot discriminate between one State and another. But here a diversity of franchise in the different States is recognized by the Constitution itself, and it may be fairly argued that any federal law of uniform application, purporting to define in part or in whole the federal qualification, would—subject to the rights reserved by this section—be good and valid, notwithstanding that it did not wholly remove this diversity. This contention may be best explained by two illustrations. It seems clear that the Federal Parliament might lawfully pass a prohibitive law (somewhat in the manner of the Fifteenth Amendment of the Constitution of the United States) in such terms as these:—

"Notwithstanding the qualification which may be prescribed by the law of a State as the qualification of electors for the more numerous House of the Parliament of the State, no person otherwise qualified by the law of the State shall be prevented from voting at elections for either House of the Parliament of the Commonwealth by reason only that such person does not possess a property qualification or a qualification based on income or earnings."

There would be no want of uniformity in such a law; on the contrary, it would remove a discrimination which at present exists. True, the whole franchise would not be uniform, but it would be more nearly uniform than at present, and the diversity would be due, not to the Federal Parliament, but to the Constitution itself. (Burgess, Political Sc. II. p. 42.) Again, it is conceived that it would also be competent for the Parliament to prescribe a franchise affirmatively by such a law as the following:—

"Every male adult subject of the Queen, who has been resident for one year within the Commonwealth and for three months in any federal electorate or electoral division shall, unless disqualified by this Act, be entitled to vote in such division at the election of members of either House of the Parliament. Persons of unsound mind, or in receipt of eleemosynary aid, or under sentence for any offence, are disqualified. Provided that this Act shall not be deemed to disqualify any adult person who under section 41 of the Constitution of the Commonwealth has a right to vote at such election."

In such a law, again, there would be no want of uniformity; it would be distinctly in the direction of uniformity; and the diversity which still remained would be due, not to the Federal Parliament, but to the particular individual rights reserved by the Constitution itself.

To hold that such laws as these were unconstitutional, because they fell short of establishing a uniform franchise throughout the Commonwealth, would be to hold that the Federal Parliament is powerless to move a single step in the direction of uniformity unless it is prepared to adopt full manhood and womanhood suffrage. This section, it is contended, imposes no such prohibition. It does not forbid the Parliament to pass franchise laws which do not fulfil certain conditions, but preserves the right of certain persons, described in the section, to vote notwithstanding such laws.

§ 139. "Has or Acquires."

The word "has" apparently refers to rights in existence at the establishment of the Commonwealth; the word "acquires" to rights acquired after that time. At Adelaide (Conv. Deb., pp. 1191-7) Mr. Barton endeavoured to secure the limitation of

the clause to rights existing at the establishment of the Commonwealth, but was defeated. At Melbourne (Conv. Deb., pp. 1840-53) he endeavoured to limit it to rights acquired, before or after the establishment of the Commonwealth, under a State law in force at the establishment of the Commonwealth. This he ultimately withdrew on the insertion of the word "adult."

It is clear that a right under this section to vote at federal elections can be acquired after the establishment of the Commonwealth, but it is not so clear that such a right can be acquired after the passing of a federal franchise law, or under State laws passed after the passing of such federal law. Three possible interpretations may be suggested:—

(1.) That the right may be acquired at any time, under a State law passed at any time.

(2.) That the right may be acquired at any time, but only under a State law passed before a federal franchise is fixed.

(3.) That the right must be acquired by the "adult person" concerned before the federal franchise is fixed.

It seems clear from the following extracts that the first of these interpretations was not intended by Mr. Holder, the author of the clause:—

"There is a stage up to which the franchise is purely a State question, and the regulation of the franchise is within the power and authority of the State. The moment that ends is when the Federal Parliament passes a law fixing the franchise. What I want is that so long as the State is free to fix the franchise, any franchise they give shall be protected afterwards. . . . The right of the State to alter the franchise continues, not up to the time of the formation of the Constitution, but up to the time that the Federal Parliament frames a franchise, and I want all the rights granted up to that time preserved in the future. [*Mr. Peacock:* If the Federal Legislature has legislated?] No. I want the States to have their rights with regard to the franchise unimpaired up to the day when the federal franchise is indicated, and that whatever the franchise shall be at that date it shall be preserved, and so that no person having a right up to that date shall have it taken from him, and that this shall apply not only to South Australia, but also to other colonies who may widen their franchise before the federal franchise is provided." (Mr. Holder, Conv. Deb., Adel., p. 1195.)

"I want the right of the State Parliament to be protected up to the moment when the Federal Parliament moves." (Mr. Holder, Conv. Deb., Melb., p. 1843.)

These quotations make it clear that Mr. Holder did not contemplate the first interpretation, but his expressions seem to waver between the second and the third. In one passage he speaks of *persons having a right* when the federal franchise is framed—words which seem to contemplate the third interpretation; whilst elsewhere he speaks of protecting *the State franchise* as it existed at that date—words which involve the second interpretation. The latter seems to accord better with his general object of securing the federal franchise to women in those States where adult suffrage might exist when the federal franchise was framed.

Let us illustrate these distinctions. Suppose that the Federal Parliament fixes a federal franchise, such as suggested above, for male adults; and that afterwards Victoria passes a law extending the Victorian franchise to women. In South Australia the franchise was extended to women before the federal franchise was fixed. Then the three questions are:—

(1.) Are Victorian women entitled to vote at federal elections?

(2.) Is a South Australian woman, who has come of age since the federal franchise was fixed, entitled to vote at federal elections; or

(3.) Are only those South Australian women who were qualified voters at the date of the federal law entitled to vote at federal elections?

Mr. Holder's intention was that Victorian women, under those circumstances, should not be so entitled; though if the Victorian law had been passed before the federal franchise, it would have been otherwise. But he probably intended that South Austra-

lian women should be entitled to vote, whether actually qualified before or after the federal law, because the franchise under which they claim was in existence before the federal law.

That being the apparent intention, as collected from the debates, it remains to consider the real intention as expressed by the section itself. "No adult person who has or acquires a right" to vote at State elections "shall, while the right continues, be prevented by any law of the Commonwealth" from voting at federal elections. The Federal Parliament being empowered to deal with the qualification, it is not to be presumed that it was intended that the State Parliament should be able, after the Federal Parliament had legislated, to confer by fresh legislation any further right of voting at federal elections. Apparently the only logical way to gather this interpretation from the section, is either (1) to construe "acquires" as meaning "acquires before the framing the federal franchise;" or (2) to construe the word "prevented" as descriptive of a deprivation taking effect at the time of passing of the federal law—not a continuous deprivation enuring under the federal law. The effect of both these readings is the same; and it is submitted that this is the true construction—though it may certainly be argued that "acquires" is not expressly limited in point of time, and that a law which restricts the franchise to certain persons "prevents" all other persons from voting so long as it remains in force.

If this be granted, it becomes necessary to consider when a person "acquires" a right to vote; at the time when he—or she—individually becomes qualified, or at the time when the franchise under which he claims is enacted. Apart from the context, there could be hardly any doubt that no person can be said to have a right to vote until his qualification is complete. The other construction can only be argued on the assumption that a law giving the franchise to a certain class of persons confers a potential or inchoate right on all persons of that class—born or unborn—from the date of the passing of the law; or else that the section refers to the right of the person, not as an individual, but as one of a class. Either construction is very forced. A right would seem to mean a complete right; and the words "no adult person" make no allusion to a class, but single out the case of each individual person to be dealt with on its merits. No mention is made of the law under which such person claims the right, and it would seem that, if the date when the right was acquired is material, we must look to the date when it was actually acquired by the person in question, not the date when it was conferred by law upon all persons of a certain class.

Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation[140] of allegiance in the form set forth in the schedule to this Constitution.

CANADA.—Every member of the Senate or House of Commons of Canada shall, before taking his seat therein, subscribe before the Governor-General or some person authorized by him . . . . the oath of allegiance contained in the fifth Schedule to this Act.—B.N.A. Act, 1867, sec. 128.

HISTORICAL NOTE.—Clause 5, Chap. I., of the Commonwealth Bill of 1891 was in almost identical words, and was adopted at the Adelaide session, 1897. At the Melbourne session, verbal amendments were made before the first report and after the fourth report. In the Bill as introduced into the Imperial Parliament (when the Constitution was placed as a schedule to the Act), the words "to this Constitution" were added after "schedule" in this section.

§ 140. "Oath or Affirmation."

There are two forms of oath known in modern legal and official proceedings; first the adjuration by invocation of the Deity, with uplifted hand, commonly called the Scotch oath; secondly, the ordinary oath on the Bible, ending with the words "So help me God." An affirmation is a solemn assertion or denial, omitting the invocation of the Deity.

Since the year 1534 it has been customary for members of both Houses of Parliament to take the oath of allegiance. (Anson, Law and Custom of the Constitution, 3rd ed. p. 6.)

An unsworn member is only debarred from sitting or voting; he is entitled to all the other rights, privileges, and immunities of a member. His seat, however, is liable to forfeiture if he fails to attend the House for a specified time. (See sections 20 and 38.)

By the English Parliamentary Oaths Act, 1866 (29 and 30 Vic. c. 19), one uniform oath, containing no reference to Christianity, was prescribed for members of the House of Commons. By the Promissory Oaths Act, 1868 (31 and 32 Vic. c. 72), the form of oath which appears in the schedule to this Constitution was adopted. In 1888, an Act was passed (51 and 52 Vic. c. 46) enabling members of the House of Commons, who objected to be sworn on the ground that the taking of an oath was contrary to their religious belief, to make a solemn affirmation in lieu of an oath. The affirmation prescribed begins with the words "I, *A.B.*, do solemnly, sincerely, and truly declare and affirm," followed by the other words required by law, and omitting any imprecation. This Act was passed as a result of Mr. Bradlaugh's celebrated contest with the House of Commons. (Attorney-General *v.* Bradlaugh, 14 Q.B D. 667.)

Member of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House[141].

CANADA.—A Senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.—B.N.A. Act, 1867, sec. 39.

HISTORICAL NOTE.—Clause 33, Chap. I., of the Commonwealth Bill of 1891 provides that "A Senator shall not be capable of being elected or of sitting as a member of the House of Representatives," and the same clause was adopted at the Adelaide session, 1897. At the Sydney session, a suggestion of the Legislature of Tasmania, to omit the clause and substitute a provision applying to both Houses, was adopted. (Conv. Deb., Syd. [1897], pp. 459-60, 992-3, 1011.) At the Melbourne session, verbal amendments were made before the first report, and after the fourth report.

In Chap. V. of the Commonwealth Bill of 1891 there were two clauses (10 and 11) prohibiting a member of either House of the Federal Parliament from being chosen or sitting as a member of either House of a State Parliament, and providing that if a member of a State Parliament were elected to the Federal Parliament, his seat in the State Parliament should become vacant. (Conv. Deb., Syd. [1891], pp. 877-83.) In the Adelaide draft of 1897 these clauses were omitted, and in Committee, Sir Edward Braddon moved their insertion. It was thought, however, that it might be left to each State, if it thought fit, to disqualify members of the Federal Parliament from sitting in the State Parliament, and the clauses were negatived. (Conv. Deb., Adel., 1181-2.) At the Sydney session, a suggestion by the Legislature of Tasmania, that a member of a State Parliament should be incapable of sitting in either House of the Parliament of the Commonwealth, was negatived. (Conv. Deb., Syd. [1897], pp. 996-1011.)

§ 141. "A Member of the Other House."

"English peers are ineligible to the House of Commons, as having a seat in the Upper House; and Scotch peers, as being represented there by virtue of the Act of Union; but Irish peers, unless elected as one of the representative peers of Ireland, may sit for any place in Great Britain." (May's Parl. Prac. 10th ed. p. 229.)

A provision to this effect, founded on the constitutional practice of the Imperial Parliament, is common to the Constitutions of all the Australian colonies.

Disqualification[142].

44. Any person who—

(i.) Is under any acknowledgment of allegiance, obedience, or adherence[143] to a foreign power, or is a subject or a citizen[144] or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason[145], or has been convicted and is under sentence, or subject to be sentenced, for any offence[146] punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown[147], or any pension[148] payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement [149] with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth[150], or of any of the Queen's Ministers for a State[151], or to the receipt of pay, half pay, or a pension by any person as an officer or member of the Queen's navy or army[152], or to the receipt of pay as an officer or member of the naval or military forces of

the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Historical Note.—In the Commonwealth Bill of 1891, the provisions as to disqualifications and vacancies were contained in clauses 46, 47, 48, and 49 of Chap. I. Clause 46 provided for the disqualification of persons under certain disabilities; clause 47 declared vacant the seats of members becoming subject to such disabilities; clause 48 provided for both disqualification and vacancy in case of contractors; and clause 49 did the same in the case of persons holding or taking an office of profit under the Crown. The same arrangement was followed in the Adelaide draft of 1897; but at the Melbourne session, before the first report, the four clauses were re-arranged into two: one disabling certain persons from being chosen or sitting as members, the other vacating the seats of members in certain cases. The debates will be most conveniently referred to under the heads of the several disabilities:

Foreign Allegiance.—At the Adelaide session, Mr. Gordon suggested the insertion of words removing the disability of a person who has taken an oath of foreign allegiance, if he since become a naturalized British subject. No amendment was moved. (Conv. Deb., Adel., p. 736.)

Attainder or Conviction.—In the Commonwealth Bill of 1891, the provision was that a person "attainted of treason, or convicted of felony or any infamous crime" should be incapable "until the disability is removed by . . . the expiration or remission of the sentence, or a pardon, or release, or otherwise." In Committee, Mr. Wrixon objected to the express provision that an ex-convict might be a member of Parliament, and proposed to make the disqualification permanent; but this was negatived by 27 votes to 9. (Conv. Deb., Syd. [1891], pp. 655-9.) At the Sydney session, 1897, Mr. Barton mentioned a suggestion by Sir Samuel Griffith to substitute more precise terms for "felony or other infamous crime." (Conv. Deb., Syd. [1897], pp. 1020-2.) Accordingly at the Melbourne session, before the first report and after the fourth report, the provision was altered to its present form. (See Conv. Deb., Melb., p. 2445.)

Bankruptcy or Insolvency.—At the Sydney session, 1897, a suggestion by the Legislative Assembly of New South Wales, to omit the disqualification of "an undischarged bankrupt or insolvent or a public defaulter" was supported by Mr. Carruthers, but was negatived. (Conv. Deb., Syd. [1897], pp. 1015-9.) The same omission was again moved by Mr. Carruthers at the Melbourne session. It was argued on the one hand that bankruptcy did not necessarily involve moral delinquency; and on the other that, for the public security, a bankrupt ought to be disqualified until the court has pronounced upon his conduct and given him a discharge. The amendment was again negatived. (Conv. Deb., Melb., pp. 1931-41.)

Office of Profit.—Conv. Deb., Syd. (1891), pp. 660-2, 898; Conv. Deb., Adel., pp. 754-6; Conv. Deb., Syd. (1897), pp. 1028-9. At the Melbourne session, Sir John Forrest moved to insert an exemption in favour of "any of the Queen's Ministers in a State," which was agreed to. (Conv. Deb., Melb., pp. 1941-2. See *ib.* p. 2448.)

At the Adelaide session, Sir Geo. Turner suggested the insertion of a provision similar to section 6 of the Constitution of Victoria, making it penal for any person, while he is a member of Parliament, or within six months after ceasing to be a member, to accept any office of profit under the Crown. After debate a proposal was made by Sir William Zeal, to the effect that until the Parliament otherwise provides, no person while a member or within six months of ceasing to be a member should hold or take any office which would disqualify a person from being chosen or sitting as a member. This was carried by 19 votes to 18. (Conv. Deb., Adel., pp. 739-53, 1198.) At the Sydney session, a suggestion by the Legislative Council of New South Wales, that this provision be omitted, was agreed to by 19 votes to 10. (Conv. Deb., Syd. [1897], pp. 1029-34.)

Agreement with the Public Service.—Conv. Deb., Adel., pp. 736-7; Conv. Deb., Syd. (1897), pp. 1022-8.

General.—At the Sydney session, 1897, Mr. Glynn, in accordance with one of three alternative suggestions made by Sir Samuel Griffith, proposed to insert at the beginning of the clause the words "until the Parliament otherwise provides." This was negatived by 26 votes to 8. (Conv. Deb., Syd. [1897], pp. 1012-5.)

§ 142. "Disqualification."

Section 44 enumerates different kinds of status which, while they continue, render "any person" incapable of being chosen or of sitting as a senator or a member. That is to say, the continuance of the disqualifying status makes a "person" incapable of becoming or being a senator or a member.

If a disqualified person is declared duly elected, he is nevertheless not chosen within the meaning of the Constitution, and accordingly is not a senator or a member. He is forbidden to sit as a senator or a member, and is liable to a penalty if he does so sit. This section does not, like the next section, declare that "his place shall become vacant," because he is incapable of having a place. The proper course for the House, upon proof of the disqualification, is either (1) to declare the candidate next on the poll duly elected, or (2) to declare that the seat is vacant—not that "his place is become vacant"—and require another election.

§ 143. "Allegiance, Obedience, or Adherence."

Allegiance is the lawful obedience which a subject is bound to render to his sovereign. Allegiance is of three kinds: natural, acquired, or local. (1) Natural allegiance is that which every subject born from his birth owes to his sovereign. He is said to be a natural liegeman, as the sovereign is said to be his natural liege lord. (2) Allegiance is acquired where one is naturalized, or made a denizen. (3) The allegiance owed by every resident in the British dominions for the protection he enjoys is called local. It is customary, however, at the present day to restrict the use of the word to the first and second of these—the bond which attaches a subject to his sovereign—though some authors still speak of "local allegiance" as due by both British subjects and aliens alike, while within the dominions of the Crown, to distinguish it from the allegiance due by British subjects on foreign soil, and entitling them also to protection there. Under British law, until the Naturalization Act of 1870, no natural-born British subject could divest himself of his allegiance; but since that Act he may make a declaration of alienage, and thereafter he ceases to be a British subject. Aliens, on naturalization, are required to take an oath of allegiance (see Naturalization Act, 1870, 33 and 34 Vic. c. 14, s. 9; Naturalization Oaths Act, 1870, 33 and 34 Vic. c. 102; and Regulations issued by the Home Office in exercise of the powers contained in the Naturalization Acts, 1870. Encyclopedia of the Laws of England, vol. i. p. 225.)

§ 144. "A Subject or a Citizen."

A subject is one who, from his birth or oath, owes lawful obedience or allegiance to his liege lord or sovereign. "Citizen" is the term usually employed, under a republican form of government, as the equivalent of "subject" in monarchies of feudal origin. (Ency. of the Laws of Eng., iii. p. 35.) See Note § 463 *infra*, "Subject of the Queen."

"While the active duties of the citizen of a Commonwealth can hardly be discharged beyond the territories of that Commonwealth, the duties of the subject of a king, the subject, that is, of a personal master, are as binding on one part of the earth's surface as on another. I have just used words which go to the root of the matter. I have used words 'citizen' and 'subject.' The difference between the two conceptions can nowhere put on a more living shape than in the use of those two names. The Greek could have deemed himself degraded by the name of 'subject.' To him the word that best translates it expressed the position of men who, either in their own persons or

in the person of the cities to which they belonged, were shorn of the common rights of every city, of every citizen. We use the word 'subject' daily without any feeling of being lowered by it. It has become so familiar that it is assumed as the natural phrase to express membership of a political body, and it is often used when it is quite out of place. I once read, and that in a formal document, of a 'Swiss subject,' and I had the pleasure of explaining that there had been no subjects, no *Unterthanen*, in Switzerland since 1798. And the question comes, What are we to say instead? 'Swiss citizen,' 'French citizen,' 'citizen of the United States,' have this awkwardness about them, that the community whose membership they express is not a city. The very awkwardness points to the main difference between the world of old Hellas and the world of modern Europe, the difference in scale. Be it kingdom or be it commonwealth, the State with which modern politics have to deal is not a city but something vastly greater." (Freeman, Greater Greece and Greater Britain, pp. 23-24.)

§ 145. "Attainted of Treason."

In 1870 O'Donovan Rossa, a convict in prison under sentence of penal servitude for life for felony under the Treason-Felony Act, 11 and 12 Vic. c. 12, was returned as member of the House of Commons for the County of Tipperary. It was contended that as he was not "attainted of treason" there was no disqualification, but the House determined that "John O'Donovan Rossa having been adjudged guilty of felony and sentenced to penal servitude for life, and being now imprisoned under such sentence, he has become and still continues incapable of being elected or returned as a member of the House," and a new writ was issued.

§ 146. "Or has been Convicted, and is Under Sentence for any Offence."

An offence is some act or omission which is triable and punishable, either on indictment or information, in a superior court before a jury, such as a felony or misdemeanor, or summarily before Justices, according to the direction of the law creating the offence. A person convicted of an offence of any description against the law of the Commonwealth or against the law of a State, whether it be felony or misdemeanor, or an offence punishable on summary conviction, and undergoing sentence of imprisonment for the term of one year or more, is disqualified for membership until he has served his sentence.

In England persons convicted of treason or felony, and sentenced to imprisonment with hard labour, or for a term exceeding twelve months, are incapable of being elected members of the House of Commons or of sitting and voting therein until they have served their sentence. (33 and 34 Vic. c. 23, sec. 2.) Conviction for misdemeanor or offences punishable summarily does not disqualify for membership of the House of Commons. The House, however, has jurisdiction to expel any member guilty of an infamous or disgraceful offence, even though it does not amount to a felony followed by a conviction and sentence as above defined.

In 1875 John Mitchel was returned to the House of Commons for the County of Tipperary, without a contest. It was well known that he was an escaped prisoner and had not completed the term of transportation for which he had been sentenced. A new writ was accordingly issued, and Mitchel was again returned to the House, after a contest. The defeated candidate filed a petition against Mitchel's return and praying for the seat. It was referred to the Court of Common Pleas in Ireland, and the petitioner, who had given due notice of the disqualification, was adjudged entitled to the seat. (May, 10th ed. pp. 33 and 619.)

§ 147. "Office of Profit under the Crown."

A person holding an office of profit under the Crown is incapable of being chosen or of sitting as a senator or as a member of the House of Representatives. This general disqualification would apply to persons holding office under the Crown in any part of the British dominions, with the exceptions mentioned at the end of this section, viz., (1) the

Queen's Ministers of State for the Commonwealth; (2) the Queen's Ministers for a State; (3) officers or members of the Queen's army or navy in receipt of pay, half-pay, or a pension; and (4) to officers or members of the naval or military forces of the Commonwealth whose services are not wholly employed by the Commonwealth.

The office of President of the Senate, or Speaker of the House of Representatives, with a salary annexed thereto, would not be an office of profit under the Crown. Those dignitaries are appointed by the respective Houses, not by the Crown; they are not servants of the Crown. (See Conv. Deb., Melb., p. 2448.)

"In England the holders of new offices under the Crown created since 25th October, 1705, are incapable of being elected or of sitting and voting (6 Anne, c. 41, s. 24) unless a statutory exception has been made in favour of such new offices. By sec. 25, members of the House of Commons accepting from the Crown old offices, that is to say, offices created before 1705, vacate their seats, but may be re-elected." (Encycl. Laws of England, ix. p. 399.)

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." (Const. of U.S. Art. I. sec vi. subs. 2.)

§ 148. "Pension."

In England, persons in receipt of pensions from the Crown, during pleasure, are disqualified by 6 Anne c. 41, sec. 24; but under 32 and 33 Vic. c. 15 and c. 43, this does not apply to pensioners in the diplomatic and civil services. Persons disqualified under this Constitution are those in receipt of pensions payable out of the revenues of the Commonwealth during the pleasure of the Crown. Pensioners paid out of the Imperial revenue, or out of the revenues of States, are subject to no disability under this section.

§ 149. "Interest in any Agreement."

This is a disability arising from any contract or agreement for valuable consideration, which any person may have entered into to supply any goods or perform any service to the Government of the Commonwealth. In England, Government contractors are disqualified under 22 Geo. III. c. 45, sec. 1. The reason for the disqualification of Government contractors is that they are supposed to be liable to the influence of their employers.

150. "The Queen's Ministers of State for the Commonwealth."

The Queen's Ministers of State for the Commonwealth, appointed by the Governor-General under sec. 64, are exempt from the general prohibition directed by sub-sec. iv. against office-holders and place-holders occupying seats in the Federal Parliament. It is one of the fundamental principles of the existing system of responsible government, that Ministers of the Crown should be capable of being members of Parliament, and that they should not hold office for any lengthened period, unless they are members; the reason being that they are responsible to Parliament for their political conduct, and should therefore be present in one of the Chambers in order to answer questions respecting the administration of their departments, to hear Parliamentary criticism, and, if necessary, to defend themselves when attacked.

§ 151. "The Queen's Ministers for a State."

The members of a State legislature are not debarred from becoming members of the Federal Parliament (see Historical Note to sec. 43), and it was thought equally desirable that the members of a State Government should not be so debarred.

§ 152. "Officer or Member of the Queen's Navy or Army."

Under this exception to the rule for the exclusion of place-holders, a person in the receipt of pay, half-pay, or a pension, as an officer or member of the Imperial Navy, or of the Imperial Army, is qualified to be a member of the Federal Parliament. In England, the statute 6 Anne c. 41, s. 27, contains an exception in favour of officers in the army and navy accepting a new commission.

Vacancy on happening of disqualification.

45. If a senator or member[153] of the House of Representatives—

(i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

HISTORICAL NOTE.—For reference to the corresponding provisions of the Commonwealth Bill of 1891, and the Adelaide draft of 1897, see Historical Note, sec. 44.

The provision as to fees or honorariums was first suggested by Mr. Carruthers at the Adelaide session, 1897, and ultimately agreed to. (Conv. Deb., Adel., pp. 737-8, 1034-44.) At the Sydney session, a suggestion of the Legislative Council of New South Wales, to omit the paragraph, was negatived. (Conv. Deb., Syd. [1897], p 1028.) At the Melbourne session, after the second report, Mr. Reid moved to insert "or for work done or services rendered in Parliament for or on behalf of any person or corporation." This was agreed to. (Conv. Deb., Melb., pp. 1944-7.) After the fourth report, verbal amendments were made. (See Conv. Deb., Melb., pp. 2448-9.)

§ 153. "If a Senator or Member."

The preceding section enumerates different kinds of status, which, while they continue, disqualify "any person" from becoming or being a senator or a member; this section enumerates different acts or events which, if they are done by or happen to a senator or a member, disqualify him from continuing to be a senator or a member. The preceding section refers to the continuing existence of a disqualifying status; this section to the happening of a disqualifying event. This section therefore deals only with senators or members who were qualified at the time of their election, but who become disqualified afterwards.

The disqualifying event mentioned in sub-sec. i. is the acquirement of any of the kinds of status enumerated in the preceding section. If such status existed at the time of the election, the person affected is not a senator or a member; he is dealt with under the preceding section. But if, after becoming a senator or a member, he "becomes subject to" the disability, *eo instanti* his seat is vacated under this section.

The disqualifying acts mentioned in sub-secs. ii. and iii. are acts which do not involve a continuing status, but which, if done by a senator or a member, vacate his seat.

Penalty for sitting when disqualified.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it[154] in any court of competent jurisdiction.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891 the clause was substantially the same, except that the words "Until the Parliament otherwise provides" were absent. At the Adelaide session, 1897, the clause was introduced in nearly the same words. In Committee, on Mr. Barton's motion, the words "or disqualified or prohibited from holding any office" were inserted after "House of Representatives;" and the words "or accepts or holds such office" were inserted before "be liable." (Conv. Deb., Adel., pp. 1193-9.) At the Sydney session, Dr. Quick called attention to the provision for a penalty, which had been decided to be unnecessary in respect of the prohibition against plural voting; and Mr. Barton agreed to bring before the Drafting Committee the question of its omission. (Conv. Deb., Syd., 1897, p. 1034.) Subsequently as a drafting amendment, the words previously inserted as to accepting or holding office were omitted, and the words "until the Parliament otherwise provides" were inserted. At the Melbourne session, verbal amendments were made before the first report and after the fourth report.

§ 154. "To any Person who Sues for it."

A common informer is authorized to sue in a court of competent jurisdiction to recover the penalty for sitting and voting as a member of Parliament when disqualified. The Federal Parliament has power under sec. 77 to enable this penalty to be sued for in a State court.

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Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election[155] to either House, shall be determined by the House in which the question arises.

UNITED STATES.—Each House shall be the judge of the elections, returns, and qualifications of its own members.—Const. Art. I. sec. 5, sub-sec. 1.

CANADA.—Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to . . . the trial of controverted elections and proceedings incident thereto, the vacating of seats of members . . . shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.—B.N.A. Act, sec. 41.

HISTORICAL NOTE.—The Commonwealth Bill of 1891, clause 21, Chap. I., provided that "If any question arises respecting the qualification of a senator or a vacancy in the Senate, the same shall be determined by the Senate." Clause 44 made a similar provision in the case of the House of Representatives.

At the Adelaide session, 1897, the provision was that "Until the Parliament otherwise provides, any question respecting the qualification of a member, or a vacancy in the Senate, or a disputed return, shall be determined by the Senate;" and similarly for

the House of Representatives. In Committee, Sir Edward Braddon proposed to substitute "High Court" for "Senate." Mr. Wise, however, argued that questions of qualifications and vacancies ought to be decided by the House, though disputed returns ought to be decided by the High Court. Sir Edward Braddon withdrew his amendment, and on Mr. Wise's motion the words "or a disputed return" were omitted, with a view to dealing with the matter in another clause. (Conv. Deb., Adel., pp. 680-2.) Subsequently Mr. Barton proposed a new clause (48 A):—

"Until the Parliament otherwise provides, all questions of disputed elections arising in the Senate or the House of Representatives shall be determined by a federal court or a court exercising federal jurisdiction." This was agreed to. (Conv. Deb., Adel., p. 1150.)

At the Sydney session, 1897, a suggestion by the Legislature of Tasmania, to omit the new clause and restore "disputed elections" to the "qualifications and vacancies" clauses, was considered. It was pointed out that there might be a difficulty as to the first election, before the Parliament could make suitable provision. The whole question was ultimately left to the Drafting Committee. (Conv. Deb., Syd., 1897, pp. 464-6, 993, 1034-5.) The Drafting Committee struck out all three clauses and substituted a clause substantially in the form of this section. At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 155. "Qualification . . Vacancy . . a Disputed Election."

This section provides that, until legislation on the subject by the Federal Parliament establishing a different procedure, each chamber shall have exclusive jurisdiction to determine all questions which may arise respecting (1) the qualification of its members, (2) a vacancy which has arisen or which may be alleged to have arisen in its membership, and (3) a disputed election in which it is concerned. Such legislation may assume the form of transferring the jurisdiction to the Federal Courts or to the State Courts, to hear and determine all controversies of the kind.

"In England before the year 1770, controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested. In order to prevent so notorious a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own members, should be appointed so as to secure impartiality, and the administration of justice according to the laws of the land, and under the sanction of oaths. The principle of the Grenville Act, and of others which were passed at different times since 1770, was the selection by lot of committees for the trial of election petitions. Partiality and incompetence were, however, generally complained of in the constitution of committees appointed in this manner; and, in 1839, an Act was passed establishing a new system, upon different principles, increasing the responsibility of individual members, and leaving but little to the operation of chance. This principle was maintained, with partial alterations of the means by which it was carried out, until 1868, when the jurisdiction of the house, in the trial of controverted elections, was transferred by statute to the courts of law." (May's Parl. Prac. 10th ed. p. 613.)

"By the Election Petitions and Corrupt Practices at Elections Act, 1868, the Parliamentary Elections and Corrupt Practices Act, 1879, and the statute 44 and 45 Vic. c. 68, the trial of controverted elections is confided to two judges, selected, as regards England, from the Queen's Bench Division of the High Court of Justice; as regards Ireland, from the Court of Common Pleas at Dublin; and as regards Scotland, from the Court of Session. Petitions complaining of undue elections and returns are presented to these courts instead of to the House of Commons, as formerly, within twenty-one days after the returns to which they relate, and are tried by two judges of those courts, within the county or borough concerned. The house has no cognizance of these proceedings until their termination: when the judges certify their determination, in writing, to the Speaker, which is final to all intents and purposes. The judges are also to report whether any corrupt practices have been committed with the knowledge and consent of any candidate; the names of any persons proved guilty of corrupt practices; and whether corrupt practices have extensively prevailed at the election. They may also make a special report as to other matters which, in their judgment, ought to

be submitted to the house. Provision is also made for the trial of a special case, when required, by the Court itself, which is to certify its determination to the Speaker. By sec. 5 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 and 47 Vic., c. 51), the election court is directed also to report to the Speaker whether candidates at elections have been guilty by their agents of corrupt practices. The judges are also to report the withdrawal of an election petition to the Speaker, with their opinion whether the withdrawal was the result of any corrupt arrangement. All such certificates and reports are communicated to the House by the Speaker, and are treated like the reports of election committees under the former system. They are entered in the journals; and orders are made for carrying the determinations of the judges into execution." (*Id.* p. 616.)

In 1872 the Legislature of the Province of Quebec passed an Act transferring to the Supreme Court of the Province the decision of controverted election cases which was previously vested in its own hands. Further and later provision was made by an amending act passed in 1875, by the 90th section of which it was declared that the judgment of the Supreme Court sitting in review "should not be susceptible of appeal."

In 1874 the Canadian Parliament transferred the jurisdiction in the trial and decision of federal election petitions to the ordinary courts of the Provinces, subject to appeal to the Supreme Court of Canada. Amending and consolidating acts, dealing with same subject, were passed in 1886 and 1887. The procedure in the prosecution of such petitions is as follows: a petition is to be presented to the Provincial Court, which is to have the same powers as if such petition were an ordinary cause within its jurisdiction. Short periods of time are prescribed for giving notice of the petition, for taking preliminary objections to it, and for answering it, if those objections are overruled. Every petition is to be tried by one of the judges of the court, without a jury. The trial of every petition is to be commenced within six months of its presentation, and to be proceeded with from day to day until it is over. The court may enlarge the time for commencement of trial, or the period limited for taking any steps or proceedings. The judge may order a special case to be stated for the decision of any question, but it is "as far as possible" to be heard before that judge. An appeal from the judge's decision may be made to the Supreme Court of Canada within eight days. If there is no such appeal, the judge is, within four additional days, to certify his decision to the Speaker of the House of Commons, who is to take action thereupon "at the earliest practicable moment," or "without delay." If there is an appeal, the Supreme Court is to decide, its registrar is to certify the decision, and the Speaker to take action upon it. (Wheeler, D.C. p. 315.)

The validity of the Provincial and Federal Acts was affirmed by the Privy Council in Theberge *v.* Laudry (1876), 2 App. Ca. 102; Valin *v.* Langlois (1879), 5 App. Ca. 115, and Kennedy *v.* Purcell (1888), 14 Sup. Ct. (Canada) Rep. 453; 59 L.T. 279 P.C. On the question whether an appeal should be allowed to the Queen in Council, in controverted election cases, the following extracts from judgments of the Privy Council may be cited:—

"Now the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors, and of the legislative assembly to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the legislative assembly. Above all, they have been looked upon as rights and privileges which pertain to the legislative assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the legislative assembly, no longer belonged to the superior court which the legislative assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the legislative assembly, or of that court which the legislative assembly had substituted in its place. These are considerations which would their lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot

be taken away, except by express words; but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the legislature under this Act,—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party,—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex it to the incident of its judgment being reviewed by the Crown under its prerogative. In the opinion, therefore, of their lordships, there is not in this case, adverting to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused." (Per Lord Cairns in Theberge *v* Laudry, 2 App. Ca. 107-8.)

"Suppose we recommend Her Majesty to reverse the judgment, how would that decree be carried into execution? It would go to the House of Commons and be reported to the Speaker. The Speaker could not act on his own authority, and could only act by order of the House: suppose the House to say, 'Her Majesty has no prerogative to do this, and we refuse to carry it out.' Then there would be an immediate conflict between the House of Commons of the Dominion and Her Majesty. It would not be a very prudent thing for us to advise Her Majesty to reverse a judgment unless we can see our way to having it carried into execution when Her Majesty ordered it Suppose the House of Commons, on the report of the Supreme Court that both parties had been guilty of bribery, ordered a new writ, but Her Majesty orders that writ to be recalled, or upset the election which had taken place under it. It appears to me there is no mode of carrying out the decree; and we would not advise Her Majesty to reverse a decree unless we saw a mode of carrying the decree into execution." (Per Sir Barnes Peacock, in Kennedy *v.* Purcell, 59 L.T. 279 P.C., on a motion for leave to appeal; Wheeler, C.C. 314.)

Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance[148] of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

United States.—The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States.—Const., Art. I., sec. 6, sub-s. 1.

Historical Note.—Clause 45, Chap. I. of the Commonwealth Bill of 1891 was as follows:—

"Each member of the Senate and House of Representatives shall receive an annual allowance for his services, the amount of which shall be fixed by the Parliament from time to time. Until other provision is made in that behalf by the Parliament, the amount of such annual allowance shall be Five Hundred Pounds."

In Committee, Mr. Wrixon suggested that "allowance for his services" was a misdescription; it was merely an allowance for reimbursement of expenses. Mr. Marmion moved the omission of the words "for his services," but this was negatived. (Conv. Deb., Syd. [1891], pp. 653-4.)

At the Adelaide session, 1897, the clause as introduced was to the same effect, except that the sum was £400. In Committee, Mr. Gordon moved to substitute £500, but this was negatived by 26 votes to 9. (Conv. Deb., Adel., pp. 1031-4.) At the Sydney session, a suggestion by the Legislative Council of South Australia and the Legislature of Tasmania, to reduce the allowance to £300, was negatived. A suggestion by the Legislative Assembly of Victoria, to omit "on which he takes his seat," and insert "of his election," was negatived. A new clause suggested by the Legislative Council of South Australia, to prevent a Minister from drawing both a salary and his

allowance as a member, was negatived, as being a matter for federal legislation. (Conv. Deb., Syd. [1897], pp. 993-6.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 156. "Allowance."

The system known as payment of members has found a place in the Constitution Each senator and each member of the House of Representatives is entitled to receive an allowance of £400 a year, to be reckoned from the day on which he takes his seat. But neither the principle nor the amount of payment are permanent constitutional provisions. Without an amendment of the Constitution, the Federal Parliament may at any time either abolish payment of members or reduce or increase the allowance which each member is to receive, or alter the method of apportioning the allowance, providing that each member shall be paid according to the distance which he travels or the attendance which he gives at the sittings of his House.

Payment of members of Parliament is not a modern political innovation. It was known and practised in the early history of parliamentary representation in England. (See Hearn's Gov. of Eng. p. 526, cited *infra*.) It was adopted in the Federal Constitution of the United States. (Art I. sec. 6.) It has been the subject of prolonged controversy in British colonies during the last forty years, and it is now generally regarded as an essential condition of democratic government, especially in young communities. It is in force in most of the responsible government colonies, although in several instances it was not carried without bitter opposition and memorable contests.

In the Dominion of Canada each member of the Senate and of the House of Commons is entitled to an allowance of ten dollars per day for his attendance at Parliament during a session not exceeding thirty days in duration. For a session lasting longer than thirty days each member is paid $1000. In addition to this remuneration, a member is allowed ten cents per mile expenses in travelling from his division or electorate to the seat of government, and return once during the session. If a member fail to attend the sittings of his House, and his absence is not caused by illness, eight dollars for each day on which he does not attend are deducted from his allowance. Members of the Legislative Assembly of New South Wales (elected) are paid £300 per year, in addition to which they are allowed to travel free on the government railways and tramways. Members of the Legislative Council (nominated by the Crown) are not paid, but they have similar privileges on the railways. Members of the two Houses of the Victorian Parliament (elected) have respectively remuneration and railway privileges similar to those of New South Wales. Members of both Houses (elected) of the South Australian Parliament are paid at the rate of £200 per year, and in addition enjoy railway facilities. In New Zealand the members of the Legislative Council (nominated by the Crown) are paid at the rate of £150 per year, whilst members of the House of Representatives (elected) receive £240 per year. Members of the Legislative Assembly of Queensland (elected) are entitled to £300 per year, and in addition an allowance of 1s. 6d. per mile on expenses for travelling by land, and the actual cost of travelling by sea for one journey per session from their electorates to the place where the Parliament meets and return. Queensland Legislative Councillors (nominated by the Crown) receive no remuneration. The members of both Houses of the Parliament of Tasmania receive £100 per year, with free passes over the government railway lines. In the United States of America the salary of a senator, representative or territorial delegate in Congress is fixed at $5000 per year with travelling expenses at the rate of 20 cents per mile for one journey per session, from the member's State or electorate to the seat of government and return.

"Another change that time has wrought in the Commons of the Plantagenets relates to the payment of members for their services. This practice, like that of resiancy, was coeval with representation. The writs *de expensis levandis* date from the reign of Henry the Third. In subsequent reigns they were issued with as much regularity as the writs of summons. The payment was levied on the several constituencies; and was calculated

for the actual period of attendance, and for the time spent in going or returning, according to the distance in each case of the representative from the place at which Parliament met. At first the rate of wages varied according to the rank of the representative or the dearness of the season or other considerations. A Knight by order was paid more than an Esquire, and the latter more than a citizen or burgess. Finally the rate settled down at four shillings a day for Knights of the shire, and half that sum for representatives of towns. Few questions of those times excited greater interest than this payment of members." (Hearn's Gov. of Engl. p 526.)

"The reign of Elizabeth may probably be taken as the period at which honorary service in Parliament became general. The importance of the House of Commons had greatly increased. The wealth of the country had also increased. Four shillings and two shillings were much less important sums to the subjects of the Tudors than they had been to the victors of Cressy or of Agincourt. The remuneration in honour thus became a sufficient inducement to serve, without the inducement in wages. It is of course impossible to fix a precise date for a change which was probably gradual." (*Id.* p. 529.)

"But although the right has long been in abeyance, the legal obligation of constituencies has never been removed. In the Long Parliament of Charles the Second the arrears due to members must have amounted to a considerable sum. Accordingly when one of its members, Sir Thomas Shaw, sued out his writ *de expensis* against the town of Colchester, a general alarm was excited; and a bill was introduced to exonerate the electors from the payment of wages to any member of that Parliament. This measure, however, did not become law; and the old common law right still remains. The last instance in which it was exercised appears to have been in 1681, when, in the fourth Parliament of King Charles, John King sued out his writ against the burgesses of Harwich It thus appears that by our ancient constitutional usage no persons were bound to serve in Parliament gratuitously; that the payment of members was a charge upon the communities which those members were chosen to represent; that this payment was originally intended merely as an indemnity and not as a source of gain; and that the disuse of this practice is due to the influence of social changes, and not to any formal alteration of the law." (*Id.* p. 530)

By s. 2 of the New South Wales Parliamentary Representatives' Allowance Act, 1889, "every member of the Legislative Assembly now serving or hereafter to serve therein" was to receive an allowance, which was to be payable "to every such member of this present Legislative Assembly now serving . . . and to every such member hereafter elected, from the time of his taking his seat, and in every case until he shall resign, or his seat be vacated, or until Parliament shall be dissolved, or shall expire by effluxion of time":—Held, that for the purposes of the Act the Legislative Assembly must be regarded as a permanent body, and that the allowance was intended to be made to members of future Assemblies as well as of that which existed when the Act was passed. (Att.-Gen. New South Wales *v.* Rennie, 1896, App. Ca. 376.)

Privileges, &c., of Houses.

49. The powers, privileges, and immunities[157] of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament[158], and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

CANADA.—The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.—B.N.A. Act, 1867, sec. 18.

HISTORICAL NOTE.—Clause 8, Chap. I. of the Commonwealth Bill of 1891 was to the same effect. In Committee, several members thought that the word "powers" was too large; and Mr. Wrixon suggested that it should be declared that the powers should

not exceed those of the House of Commons. A proposal by Mr. Adye Douglas, to omit "powers," was negatived. (Conv. Deb., Syd. [1891], pp. 585-7.)

At the Adelaide session, 1897, the clause was introduced in substantially the same form, and in Committee some verbal amendments were made. (Conv. Deb., Adel., pp. 635, 1189.) At the Melbourne session, verbal amendments were made before the first report and after the fourth report.

§ 157. "Powers, Privileges, and Immunities."

The rights, duties, powers, privileges, and immunities of each House of the British Parliament, and of the committees and members of each House, form a part of the common law technically called the *lex et consuetudo parliamenti*. This law of Parliament is only to be collected "out of the ancient rolls of Parliament and other records, and by precedents and continual experience." (Coke, 4 Inst. 15.) The sole evidence of the ancient law of Parliament is to be found in the declarations, customs, and usages of Parliament. Each House may expound the law of Parliament and vindicate its own privileges, but no new privileges can be created. In 1704 at a joint conference of the Lords and Commons, it was resolved: that neither House of Parliament has any power by vote or declaration to create for itself new privileges not warranted by the known laws and customs of Parliament. (May, 10th ed. p. 61.)

Powers and Privileges.—The following are among the principal powers and privileges of each House, and of the members of each House, of the Imperial Parliament, as now known to the law:—

(i.) The power to order the attendance at the bar of the House of persons whose conduct has been brought before the House on a matter of privilege.

(ii.) The power to order the arrest and imprisonment of persons guilty of contempt and breach of privilege.

(iii.) The power to arrest for breach of privilege by the warrant of the Speaker.

(iv.) The power to issue such a warrant for arrest, and imprisonment for contempt and breach of privilege, without showing any particular grounds or causes thereof.

(v.) The power to regulate its proceedings by standing rules and orders having the force of law.

(vi.) The power to suspend disorderly members.

(vii.) The power to expel members guilty of disgraceful and infamous conduct.

(viii.) The right of free speech in Parliament, without liability to action or impeachment for anything spoken therein; established by the 9th article of the Bill of Rights.

(ix.) The right of each House as a body to freedom of access to the sovereign for the purpose of presenting and defending its views.

Breaches of Privileges.—The following are instances of breaches of privileges:—

(i.) Wilful disobedience to the standing rules and orders of the House passed in the exercise of its constitutional functions.

(ii.) Wilful disobedience to particular orders of the House, made in the exercise of its constitutional functions.

(iii.) Wilfully obstructing the business of the House.

(iv.) Insults, reflections, indignities and libels on the character, conduct and proceedings of the House and of its members.

(v.) Assaults on members of the House.

(vi.) Interference with the officers of the House in the discharge of their duties.

Enforcement of Privileges.—The privileges of Parliament are enforced, and breaches thereof punished, by the power vested in each House to order the arrest and imprisonment of offenders. The power of commitment, with all the authority which can be given by law, is said to be the Keystone of Parliamentary privilege.

"Either House may adjudge that any act is a breach of privilege and contempt; and if the warrant recites that the person to be arrested has been guilty of a breach of privilege, the courts of law cannot inquire into the grounds of the judgment, but must leave him to suffer the punishment awarded by the High Court of Parliament, by which he stands committed." (May's Parl. Prac. 10th ed. p. 66.)

"The *Habeas Corpus* Act is binding upon all persons whatever, who have prisoners in their custody; and it is therefore competent for the judges to have before them persons committed by the Houses of Parliament for contempt; and it is the practice for the Serjeant-at-arms and others, by order of the house, to make returns to writs of *habeas corpus*." (*Id.* p. 67.)

"But although the return is made according to law, the parties who stand committed for contempt cannot be admitted to bail, nor the causes of commitment inquired into, by the court of law." (*Id* p 67.)

"It may be considered, accordingly, as established, beyond all question, that the causes of commitment by either house of Parliament, for breaches of privilege and contempt, cannot be inquired into by courts of law; but that their 'adjudication is a conviction, and their commitment, in consequence, an execution.' No other rule could be adopted consistently with the independence of either house of Parliament; nor is the the power thus claimed by Parliament greater than the power conceded by the courts to one another." (*Id.* p. 67.)

"One qualification of this doctrine, however, must not be omitted. When it appears, upon the return of the writ, simply that the party has been committed for a contempt and breach of privilege, it has been universally admitted that it is incompetent for the courts to inquire further into the nature of the contempt; but if the causes of commitment were stated on the warrant, and appeared to be beyond the jurisdiction of the house, it is probable, judging by the opinion expressed by Lord Ellenborough, in Burdett *v.* Abbot (5 Dow 165; 14 East 1), and by Lord Denman in the case of the sheriff of Middlesex (11 A. and E. 273), that their sufficiency would be examined. The same principle may be collected from the judgment of the Exchequer Chamber in Gosset *v.* Howard (10 Q.B. 359), where it is said 'It is presumed, with respect to such writs as are actually issued by superior courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them.'" (*Id.* p. 68.)

Immunities.—The following are instances of Parliamentary immunities:—

(i.) Immunity of members for anything said by them in the course of Parliamentary debates.

(ii.) Immunity of members from arrest and imprisonment for civil causes whilst attending Parliament, and for forty days after every prorogation, and for forty days from the next appointed meeting.

(iii.) Immunity of members from the obligation to serve on juries.

(iv.) Immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes.

(v.) Immunity of Parliamentary witnesses from being questioned or impeached for evidence given before either House.

(vi.) Immunity of officers of either House, in immediate attendance and service of the House, from arrest for civil causes.

What are not Privileges.—Neither House has a right to promulgate standing rules and orders, or to make or enforce any particular votes or resolutions, which are contrary to the common law, or to the statute law of the country. Several historical cases have established the principle that there are defined limits to parliamentary privilege, and that any attempted exercise of privilege, in excess of that recognized by law, if not checked by the force of public opinion, may be pronounced illegal on appeal to the courts of law. It is an acknowledged right of the House of Commons to expel a member, who disgraces or defies it, but the House could not legally go further and declare him disqualified for re-election.

"In 1764, John Wilkes was expelled, for being the author of a seditious libel. In the next Parliament (3rd February, 1769) he was again expelled for another libel; a new writ was ordered for the county of Middlesex, which he represented, and he was re-elected without a contest; upon which it was resolved, on the 17th February, 'that, having been in this session of Parliament expelled this house, he was and is incapable of being elected a member to serve in this present Parliament.' The election was declared void: but Mr. Wilkes was again elected, and his election was once more declared void, and another writ was issued. A new expedient was now tried: Mr. Luttrell, then a member, accepted the Chiltern Hundreds, and stood against Mr. Wilkes at the election, and, being defeated, petitioned the house against the return of his opponent. The house resolved that, although a majority of the electors had voted for Mr. Wilkes, Mr. Luttrell ought to have been returned, and they amended the return accordingly. Against this proceeding the electors of Middlesex presented a petition, without effect, as the house declared that Mr. Luttrell was duly elected. These proceedings were proved by unanswerable arguments to be illegal; and on the 3rd May, 1782, the resolution of the 17th February, 1769, was ordered to be expunged from the journals, as 'subversive of the rights of the whole body of electors of this kingdom.' In 1882, Mr. Bradlaugh, having been expelled, was immediately returned by the electors of Northampton; and no question was raised as to the validity of his return." (May's Parl. Prac. 10th, p. 53.)

The House of Commons could not, by passing a particular or general order authorize the publication of parliamentary papers containing libels. In the case of Stockdale *v.* Hansard (1836), 9 A. and E. p. 1, it was held to be no defence in law, to an action for publishing a libel, that the defamatory matter was part of a document which was, by order of the House of Commons, laid before the House, and which was afterwards, by order of the House, printed and published by the defendant. In consequence of that decision the Act 3 and 4 Vic. c. 9 was passed which provided that where an action or criminal prosecution, similar to the above, is commenced, it can be stayed by bringing before the court or judge a certificate under the hand of the Lord Chancellor, or of the Speaker of the House of Commons, to the effect that the publication in question was by order of either House, together with an affidavit verifying the certificate. What could not be legally done by one House under cover of privilege could, without any difficulty, be legalized by an act of Parliament; the power of Parliament being unlimited.

Privileges of Colonial Legislatures.—The law and custom of Parliament *(lex et consuetudo parliamenti)* is not a part of the common law which Englishmen are presumed to have carried with them, as their political birthright and heritage when they founded new settlements and colonies beyond the seas. The inherent powers and privileges of colonial legislative bodies which have no express grant of powers and privileges similar to those of the British Parliament, have been considered and expounded by the highest legal tribunals of the Empire in a number of leading cases. The principles affirmed were (1) that a colonial legislative body, whether it has been established by Royal Charter, or by statute of the Imperial Parliament, is not entitled to enjoy and exercise the powers, privileges, and immunities of the Houses of the British Parliament, unless those powers, privileges, and immunities have been expressly conferred upon such a body by Imperial statute; (2) that such legislative assemblies can, without express grant, exercise all regulating and self-preserving powers that are necessary for their existence, and for the proper exercise of the functions they are intended to execute. Whatever, in a reasonable sense, is necessary for these purposes is impliedly granted, whenever any such legislative body is established by competent authority. These principles are founded on the maxim, "*quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest.*" For those purposes protective and self-defensive authority only, and not punitive, are necessary. If a member of a colonial Legislative Assembly is guilty of disorderly conduct in the House, while it is sitting, he may be removed or excluded for a time or even expelled. The power to suspend a member guilty of obstruction or disorderly conduct, during the continuance of any sitting, was held to be reasonably necessary for the proper exercise of the functions of a Legislative Assembly. It was also held that the same doctrine of reasonable

necessity would authorize a suspension until submission or apology by the offending member, but that such legislative bodies had no power to order the imprisonment of disorderly members or of other persons guilty of breach of privilege and contempt. (Kielley *v.* Carson, 4 Moore, P.C. 63; Doyle *v.* Falconer, L.R. 1 P.C. 328; Fenton *v.* Hampton, 11 Moo. P.C. 360; Barton *v.* Taylor, 11 App. Ca. 197.)

Sec. 35 of the Constitution Act of New South Wales, scheduled to 18 and 19 Vic. c. 54. enacted that the Legislative Council and Legislative Assembly of that colony should, from time to time, prepare and adopt standing rules and orders, provided that uch rules and orders should be approved by the Governor. In pursuance of this power the Assembly adopted a standing order as follows: "In all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House." At the time when the standing order was so approved, it was one of the rules or usages of the Imperial Parliament for either House of Parliament to suspend from the service of the House for such period as it should name, or, without naming any period of suspension, until it should give directions in the matter, any member persistently and wilfully obstructing the business of the House. Subsequently to the passing of the standing order a rule was adopted by the House of Commons, authorizing the suspension of an obstructing member for a week on the first occasion, for a fortnight on the second occasion, and for a month on the third or any other occasion. The effect of this standing order was considered in 1884 by the Supreme Court of New South Wales, and afterwards by the Privy Council, on appeal, in the case of Taylor *v.* Barton (6 N.S.W. L.R. 1, 11 App. Ca. 197), in which the plaintiff, a member, sued the Speaker of the Legislative Assembly to recover damages for assault in directing the Serjeant-at-Arms to remove him from the Chamber. The plaintiff had been "suspended from the service of the House" for obstruction. No term of suspension was specified in the resolution directing suspension. Within a week from the passing of the resolution of suspension Mr. Taylor re-entered the chamber and was thereupon removed, which constituted the assault complained of.

It was held by the Supreme Court, and by the Privy Council on appeal, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed; that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the Governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order. (Barton [appellant] *v.* Taylor [respondent], 11 App. Ca. p. 197.)

The Privy Council was of opinion that the authority conferred upon the Legislative Assembly, by the Constitution Act, was not limited by the principles of common law applicable to those inherent powers which, without express grant, must be implied from mere necessity; but that its authority was sufficient to enable the Assembly to adopt from the Imperial Parliament, or pass by its own authority, any standing order giving itself power to punish an obstructing member, or remove him from the Chamber for any period longer than the current sitting. This of course could not be done by the Assembly without the Governor's assent. The affirmance of the judgment appealed from was founded on the view, not that it could not have been done, but that nothing appeared on the record which gave the resolution, suspending the respondent, a longer operation than the current sitting. (Barton *v.* Taylor, 11 App. Ca. 197.)

Section 34 of the Constitution Act of Victoria, scheduled to 18 and 19 Vic. c. 55 (1st July, 1855), authorized the Legislative Council and Legislative Assembly to prepare and adopt standing rules and orders, which, when approved by the Governor, should be binding and of full force in law. Sec. 35 of the same Act provided:—

"It shall be lawful for the Legislature of Victoria by any Act or Acts to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Council and Assembly and by the members thereof respectively. Provided that no such

privileges, immunities, or powers shall exceed those now held, enjoyed, and exercised by the Commons, House of Parliament, or the members thereof."

Section 35 of the Constitution of South Australia (24th Oct., 1856), contained a similar clause enabling the Parliament of that colony to declare its privileges in like manner. In pursuance of the power conferred by sec. 35 the Parliament of Victoria passed the Act 20 Vic. No. 1, of which sec. 3 (re-enacted in sec. 10 of the Constitution Act Amendment Act, 1890) was as follows: –

"The Legislative Council and Legislative Assembly of Victoria respectively, and the committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly respectively, and of the committees and members thereof respectively, are hereby defined to be the same as, at the time of the passing of 'The Constitution Statute' were held and enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with the said Act, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise."

On 29th April, 1862, Mr. George Dill, the publisher of the *Argus*, was arrested on a warrant signed by the Speaker of the Legislative Assembly, by direction thereof, on a charge of having printed and published a libel concerning the Assembly and one of its committees. On his being brought to the bar of the House, Mr. Dill was adjudged guilty of contempt, and was ordered to be detained in custody for the space of one month. Mr. Dill applied for, and was afterwards brought before a judge of the Supreme Court on, a writ of *habeas corpus*. Mr. Palmer, the Serjeant-at-Arms, made a return to the writ, justifying detention under the mandate of the warrant of the Speaker, according to the order of the House. The warrant in this case set forth the nature of the contempt complained of as the ground for commitment. It was held by the Court that the power given by sec. 35 of the Constitution Act was well exercised by the Legislature of Victoria in the enactment of 20 Vic. No. 1, sec. 3, that the Legislative Council and Legislative Assembly of Victoria have all the privileges, immunities and powers which were legally held, enjoyed, and exercised by the Commons House of Parliament at the time of the passing of the "Constitution Statute," and that the publication outside the House, in a newspaper, of an article which the Assemby adjudged to be a libel on the Assembly, on a select committee thereof, and on a member of each, qua such member, is a contempt for which the House has authority to commit. (*In re* Dill, 1 W. and W. [L.] 171.)

The offending publisher was then remanded in custody. Subsequently he brought an action against Sir Francis Murphy, the Speaker, for false imprisonment. In that action it was held by the Supreme Court that the impossibility of the Legislative Council and Assembly exercising the power of impeachment did not restrict the general words of sec. 35 of the Constitution Act creating the power, or render invalid an enactment which gave other powers that might be exercised by the Council and Assembly. (Dill *v.* Murphy, 1 W. and W., L. 342, 356.) On appeal to the Privy Council, the decision of the Supreme Court was affirmed. The word "defined" was held equivalent to "declared," and the power given by the Act had been properly exercised. (1864, 1 Moo. P.C. N.S. 487.)

On 11th March, 1869, the Legislative Assembly of Victoria appointed a select committee to enquire and report upon certain charges which had been made relating to the character and conduct of some of its members. Hugh Glass was examined as a witness before the committee, which afterwards reported to the House that Hugh Glass and John Quarterman had been guilty of bribing and unduly influencing certain members of the Assembly. Glass and Quarterman were then adjudged guilty of contempt and of breach of privilege. They were arrested on the Speaker's warrant, brought before the House, found guilty and committed to the custody of the keeper of the Melbourne gaol. The warrant in this case was couched in general terms, and did not recite particulars of the contempt and breach of privilege. Whilst they were in gaol the Speaker issued

another warrant against Glass, similar to the first except that it contained no reference to Quarterman. On 30th April Glass obtained a writ of *habeas corpus*, directed to the keeper of the gaol, who made a return to the writ, relying on the two warrants as the cause of his detaining the prisoner. The Chief Justice, Sir William F. Stawell, assisted by two other judges, heard the arguments of counsel for and against the discharge of Glass. On the 1st May prisoner was discharged on the ground that the warrant was bad, as it did not describe the contempt so as to show that it was of a kind for which the House of Commons might have committed in 1855. By direction of the House a rule *nisi* was obtained to set aside the order of the Chief Justice. This rule was argued before the Full Court, which decided that it had no jurisdiction to rescind the order of a judge made on the return to a writ of *habeas corpus*. The Speaker petitioned Her Majesty in Council for special leave to appeal against the decision of the Chief Justice, and also against that of the Full Court. On the case coming before the Privy Council for hearing, the appeal was allowed, and the orders of the court in the colony were reversed. The Privy Council held that the Assembly had, under sec. 35 of the Constitution Act and the Act 20 Vic. No. 1, the same powers and privileges as those of the House of Commons, and, among them, the power of judging for itself what is a contempt, and of committing for contempt by a warrant stating generally that a contempt has been committed. (Speaker of the Legislative Assembly *v.* Glass, 1871, L.R. 3 P.C. 560.)

The Legislative Assembly of Victoria, it has been held, does not possess the privilege, by passing resolutions imposing customs duties, to authorize the collection of those duties by a customs officer till the end of the session of Parliament in which such resolutions have been passed. The Supreme Court has power to determine the legality of the privilege. And the statement in the pleadings of such a privilege is a question of law and not of fact, and sec 2 of Act 20, Vic. No. 1, making the journals of the House of Commons, and consequently of the Assembly, *prima facie* evidence of the privilege, does not turn the privilege into a question of fact; and therefore the privilege could not be admitted by a demurrer to a plea averring such privilege. (Stevenson *v.* The Queen, 2 W.W. & A'B [L.] 143.)

§ 158. "Such as are Declared by the Parliament."

This section authorizes the Federal Parliament, by an ordinary act of legislation, to declare what shall be the powers, privileges, and immunities of the Senate and its members and committees, and of the House of Representatives and its members and committees. The limitation which is contained in sec. 18 of the Canadian Constitution (amended by 38 and 39 Vic. c. 38), in sec. 35 of the Victorian Constitution, and in sec. 35 of the South Australian Constitution, viz., that the powers, privileges, and immunities so declared shall not exceed those then held and enjoyed by the Commons House of Parliament, does not appear in this section. The Federal Parliament has therefore unrestricted authority to define and declare its powers, privileges and immunities. In the exercise of that authority it could not legally arrogate to itself a new jurisdiction, not within the scope of this section. In the absence of such legislation the powers, privileges, and immunities of each House, and of the committees and members of each House, will be those of the House of Commons, as known to law at the establishment of the Commonwealth.

Rules and orders.

50. Each House of the Parliament may make rules and orders[159] with respect to—

(i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:

(ii.) The order and conduct of its business and proceedings either separately or jointly with the other House.

UNITED STATES.—Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.—Const., Art. I., sec. 5, sub-s. 2.

HISTORICAL NOTE.—In the clause as adopted at the Sydney Convention of 1891, and the Adelaide session of the Convention of 1897, the matters as to which rules and orders might be made were somewhat elaborately defined in six sub-clauses, the last of which was: "Generally for the conduct of all business and proceedings of the Senate and House of Representatives severally and collectively." There was no sub-clause dealing with the exercise of powers, privileges, and immunities. At the Adelaide session, Sir Joseph Abbott called attention to the need of some power to protect the privileges of the Houses, and suggested that the power to make standing orders was too narrow. He moved to omit all the sub-sections, and insert words empowering each House to make such standing orders as it should think fit, and giving to such orders the force of law. This was objected to as being too wide, and Sir Joseph Abbott withdrew it. (Conv. Deb., Adel., pp 756-60.) At the Sydney session, on Mr. Isaacs' motion, the word "standing," before "rules and orders," was omitted. (Conv. Deb., Syd., 1897, p. 1035.) At the Melbourne session, before the first report, a new sub-clause was inserted: "The mode in which the powers, privileges, and immunities of the Senate and of the House of Representatives respectively may be exercised and upheld." After the fourth report the five specific sub-clauses were omitted, and verbal amendments were made.

§ 159. "Rules and Orders."

It will be observed that this section recognizes the important distinction between "powers, privileges, and immunities," and the "rules and orders" by which such powers, &c., are enforced.

Sub-sec. i. enables each House of the Federal Parliament to makes rules and orders, defining the mode or manner in which its powers, privileges, and immunities may be exercised and upheld. It does not authorize the declaration of any power, privilege, or immunity, but merely the procedure requisite for the maintenance and enforcement of the same. Thus, rules could be made prescribing the formalities to be observed in summoning persons to appear at the bar of the House, or to give evidence before its committees; the preparation, form, and execution of warrants for the arrest of persons guilty of contempt, and breach of privilege, and the form of warrants of commitment.

Sub-sec. ii. enables each House to make rules and orders regulating the conduct of its business and proceedings, either when acting separately, or when acting jointly with the other House. Rules and orders may, according to the practice of the Imperial Parliament, be classified as follows: (1) standing rules and orders, (2) sessional rules and orders, (3) orders and resolutions undetermined in regard to duration.

STANDING ORDERS.—These are permanent rules for the guidance and government of the House, which endure from Parliament to Parliament until vacated or repealed. They relate to such matters as the days on which the sittings of the House are held, the

hour for commencement of business, the sequence of business on each day, the distribution of business, the preservation of order, the closure of debate, the taking of divisions on question put, the progressive stages of bills, procedure in money bills, examination of public accounts, standing committees on particular subjects, form and reception of petitions, seats in the House, witnesses before the House and its committees, admission and withdrawal of strangers, and orders relating to the introduction and conduct of private bills. In the House of Lords a standing order cannot be suspended except in pursuance of notice of motion. In the Commons the rule is not so stringent, and in cases of emergency a standing order may be suspended without notice, but the unanimous concurrence of the House is generally necessary. (May, 10th ed. p. 145.)

Sessional Orders.—These are orders or resolutions which are intended and expressed to last for a session only and which expire at the end of the session.

Orders of Undefined Duration.—"By the custom of Parliament any order or resolution of either House the duration of which is undetermined, would expire with prorogation; but many of them are, as part of the settled practice of Parliament, observed in succeeding sessions, and by different Parliaments, without any formal renewal or repetition. For examples of resolutions being observed as permanent, without being made standing orders, may be cited the formal reading of a bill at the opening of a session; several resolutions regarding procedure on petitions; the resolution prohibiting members from engaging in the management of private bills; the time for presenting estimates; the rules of the committee of supply; and the means of securing a seat in the house by a member on a select committee." (May's Parl. Prac. 10th ed. p. 145.)

PART V.—POWERS OF THE PARLIAMENT.

Legislative powers[160] of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government[161] of the Commonwealth with respect to :—

United States.—The Congress shall have power :—Art 1., sec. 8.

Canada.—It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :—B.N.A. Act, 1867, sec. 91.

Historical Note.—In the Commonwealth Bill of 1891, the general words of this section were :—"The Parliament shall, subject to the provisions of this Constitution, have full power and authority to make all such laws as it thinks necessary for the peace, order, and good government of the Commonwealth, with respect to all or any of the matters following, that is to say." At the Adelaide session, 1897, these words were reproduced, except that the word "laws" was substituted for the phrase "all such laws as it thinks necessary." At the Sydney session, there was a short debate upon the words "peace, order, and good government." (Conv. Deb., Syd., 1897, pp. 1035-7.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 160. "Legislative Powers."

This important section, containing 39 sub-sections, enumerates the main legislative powers conferred on the Federal Parliament. They are not expressly described as either exclusive powers or concurrent powers, but an examination of their scope and intent, coupled with subsequent sections, will show clearly that, whilst some of them are powers which either never belonged to the States, or are taken from the States and are

vested wholly in the Federal Parliament to the exclusion of action by the State legislatures, others are powers which may be exercised concurrently by the Federal Parliament and by the State legislatures.

Classification of Powers.—The powers conferred on the Federal Parliament may be classified as (1) the new and original powers not previously exercised by the States, such as "Fisheries in Australian waters beyond territorial limits," "external affairs," "the relations of the Commonwealth with the islands of the Pacific," &c.; (2) old powers previously exercised by the colonies and re-distributed, some being (*a*) exclusively vested in the Federal Parliament, such as the power to impose duties of customs and excise, and the power to grant bounties on the production or export of goods, after the imposition of uniform duties of customs; and others being (*b*) concurrently exercised by the Federal Parliament and the State Parliaments such as taxation (except customs and excise), trade and commerce (except customs, excise, and bounties), quarantine, weights and measures, &c. The rule of construction is, that the legislative authority of the Federal Parliament with respect to any subject is not to be construed as exclusive, "unless from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive;" otherwise, "the true rule of interpretation is that the power is merely concurrent." (Story, Comm., § 438.)

Plenary Nature of the Powers.—An important point to consider is whether the Legislative powers vested in the Federal Parliament are to be regarded as plenary, absolute, and *quasi*-sovereign, or whether they are merely entrusted to the Federal Parliament as an agent of the Imperial Parliament, so as to come within the effect of the maxim *delegatus non potest delegare* (Broom's Leg. Max. 5th ed. p. 840), according to which a person or body to whom an office or duty is assigned by law cannot lawfully devolve that office or duty on another unless expressly authorized. The distinction between the two classes of powers, plenary and delegated, was discussed by the Privy Council in the case of The Queen *v.* Burah (1878), 3 App. Ca. p. 889. The question there raised was the legality of a section of an Act passed by the Governor-General in Council of India, conferring on the Lieutenant-Governor of Bengal the power to determine whether the Act or any part of it should be applied to certain districts. The Privy Council, per Lord Selborne, said:—

"Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the Legislative powers which it from time to time conferred." (Lord Selborne, The Queen *v.* Burah, 3 App. Ca. 906.)

At the same time their Lordships were of opinion that the Governor-General in Council could not create in India, and arm with general legislative authority, a new legislative body not created or authorized by the Imperial Act constituting a Council.

In the case of Hodge *v.* The Queen (1883), 9 App. Ca. 117, the question raised for the decision of the Privy Council was the constitutionality of the Liquor License Act (1877), ss. 4, 5, by which the Provincial Legislature of Ontario gave authority to a Board of Commissioners to enact regulations for the government of taverns. The appellant had been convicted for a breach of one of the regulations passed by the Commissioners, and he appealed on the grounds (*inter alia*) that the British North America Act, 1867, conferred no authority on the Provincial Legislatures to delegate their powers to Commissioners or any other persons; that a Legislature committing the power to make regulations to agents or delegates thereby effaced itself; and that the power conferred by the Imperial Parliament on the local Legislatures could be exercised in full by these bodies only, according to the maxim *delegatus non potest delegare*. The Privy Council

in considering the legislative power of the Provincial Legislatures pointed out the difference between their constitution and that of the Legislative Council of India.

"They are in no sense delegates of, or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province, and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its power intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide. (Per Sir B. Peacock: Hodge v. The Queen, 9 App. Ca. 132.)

Applying the principles established in the foregoing cases to the Constitution of the Commonwealth, we may draw the conclusions: (1) As the words of the Imperial Act, creating the Federal Parliament and conferring on it legislative powers, are similar in substance and intent to those of the British North America Act, conferring exclusive legislative authority, it follows that the Federal Parliament is in no sense a delegate or agent of, or acts under any mandate from, the Imperial Parliament. (2) Its authority within the limits prescribed by the Constitution are as plenary and ample as the Imperial Parliament in its plenitude possessed and could bestow. (3) Within those limits the Federal Parliament can do what the Imperial Parliament could do, and among other things it can entrust to a body of its own creation power to make by-laws and regulations respecting subjects within its jurisdiction.

Limitations of Federal Legislative Power.—As we proceed with an analytical examination of section 51 it will be seen that whilst several of its sub-sections contain grants of legislative power in general and unlimited terms, the grants conveyed by other sub-sections are qualified or subject to restraints. These are known as constitutional limitations. Take sub-section 1. There, the Federal Parliament is assigned power to legislate respecting trade and commerce "with other countries and among the States;" the words quoted are words of limitation excluding from Federal control the internal commerce of each State. This is obviously a federal limitation, justifiable by considerations of federal policy. It is not founded on any distrust of the Federal Legislature; it is not designed for the protection of individual citizens of the Commonwealth against the Federal Legislature. It is, in fact, one of the stipulations of the federal compact. So the condition annexed to the grant of taxing power is, that there must be no discrimination between States in the exercise of that power. This, again, is not a limitation for the protection of private citizens of the Commonwealth against the unequal use of the taxing power; it is founded on federal considerations; it is a part of the federal bargain, in which the States and the people thereof have acquiesced, making it one of the articles of the political partnership, as effectually as other leading principles of the Constitution. Another federal limitation annexed to a grant of legislative power is that bounties granted by the Federal Parliament "shall be uniform throughout the Commonwealth." The authority of the Federal Parliament over bounties is fettered in the same manner and for the same reasons that its authority to tax is fettered.

Attention having been drawn to federal limitations to be found in grants of power contained in sec. 51, the subject may be here further elucidated by the statement that sec. 51 is not the only section of the Constitution in which limitations to the grants therein made are to be found. Logically, if not for perspicuity, the limitation of a power ought to be associated with or in proximity to the conveyance of power. But this rule is not uniformally observed in the drafting of Constitutions. Thus the grant of power over trade and commerce in sec. 51-i. is subject to further qualifications and restrictions contained in subsequent sections. By sec. 92, the Federal Parliament, in common with the State Parliaments, is restrained from interfering with the freedom of inter-state trade and commerce. after the imposition of uniform duties of customs. By sec. 98, the Federal Parliament is unable to pass commercial regulations which may give preference to one State over another State. In like manner the taxing power is subject to other qualifications and restrictions. The Federal Parliament cannot impose a tax which would operate in derogation of the freedom and equality of inter-state trade and commerce ; secs. 92 and 98. It cannot impose a tax on property of any kind belonging to a State ; sec. 114.

The first part of sec. 115 declares that the Commonwealth (Federal Parliament) shall not make a law establishing any religion. This is an absolute prohibition, an absolute denial of power, which stands in contrast to a limitation or cutting down of a power which is granted. There is, in the Constitution, no express or implied grant of power over religion which the first part of this section can possibly qualify or limit (see Note § 462). The last part of the section, providing that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth," is a true and legitimate limitation of a power granted by sec. 69 ; yet that limitation cannot be described as a federal limitation, warrantable and explainable by federal considerations. It is a notable instance of a national, as compared with federal, limitation. It is an example of the limitation of power founded on what Mr. Lefroy calls "distrust of legislatures." (Law Quarterly Review, July, 1899, p. 286. See also Lefroy, Legisl. Power in Canada, Introd. p. xlv.)

Nature and Distribution of Powers.—It was competent for the people to invest the Federal government with all the powers they might deem proper and necessary, to extend or restrain these powers, and to give them a paramount authority. (Martin *v.* Hunter's Lessee, 1 Wheat. 304 ; Baker, Annot. Const. p. 15.)

The Federal government can claim no powers not granted to it by the Constitution ; powers actually granted must be such as are given expressly or by necessary implication. The instrument is to have a reasonable construction according to the import of its terms ; where a power is expressly given in general terms it is not to be confined to particular cases, unless that construction grows out of the context or by necessary implication. (*Id.*)

The Constitution deals in general language. It does not provide for minute specifications of powers or declare the means by which those powers shall be carried into execution. (*Id.*)

"I now pass to that which is, perhaps, the most delicate and most important part of this measure, the distribution of powers between the central government and the local authorities ; in this, I think, is comprised the main theory and constitution of the Federal Government ; on this depends the principal working of the new system ; the principal object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured on those questions that are of common import to all the Provinces, and at the same time to retain for each Province such an ample measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community." (Lord Carnarvon, in presenting the Canadian Constitution to the House of Lords, 1867.)

§ 161. "Peace, Order, and Good Government."

These, or words nearly similar, have been used in most of the Constitutional Act passed by the Imperial Parliament, conferring local legislatures on British colonies. The Act 14 Geo. III. c. 83, s. 12, authorized the legislative body appointed thereunder to make

ordinances for "the peace, welfare, and good government" of the province of Quebec. The Act 31 Geo. III. c 31 established legislatures for Upper Canada and Lower Canada respectively, with power to make laws for "the peace, welfare, and good government" thereof. The Act 3 and 4 Vic. c. 35, which united the Upper and Lower Provinces established a Parliament of two Houses with power to make laws for "the peace, welfare, and good government" of Canada. The British North America Act, 1867, (30 and 31 Vic c. 3) gave the Parliament of the Dominion of Canada power to make laws for "the peace, order, and good government of Canada," in relation to matters not exclusively assigned to the Provinces. By the Act of 9 Geo. IV. c. 83, s. 20, 1829, his Majesty was empowered to constitute, in the colonies of New South Wales and Van Diemen's Land respectively, Councils to make laws for "the welfare and good government" of the said colonies. By the Act 10 Geo. IV. c. 22, 1829, his Majesty was enabled to authorize any three or more persons resident in the settlement then known as Western Australia, to make and ordain laws, institutions and ordinances for "the peace, order, and good government" of the settlement. The Act 3 and 4 Vic. c. 62, s. 3, 1840, authorized Her Majesty to appoint a Legislative Council in any colony or colonies which might be erected in any islands comprised within the dependencies of New South Wales, and such Council was to be authorized to make laws for "the peace, order, and good government" of such colony. By 5 and 6 Vic. c. 76, 1842, there was created a legislative Council in and for New South Wales, with power to make laws for "the peace, welfare, and good government" of the colony. In the Act 13 and 14 Vic. c. 59, s. 14, 1850, the Governors and Legislative Councils of Victoria. Van Diemen's Land, South Australia, and Western Australia, established, or to be established under that Act, were authorized to make laws "for the peace, welfare, and good government" of the said colonies. By the Constitution Act of New South Wales, scheduled to 18 and 19 Vic. c. 54, a new legislature was created to make laws for the "peace, welfare and good government" of the colony. The Victorian Constitution Act, scheduled to 18 and 19 Vic. c. 55, established a legislature to make laws in and for Victoria in "all cases whatsoever." The Constitution Act of Tasmania (then Van Diemen's Land) of 1st Nov., 1854, called into existence a new legislature which was declared "to have and to exercise all the powers and functions of the Legislative Council" which it superseded. The Constitution Act of South Australia, No. 2, 1855-6, was similarly worded. The Order in Council of 6th June, 1859, creating a legislature in and for the colony of Queensland, authorized it to make laws for the good government of the colony, and to alter or repeal the Order in Council. By the Act to consolidate the law relating to the Constitution of Queensland dated 28th Dec., 1867, it was declared that Her Majesty by and with the advice and consent of the Council and Assembly could make laws for "the peace, welfare, and good government of the colony in all cases whatsoever."

Significance of the Words.—The Federal Parliament has not general power to make laws for "the peace, order, and good government of the Commonwealth," but only with respect to matters that are specifically enumerated in the section. The question has been raised as to whether the words "peace, order, and good government" may be construed so as to qualify, limit, or restrict the grant of power. Another question has been raised as to whether they will tend to increase, enlarge, or magnify the grant of power. These two questions will be found referred to in the extracts and cases given below.

Reference may be here made to a third question which has been raised, as to whether the words "for the peace, order, and good government of the Commonwealth" will prevent the Federal Parliament from passing a law which may be confined in its operation to a particular State. On this point some assistance may be derived from several leading Canadian cases. In Russell *v.* The Queen (1882), 7 App. Cas. 829, the Privy Council held that the Canada Temperance Act, 1878, which was passed by the Dominion Parliament, in order to abolish the retail traffic in intoxicating liquor within every provincial area, or local option district, in which a majority of the electors adopted

the Act, was a general law relating to the order, safety, and good morals of the Dominion, and was therefore within the power conferred upon the Dominion Parliament to make laws for "the peace, order, and good government of Canada." In Huson *v.* South Norwich (1895), 24 S.C.R. (Can.) p. 146, Strong, C.J., said "It is established by Russell *v.* The Queen that the Dominion, being invested with authority by section 91 to make laws for the peace, order, and good government of Canada, may pass what are denominated local option laws. But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular Province."

In the Liquor Prohibition Appeal Case, which came before the Privy Council (1896), App. Ca. 348, these observations of the Chief Justice were quoted by Mr. Haldane, when the following remarks were made:—Lord Watson: "I do not know that they must be general laws, not limited to any particular Province, that they must be for the benefit of the whole of the Provinces." Lord Herschell: "But to legislate in a matter which is a local matter, for one Province only, and merely say we thought it would be for the benefit of all Canada that Ontario should be made a sober place, would be to my mind legislation about which there would be a good deal of question. I think it is too narrow to say that the law must extend to every Province; but, on the other hand, it must not be local legislation in a particular Province." Lord Morris: "I think the Chief Justice is only dealing with the local option laws. . . It is the local option laws, and I think he is strictly right." (Printed Report of Case, pp. 149-50.)

Mr. Lefroy considers that Mr. Edward Blake's argument on the appeal contains a correct summary of the whole matter:—"You have," said Mr. Blake, "the powers limited, when you come to the Province, by the area and the objects; provincial area and provincial objects are the scope. I think each one of the provincial powers is indicated in itself to be for provincial purposes. Instead of setting that out generally at the commencement, in each one of the articles it is specifically stated. But you find, on the contrary, unlimited, save by the express exception, general powers both as to scope, area, and objects in the Dominion. There is, therefore, as I submit, nothing whatever to indicate in the least degree that the power of the Parliament of Canada was so limited as to those subjects on which it might enact that it could not, if the welfare of the whole community in its opinion demanded, enact with reference to particular parts of that community, the legislation which the conditions of that part might, in the interest of all, specially demand. It is quite true that it was hoped and expected, and it was a reasonable hope and expectation, that, as a rule, the legislation would be general, extending over the whole area, the subjects being common. But there is nothing in these powers which prescribes any such limitation, and it is perfectly clear that the peace, welfare, and good government of the whole community may demand, within the undisputed bounds of the legislative powers of the Dominion, an Act of Parliament affecting directly not the whole area, not the whole community, but some part of that community, as to these matters on which the Dominion has power to legislate for all." (Lefroy, Leg. Pow. in Canada, p. 580.)

"These words are copied from the several Acts of the Imperial Parliament providing for the establishment of legislatures in the various Australian colonies, and are perfectly appropriate when used in reference to the establishment of the legislature which is to possess plenary legislative powers, and have unlimited jurisdiction on all questions relating to the protection of life and property, and the enforcement of contractual rights of every kind; but it is very doubtful if they ought to find a place in connection with the definition and delegation of limited legislative powers which do not include matters relating to the daily protection of life and property, or to enforcement of private rights and obligations in general. It is true that they find a place in the 91st section of the British North America Act, which establishes a federal constitution for Canada: but the primary object of that Act is to limit the powers and jurisdiction of the provincial legislatures, and to vest the residuum of legislative authority in the Dominion of Canada in the federal parliament. The words in question may, therefore, fitly find a place in that Act, and they were relied upon in the case of Attorney-General of Canada *v.* the Attorney-General of Ontario, which was decided by the Privy Council last year (App. Ca. 1896) to uphold the Act of the Dominion Parliament, which had been challenged on

the ground that it had encroached upon the domain of the provincial legislatures. That decision, in effect, appears to me to be an argument against the insertion of the words in question in connection with the definition and delegation of the legislative powers of the Parliament of the Commonwealth, because they might, in some unforeseen and unexpected controversy, afford ground for an argument in favour of the jurisdiction of the Parliament of the Commonwealth in matters which the several States might claim to be wholly within their own legislative powers. It cannot be contended that they are required for the purpose of giving the Parliament of the Commonwealth full power to legislate with regard to all subjects mentioned in the sub-sections of section 51; and, if they are not required for that purpose, they must inevitably encourage the contention that they are inserted for some additional purpose. But, if their insertion is not intended to add in any way to the powers of Parliament, in relation to the matters mentioned in the sub-sections of section 51, then they violate the canon of drafting, which requires that no unnecessary words should be used in giving expression to the intention of the legislature. They are very properly inserted in section 52, because that section confers upon the Parliament of the Commonwealth plenary and exclusive powers in regard to the several matters mentioned in the sub-sections of that section. But their presence in section 51 tends to create a resemblance in the scope of the powers conferred by the two sections, whereas it would be much more desirable to make the difference in the purport of each section as apparent and emphatic as possible." (Memorandum by the Hon. A. Inglis Clark, M.P., Attorney-General for Tasmania, presented to the Federal Convention, Sydney Session, 1897.)

"I should like to submit for the consideration of the leader of the Convention the question whether the words which the legislature of Tasmania have proposed to omit might not raise the question whether legislation of the Federal Parliament was in every instance for the peace, order, and good government of the Commonwealth. Take, for instance, navigation laws. Might it not be contended that certain navigation laws were not for the peace, order, and good government of the Commonwealth, and might there not be litigation upon the point? We are giving very full powers to the Parliament of the Commonwealth, and might we not very well leave it to them to decide whether their legislation was for the peace, order, and good government of the Commonwealth? Surely that is sufficient, without our saying definitely that their legislation should be for the peace, order, and good government of the Commonwealth. I hope the leader of the Convention will give the matter full consideration with a view to seeing whether these words are not surplusage, and whether, therefore, they had better not be left out of the bill altogether." (Mr. N. E. Lewis, Conv. Deb., Syd., 1897, p. 1037.)

The point submitted for consideration by Mr. Clark and Mr. Lewis did not lead to any debate in the Convention. Mr. Barton stated he had read the reasons through very carefully, and he had been unable to discover that any of the evils which his hon. and learned friend Mr. Clark feared might be expected from leaving those words as they were. The powers were powers of legislation for the peace, order, and good government of the Commonwealth in respect of the matters specified. No construction in the world could confer any powers beyond the ambit of those specified.

In the case Riel *v.* The Queen, 10 App. Ca. 675, the question was raised as to the validity of a Canadian Act, 43 Vic. c. 25, providing for the administration of criminal justice in the North-west Territories. This Act was passed by the Dominion Parliament under the British North America Act, 1871, 34 and 35 Vic. c. 28, s. 4, which provided that that Parliament might, from time to time, make laws for the administration of peace, order, and good government, of any territory, not for the time being included in any Province. In delivering the judgment of the Privy Council, Lord Halsbury, L.C., said:—

"It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates; and, further, that if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to these objects, but which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact. Their lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this

country, have been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence." (10 App. Ca. 678, 1885.)

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51. (i.) Trade and commerce[162] with other countries, and among the States[163]:

UNITED STATES.—To regulate commerce with foreign nations and among the several States and with the Indian tribes.—Const. Art. I. sec. 8, subs. 2.

CANADA.—The Regulation of trade and commerce.—B.N.A. Act, s. 91-2.

HISTORICAL NOTE.—Earl Grey's Committee of the Privy Council in 1849 proposed to give the General Assembly power with respect to "The imposition of dues or other charges on shipping in every port or harbour" (p. 85, *supra*). Wentworth's Constitutional Committee in 1853 specified "The coasting trade;" and the Bill attached to Wentworth's memorial in 1857 specified "Navigation of connecting rivers." (Pp. 91, 94, *supra*.)

The sub-clause in the Commonwealth Bill of 1891 was worded "The regulation of trade and commerce with other countries, and among the several States." In Committee, the questions of railway gauges and railway tariffs were discussed. (Conv. Deb., Syd., 1891, pp. 662-70.) The same words were adopted at the Adelaide session, 1897. At the Sydney session, the liquor question was discussed (see Notes, sec. 113). (Conv. Deb., Syd., 1897, pp. 1037-65.) At the Melbourne session, after the second report, the river question was discussed (see Notes, sec. 100). (Conv. Deb., Melb., p. 1947-90.) After the fourth report, the words "the regulation of," and the word "several," were omitted.

§ 162 "Trade and Commerce."

PRELIMINARY DEFINITION.—Trade means the act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter. It comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills, or in money, but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail. (Webster's Internat. Dict.) Commerce means the exchange or buying and selling of commodities; especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic. (Webster's Internat. Dict.) The courts of the United States have, in a series of decisions, defined commerce to be both intercourse and traffic, and the regulation of commerce to be the prescribing of the rules by which intercourse and traffic shall be governed. (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196.) The object of investing the Federal Parliament with the power to deal with trade and commerce, was to secure uniform legislation, where such uniformity is practicable, against conflicting State legislation. (Western Union Telegraph Co. *v.* Pendleton, 122 U.S. 347.) The object is to secure uniformity against discriminating State legislation. (Welton *v.* Missouri, 91 U.S. 275.) Commerce includes all commercial traffic and intercourse. (Gibbons *v.* Ogden, 9 Wheat. 1; *The Daniel Ball*, 10 Wall. 557.) Sale is an ingredient of Commerce. (Brown *v.* Maryland, 12 Wheat. 441; Leisy *v.* Hardin, 135 U.S 100.) It means intercourse for the purpose of trade of all descriptions. (Corfield *v.* Coryell, 4 Wash. 371.) It comprehends everything that is grown, produced, or manufactured. (Welton *v.* Missouri, *supra*.) It extends to persons who conduct it as well as the means and instrumentalities used. (Cooley *v.* Port Wardens, 12 How. 299.) It includes vessels, railways, and other conveyances used in the transport of merchantable goods, as well as the goods themselves. (The Brig *Wilson v.* United States, 1 Brock. 423.) It embraces navigation and shipping.

(Cooley *v.* Port Wardens, *supra*); including free navigation of the navigable waters of the several States. (Corfield *v.* Coryell, *supra.*) It covers the right to improve navigable waters (South Carolina *v.* Georgia, 93 U.S. 4); and to remove nuisances and obstructions interfering with navigation. (Miller *v.* Mayor of New York, 109 U.S. 385.) It embraces railways, highways, and navigable waters along and over which commerce flows. (Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245.) It includes the freights and fares charged for transport. (State Freight Tax Cases, 15 Wall 232.) It includes passengers. (Passenger Cases, 7 How. 283.) Bills of exchange are instruments of commerce. (Nathan *v.* Louisiana, 8 How. 73.) Sending a telegraph message is commerce. (Western Union Telegraph Co. *v.* Alabama, 132 U.S. 472.) The power to regulate commerce is held in the United States to imply the power to construct railways, to promote and carry commerce. (California *v.* Central Pacific R. Co., 127 U.S. 1. See cases collected, Prentice and Egan's Commerce Clause of the Federal Constitution, U.S. [1898], p. 43.)

The power of the Congress of the United States is "to *regulate* trade and commerce." The power of the Parliament of Canada extends to "*the regulation of* trade and commerce." In this Constitution the words "the regulation of" have been omitted, and the Federal Parliament has been given power to make laws "in respect of trade and commerce." It has been held by the Privy Council that the power of the Parliament of Canada to regulate trade does not imply the power to prohibit trade. (Att.-Gen. for Ontario *v.* Att.-Gen. for Canada [1896], App. Ca. 363; and see note, § 163 *infra*, "Does Regulation Include Prohibition?") The omission of the words "the regulation of" can certainly not be held to narrow the scope of the power, and may perhaps in some degree extend it.

Aids to the Commerce Power.—There are several important sections in Chapter IV. of this Constitution, which strongly re-enforce the grant of power over commerce contained in this sub-section. By section 98 the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State. By section 101 the Federal Parliament is authorized to appoint an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder. By section 102 the Parliament may, by any law with respect to trade or commerce, forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State.

Limits of the Commerce Power.—The Federal power over commerce is not absolute or universal or unrestricted; it is subject to certain limitations and prohibitions, which will be found enumerated in the next note.

§ 163. "With Other Countries and Among the States."

Limits of the Commerce Power.—The power of the Federal Parliament to legislate concerning trade and commerce, whilst unbounded as regards the subject matter, is limited as regards its area and operation. Unlike the Parliament of Canada, whose commercial power is expressed by the words "trade and commerce," without qualification, the Parliament of the Commonwealth, like the Congress of the United States, can only deal with trade and commerce "with other countries and among the States." It therefore embraces inter-state trade and commerce, and foreign trade and commerce, but it cannot invade the domain occupied by the internal trade and commerce of a State. Commerce among the States is traffic, transportation and intercourse, between two points situated in different States. (Wabash, St. Louis and Pacific R. Co. *v.* Illinois, 118 U.S. 557.) Commerce among the States is commerce which begins in one State and ends in other, and it may pass through one or many States in its operation. (Gibbons *v.* Ogden, 9 Wheat. 1.) Freight carried from points without a State to points within

that State, or *vice versa*, is as much commerce among the several States as is freight taken up at points without the State and carried across it to points in other States. (Fargo *v.* Michigan, 121 U.S. 230.) The regulation of inter-state and foreign commerce is vested in the Federal Parliament, both as against the States and as against the other departments of the Federal Government. (Robbins *v.* Shelby Taxing District, 120 U.S. 489. See also Notes, § 427, *infra.*)

In addition to the constitutional limitations of the Federal power over commerce, expressed by the words "with other countries and among the States," the Federal power is subject to several other limitations and prohibitions. By section 92, trade, commerce, and intercourse among the States become absolutely free on the imposition of uniform duties of customs; so that the Federal Parliament, whilst it may assist and facilitate inter-state freetrade, is disabled from interfering with, or impairing the rule of, inter-state commercial freedom. By section 99 the Commonwealth is prohibited from giving preference to one State over another State, by any regulation of trade, commerce, or revenue.

Control of Domestic Commerce of States.—The control of the internal trade and commerce, which begins and ends in a State, and which does not cross its limits, is reserved exclusively to the State; it is beyond Federal control, and the right of regulating it, in each State, belongs to the State alone. (License Cases, 5 How. 504.) To this exclusive reservation of power over domestic trade and commerce of the States there is one notable exception; they cannot impose duties of excise on commodities produced or manufactured within their borders; the right of imposing duties of excise is exclusively vested in the Federal Parliament. (See sec. 90.)

Commerce Further Discussed.—Commerce is said to be the interchange of goods between nations or individuals, and transportation is the means by which it is carried on. There could be no commerce without transportation. (Philadelphia Steamship Co. *v.* Pennsylvania, 122 U.S. 326.) Actual transportation is the characteristic of inter-state and foreign commerce. The Federal authority over commerce extends to places, such as ports and harbours, in which vessels receive and discharge their frieght; to means and instrumentalities by which commerce is transported, such as ships and railways, and to the subjects of commercial intercourse such as commodities. (Von Holst, Const. Law, pp. 144-146.)

Transportation.—Federal control over the transportation of commerce embraces every agency employed in the movement of commerce, by land or by water, such as roads, stage coaches, railways, bridges, ships, navigable waters, ports and harbours All these are means or instruments by or through which the subjects of commerce are transferred, in order to facilitate exchange and intercourse. A ship is not commerce, but it is one of the chief means by which commerce is conducted. A railroad is not commerce, but it is one of the most important agencies by which commerce is transported. Telegraphs and telephones are instruments of commerce. Foreign or inter-state bills of exchange are instruments of commerce. (Nathan *v.* Louisiana, 8 How. 73.) The Federal control over commerce necessarily implies control of the means and instrumentalities of commerce. Accordingly it has been decided in the United States that the Federal power over commerce give the Federal legislature authority—

To establish or authorize the establishment of a bridge which obstructs the navigation of a river, or to order the removal of such a bridge, if its removal is necessary for the preservation of freedom of commerce. (Pennsylvania *v.* Wheeling Bridge Co., 18 How. 421; The Clinton Bridge, 10 Wall. 454; Miller *v.* Mayor of New York, 109 U.S. 385; Bridge Co. *v.* United States, 105 U.S. 470.)

To regulate boats carrying inter-state freight and passengers between two points within the same State. (*The Daniel Ball*, 10 Wall. 557.)

To regulate the liability, or immunity from liability, for accidents, of the owners of boats, plying the high seas between two points in the same State. (Lord v. Steamship Co., 102 U.S. 541.)

To improve the navigation of ports, harbours, and rivers. (Wisconsin *v.* Duluth, 96 U.S. 379.)

To establish railroads in order to promote inter-state commerce. (California *v.* Central Pacific R. Co , 127 U.S. 1.)

To establish telegraph companies authorized to carry on inter-state telegraphic business. (Pensacola Telegraph Co. *v.* Western Union Tel. Co., 96 U.S. 1 ; Western Union Telegraph Co. *v.* Alabama, 132 U.S. 472.)

To regulate liens on vessels. (White's Bank *v.* Smith, 7 Wall. 646.)

To grant corporations carrying on inter-state trade the right of eminent domain through a State. (Winconsin *v.* Duluth, 96 U.S. 379.)

Travel.—The movement and personal intercourse of individuals engaged in commerce, or entitled to be so engaged, is a branch of commerce. The arrival and departure of passengers from one State to another, and the embarkation and disembarkation of passengers by sea, is also a branch of commerce. (Passenger Cases, 7 How. 283 ; Welton *v.* Missouri, 91 U.S. 275 ; Mobile *v.* Kimball, 102 U.S. 691.)

The Subjects of Commerce.—Commodities, ordinarily intended and fit to be exchanged, are the usual subjects of commerce. The question whether an article is or is not a subject of commerce has to be determined by the usages of the commercial world ; it does not depend upon the declaration of any State. (Bowman *v.* Chicago, &c., R. Co. 125 U S. 465 ; Leisy *v.* Hardin, 135 U.S. 100.) Passengers from one State to another, or from foreign States to federal jurisdiction, are subjects of the commerce power.

What are not Subjects of Commerce.—All commodities are not always the subjects of commerce ; they, at certain stages, may lose that quality. Of course land, not being transportable, could never become the subject of commerce. At the same time certain things, though capable of being transported and exchanged, do not come within the true definition of commerce. Thus meat, at one time, may be a fit article of commerce ; if it becomes putrid it ceases to be merchantable ; it loses its commercial quality and passes beyond the domain of the commercial power. Obscene books and noxious drugs, though capable of being exchanged, are not subjects of commerce. (Preston *v.* Finley, 72 Fed Rep. 850.) Indecent publications and articles may be excluded from Federal mails by Federal authority, and their transportation may be forbidden either by Federal or State authority. The maxim is that there can be no commerce in disease, pestilence, crime, pauperism and immorality. (Per Chief Justice Taney in License Cases [liquor], 5 How. 585 ; Railroad Co. *v.* Husen, 95 U.S. 465.) Passengers, goods, or animals infected with disease, and passengers who are known to be criminals, paupers, idiots, lunatics, or persons likely to become a public charge on a State, are not subjects of commerce ; hence they may be excluded from a State by State legislation in the exercise of its reserved police power. (See authorities collected, Prentice and Egan, Commerce Clause, p. 56.) As a further illustration, it may be mentioned that a corpse is not property, and is not capable of being a legitimate subject of commerce. (*Re* Wong Yung Quy, 6 Sawy. 442.) Banks and insurance companies are not commercial institutions. (See Federal Commerce.)

Production and Manufacture.—The growth, production and manufacture of commodities, and their preparation for transit, do not constitute commerce. Commerce only begins where manufacture and production end. (Kidd *v.* Pearson, 128 U.S. 1.) The mere fact that commodities have been manufactured, and are intended for other States or countries, does not bring them within federal protection and control. (Prentice and Egan, Commerce Clause, p. 55.) Hence a State may forbid the manufacture of commodities such as intoxicating liquors and oleomargarine, provided that such prohibition is not in conflict with the exercise of any other federal power, such as a law offering bounties for production or export. (See note, § 456.)

Occupations not within Federal Control.—It has been decided in the United States that the following occupations do not come within federal commerce: the business of a building and loan association, loaning money, dealing in foreign lands, conducting a manufacturing establishment in another State, mining, practicing medicine in connection with the sale of imported drugs.

When Federal Control over Commerce Begins.—Commerce does not come within Federal protection or control until its transportation from one State to another, or from a State to a foreign country, has begun. Even preparation for exportation is not sufficient. The deposit of logs in a river running within one State, in order to ship them into another State, does not mark the beginning of Federal jurisdiction. (Coe *v.* Errol, 116 U.S. 517; Pace *v.* Burgess, 92 U.S. 372.) Other cases seem to suggest that inter-state commerce begins with negotiations and contracts looking to transportation among the States (Walling *v.* Michigan, 116 U.S. 446; Robbins *v.* Shelby Taxing District, 120 U.S. 489.) When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. (Per Mr. Justice Bradley in Coe *v.* Errol, 116 U.S. 517; see, however, note, § 427 *infra.*)

Duration of Federal Control.—As long as the goods are *in transitu* they remain the subjects of Federal commerce. (*The Daniel Ball*, 10 Wall. 557.) A transhipment of freight which has once started upon its passage to another State does not break up the carriage so as to bring it within the control of a single State.

Interruption of Transit.—Goods and passengers in course of transportation from one State to another do not lose their inter-state character by a temporary stoppage in an intermediate State. Having once started on their passage from a State to a State, they do not break their carriage by a transhipment in an intermediate State, so as to bring them within the taxing power of that State. (*The Daniel Ball*, 10 Wall. 557.) Where coal was shipped in Pennsylvania by a company to its agents in New Jersey, in which State it was assorted and reshipped to New York as advice of sales was received, it was held that the temporary delay in New Jersey had not terminated its transit so as to subject it to State taxation in New Jersey. (State *v.* Engle, 34 New Jers. L. 435.) In Kelley *v.* Rhoads (51 Pac. Rep. [Wyo.] 593), the validity of a tax collected by the State of Wyoming, on a flock of sheep which was being driven from Utah through Wyoming to Nebraska, was questioned. The court recognized the principle that "no tax could be laid upon property in transit from one State to another, but, if the sheep were brought into the State to find grazing grounds, inter-state transportation ceased when the grazing grounds were found. The question upon which the validity of the tax depended was, therefore, a question of purpose—whether the grazing was incidental to the transportation, or whether the transportation was incidental to the grazing. It is not true that every time a person drives his herds into a State, intending, at some future period, to pass from it into another State, his cattle are wholly beyond State jurisdiction. It would be possible under such a rule, by selecting a circuitous route, to avoid taxation upon grazing animals." (Prentice and Egan, Commerce Clause, p. 64.) In considering the question of *situs* in such cases, it is necessary to look to the course and method of travel, the character of the live-stock and of the territory grazed upon, the time employed, possibly the time of year, and all other considerations which would throw light upon the purpose of the owner; and where, upon such examination, it is found that property is kept within the State for some other purpose than that of transportation, the original movement must be considered as abandoned." (*Id.*)

The End of Transit.—Goods and passengers, subjects of Federal commerce, having once started on their passage, remain subject to Federal control and entitled to Federal protection until the end of the transit, and until they are lost and intermingled in the

general mass of property and people of the State in which they arrive. (Passenger Cases, 7 How. 405; Head Money Cases, 112 U.S. 580.) Some embarrassment has been experienced in determining the exact point of time and place at which this commingling is accomplished, when Federal control ends and when municipal control begins. In the great case of Brown *v.* Maryland, the Court referred to the difficulty of distinguishing between the restriction placed upon the power of the States to lay taxes on imports, and their acknowledged power to tax persons and property within their jurisdiction. It was observed that the two, "though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them; yet the distinction exists, and it must be marked as the cases arise." The Court, after observing that it might be premature to state any rule as being universal in its application, held that "when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but, while remaining the property of the importer in his warehouse, in the original form and package in which it was imported, the tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (Per Marshall, C.J., in Brown *v.* Maryland, 12 Wheat. 419, Boyd Const. Cases, p. 197.)

In delivering the judgment of the Court in Welton *v.* Missouri, 91 U.S. 275, Mr. Justice Field, referring to this judgment, said:—

"Following the guarded language of the Court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."

Navigation, Shipping and Railways.—The power of the Federal Parliament to make laws with respect to trade and commerce extends to navigation and shipping and to railways, the property of any State. See section 98.

Internal Improvements.—The power over commerce carries with it the power to authorize internal improvements necessary for the promotion and advancement of commerce. For this purpose the Federal legislature may make surveys of coasts, rivers, harbours, and highways, and may construct works tending to increase the facilities for transportation by sea and by land; may construct bridges over navigable waters; may clear and keep clear navigable streams; may remove wrecks from rivers and harbours. So liberal a construction has this power received in the United States, that it has been held sufficient to authorize the incorporation of railway and highway companies, having a right to engage in inter-state commerce, and to compulsorily acquire private property within the States for that purpose. (Cherokee Nation *v.* South Kansas Railway Co., 135 U.S. 641; California *v.* Central Pacific R. Co., 127 U.S. 1.)

Freights and Fares.—The States may regulate freights and fares charged for domestic transportation, but they cannot regulate inter-state freights and fares. (Wabash Railway Co. *v.* Illinois, 118 U.S. 557; Smyth *v.* Ames, 169 U.S. 466.) The question was for a considerable time discussed in America, whether the mere grant of power to regulate commerce conferred on the Federal legislature authority to fix the rates for inter-state carriage. It was admitted that Congress had power to prevent unjust discriminations in inter-state transportation, and that it could make legislative provision enabling those having just cause of complaint to bring actions at law to recover unreasonable charges. Hence it was argued that, if Congress could prohibit unreasonable charges, it impliedly had the power to determine what charges should be deemed reasonable. (Prentice and Egan, Commerce Clause, p. 287.) If the States were deprived of jurisdiction to settle freights and fares in inter-state traffic, it was

reasoned that the power must be lodged in the Federal legislature. It is now admitted that Congress has plenary power to regulate the rates of inter-state and foreign commerce. (Covington and Cincinnati Bridge Co. *v.* Kentucky, 154 U.S. 204; New York Board of Trade *v.* Pennsylvania R. Co., 3 Inter-State Com. Rep. 417; Kauffman Milling Co. *v.* Missouri Pacific Railroad Co., 3 Inter-State Com. Rep. 400.)

Inter-State Commerce Commission.—The Constitution of the United States contains no clause authorizing Congress to appoint an Inter-State Commerce Commission; but such a Commission has been authorized and appointed under and by virtue of the power vested in Congress to regulate commerce. This is a striking illustration of the vastness and elasticity of the commerce power. The first Inter-State Commerce Act was passed on 4th Feb., 1887; it was amended on 2nd March, 1889; again amended on 10th Feb., 1891, and finally on 11th Feb., 1893. The general outlines of this legislation and the principles deducible therefrom will be found discussed in Inter-State Com. Commission *v.* Baltimore and Ohio Railroad Co., 1892, 145 U.S. 263; Inter-State C. C. *v.* Brimson, 1894, 154 U.S. 447; Inter-State C. C. *v.* Alabama Midland Railway Co., 1896, 5 Inter-State Com. Rep. 685; Inter-State C. C. *v.* Alabama Midland Railway Co., 1897, 168 U.S. 144. (See Notes, secs. 101, 102.)

Leading American Commerce Cases.—A review in their chronological sequence of some of the leading cases decided by the Supreme Court of the United States, under the Commerce Clause of that Constitution, and a reference to the dominating principles which run through them, will serve as an introduction to the study of the Commerce Clause of the Constitution of the Commonwealth. Among those decisions some will appear to be inconsistent with others. The explanation is that the current of legal construction has not been, at all times, along and within the same lines of progress; its course has been, at certain stages, influenced by different principles of interpretation. Changes in the *personnel* of the Court, the growth of new commercial interests conflicting with old ones, the expansion of commerce simultaneously with the growth of the nation, the determination of the State rights party, at the period of Federal history preceding the Civil War, to enforce their views in favour of State sovereignty, the ultimate overthrow of that party and its dangerous doctrines, the progress of the nation and the national idea gradually overshadowing the idea of State supremacy, were circumstances which occasionally and naturally found expression in the, at times, varying and apparently irreconcilable judgments of the Supreme tribunal.

Gibbons v. Ogden, 9 Wheat 1 (1824).—This was the first great case decided under the Commerce Clause of the United States. It stands like a high land-mark in the constitutional history of that country. The facts were few and brief. The legislature of the State of New York gave to Robert Livingstone and Robert Fulton the exclusive right to navigate all waters within the jurisdiction of the State with vessels propelled by steam. Ogden acquired the rights of Livingstone and Fulton. Gibbons, having obtained a license to run a steam-boat under the Acts of Congress regulating the coasting trade, navigated the Bay of New York with a steamer between New York city and Elizabeth Port in New Jersey. Ogden commenced a suit against Gibbons in the New York Courts in order to restrain him from navigating those waters, in breach of his exclusive right under the laws of the State. The State Courts held that the statute of New York was valid, and granted an injunction restraining Gibbons. Gibbons then appealed to the Supreme Court of the United States, his contention, as presented by his counsel, Daniel Webster, being that the New York statute contravened the clause of the Constitution conferring upon Congress the power to regulate commerce among the States, and that it was therefore void.

The judgment of the Court was delivered by Chief Justice Marshall, the first great champion and interpreter of the Constitution. That judgment has been described by competent authorities as a master-piece of reasoning and a monument of learning, well worthy of the momentous issue involved. The following passages from this historical judgment will be read with interest :—

"The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.

"If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood and must have been so understood when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The Convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.

"If the opinion that 'commerce,' as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made those exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted." (9 Wheat. pp. 189-191.)

"To what commerce does this power extend? The Constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.' It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." *Id.*, p. 193.

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single govern-

ment, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies." (*Id.* pp. 196-7.)

Applying the principles here discussed to the facts of the case, the Chief Justice decided the following propositions:—

1. That the law of New York giving the exclusive right of navigation to Livingstone and Fulton and their assigns was in collision with the Federal law regulating the coastal trade; that the Federal law on this subject was the supreme law; that the State laws must yield to that supremacy, even though enacted in pursuance of powers reserved to the State. (9 Wheat. 210.)

2. That a coasting license under an Act of Congress passed for the regulation of the coasting trade gave a legal permission to carry on that trade. (9 Wheat. 212.)

3. That the Act of Congress regulating the coasting trade applied to steamers as well as to sailing ships. (9 Wheat. 219.)

This case did not decide that the mere grant to Congress, by the Constitution, of the power to regulate foreign and inter-state commerce excluded *ipso facto* the States from the exercise of a similar power. At the same time some of the reasoning of the Chief Justice evidently led to that conclusion, while Mr. Justice Johnson was distinctly of that opinion. It did, however, expressly decide that the grant in the Constitution, coupled with Federal legislation in pursuance thereof, removed the subject matter absolutely from the jurisdiction of the States. (Pomeroy, Constitutional Law, 10th ed. p. 284.)

We have now to consider how far the principles affirmed in Gibbons *v.* Ogden would be applicable to the interpretation of the Australian Constitution. In order to determine this question, the power granted by sec. 51—i. must be read in conjunction with secs. 108-109, which, shortly summarized, provide that a State law, relating to any matter within the powers of the Federal Parliament, shall continue in force in the State; that until provision is made in that behalf by the Federal Parliament the Parliament of the State may alter or repeal any such laws; but when a law of a State is inconsistent with a law of the Commonwealth the latter prevails, and the former, to the extent of the inconsistency, becomes invalid. These clauses may be compared with Art. VI. sec. 2 of the Constitution of the United States, which declares that the Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land. It seems clear, therefore, that should a similar conflict arise in the Commonwealth between rights claimed under a State law and rights claimed under a Federal law, the High Court would give a decision similar to that rendered in Gibbons *v.* Ogden. This statement leaves out of consideration the question discussed by Chief Justice Marshall, but not necessarily decided, whether the mere grant of power to Congress to regulate foreign and inter-state commerce *ipso facto* excluded the State legislatures from the exercise of a concurrent power, even in the absence Federal legislation. This point pervades the argument in most of American commerce cases, and it was not finally settled until the case of Cooley *v.* Port Wardens, 12 How. 299, see *infra*. On account of the special provisions of secs. 90 and

108 the question of exclusiveness or concurrency of the commerce power will not prove such an embarrassing and perplexing problem, in the interpretation of the Constitution of the Commonwealth, as it has been in the interpretation of the Constitution of the United States. Section 108 is intended to confer on the Parliaments of the States the right known in Federal jurisprudence as that of concurrent legislation ; that is, the right to legislate on subjects transferred to the Federal Parliament, until the Federal Parliament interferes, and deals with those subjects in a manner inconsistent with State laws. That right of concurrent legislation, however, is expressly limited by sec. 90. By that section the power of the Federal Parliament to impose duties of customs and of excise, and to grant bounties, becomes exclusive on and after a certain event ; with reference therefore to customs, excise, and bounties, State laws will be null and void absolutely on and after the given event, irrespective of the question of consistency or inconsistency. But other State laws relating to commerce will only be void to the extent of their inconsistency either with the Constitution or with Federal laws made in pursuance thereof.

But sec. 108 will only enable the State Parliaments to deal with such a question as was involved in Gibbons *v.* Ogden, until the Federal Parliament has legislated and authorized others to use the navigable waters ; then the Federal license will override the previously granted State monopoly.

Brown v. Maryland, 12 Wheat. 419 (1827).—The State of Maryland passed a statute requiring every importer of foreign goods by bale or package, and every person selling the same by the wholesale bale or package, to take out a license, for which a fee was required ; in default of a license he was liable to a penalty. One Brown violated the statute by importing foreign goods and selling them without a license. He was indicted in the State courts, and he demurred to the indictment, contending that the State law was contrary to the Constitution, and therefore null and void. The courts of Maryland gave judgment against him, and he then appealed to the Supreme Court of the United States. The constitutionality of the State law was assailed on the grounds :—(1.) That it contravened the clause in the Constitution forbidding States to lay duties on imports, and (2) that it contravened the laws granting to Congress power of regulating foreign and inter-state commerce. The judgment of the court was delivered by Chief Justice Marshall. It was held that the State law was void on both grounds. The right to import had already been granted by Congress, and that right, the Court said, involved a right on the part of the importer to sell ; and any State law which imposed a tax upon the exercise of that right was in collision with the Federal law, and therefore invalid. It was also held that the State law was repugnant to that clause of the Constitution which empowered Congress to regulate foreign and inter-state commerce. The judgment then proceeded :—

"If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse ; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported ? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported ? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them ? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced, that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside ? not, how far will it probably be abused ? The power

claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable. If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." (Per Chief Justice Marshall in Brown *v.* Maryland, 12 Wheat. pp. 446-7.)

The principles affirmed in Brown *v.* Maryland would be sustained by the High Court in a similar case arising under the Constitution of the Commonwealth, by virtue of the provision of sec. 90, subject, however, to sec. 113.

Willson v. Blackbird Creek Marsh Co., 2 Pet. 242 (1829).—The Blackbird Creek Marsh Co. was incorporated by a statute of Delaware, and it owned certain marsh land bordering on the Blackbird Creek, a small stream in which the tide ebbed and flowed from the ocean. The company was authorized by the State to make a dam across the creek and to embank the marsh, the object being to reclaim and improve the adjacent land. The company constructed the dam, owing to which the navigation of the stream was obstructed. Willson was the owner of a sloop licensed to trade by the law of the United States. In order to navigate the stream he broke the dam, and the company sued him to recover compensation for the destruction of the dam. The defendant justified the trespass, contending that he had a right to navigate the creek, by virtue of his Federal license and enrolment; that, the dam being an unlawful obstruction to his right, he was entitled to remove t. The company demurred to this defence, and the question was then raised as to the validity of the State statute. The courts of Delaware sustained the statute and gave judgment against Willson, who then appealed to the Supreme Court of the United States. The appeal was dismissed, the State statute being held valid. The judgment of the Court was delivered by Chief Justice Marshall. In the course of the judgment he said:—

"The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which the Court can take no cognizance. The counsel for the plaintiff in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, we should not feel much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." (2 Pet. pp. 251-3.)

The decision of the Court in the Blackbird Creek case, though often criticized as being inconsistent with Gibbons *v.* Ogden and Brown *v.* Maryland, has never been overruled, but has always been sustained. (Pound *v.* Turck, 95 U.S. 459; Hatch *v.* Willamette Iron Bridge Co., 6 Fed. Rep. 326.) It is now considered that the true principle,

by which the Blackbird Creek case can be reconciled with its two memorable predecessors, is that the Delaware statute, by which the dam was authorized, was purely a police regulation for the reclamation of the adjacent marshes, in the interests of public health. This at any rate was the solution of the apparent conflict suggested in Pennsylvania *v.* The Wheeling Bridge Company (13 How. 566). A similar decision would, no doubt, be given under the Constitution of the Commonwealth, especially in view of sections 108 and 109.

New York v. Miln, 11 Pet. 102 (1837).—The State of New York passed a statute providing that every master of a vessel arriving in the port of New York from another State, or from a foreign country, should, within twenty-four hours, report to the local authorities the name, age, and last place of settlement of every passenger; in default thereof he was liable to a penalty. Miln, the master of the ship *Emily*, omitted to give the required report and was sued for the penalty; his defence was that the statute of New York assumed to regulate commerce between New York and foreign countries, and was therefore unconstitutional and void. The case came before the Supreme Court of the United States. It was twice argued; after the first argument, and before judgment was given, Chief Justice Marshall died, and was succeeded by Chief Justice Taney. The case was then re-argued, and the judgment of the Court was delivered by Mr. Justice Barbour. It was held that the New York statute was valid; that it was not a regulation of commerce, but merely a police regulation. Mr. Justice Story dissented from the judgment. He was of opinion that, though the New York statute might be a police regulation, it was certainly also a regulation of commerce; that the power to regulate commerce was exclusively vested in Congress; that full power to regulate a particular subject implied the whole power and left no residuum; that a grant of the whole to one was incompatible with a grant of a part to the other; and that the police powers of the States could not be enforced by laws which trenched upon the exclusive powers of Congress. This case is interesting as containing an authoritative definition of the police powers of a State, as will be seen from the following extracts:—

"We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion we have formed renders it unnecessary. In other words, we are of opinion that the Act is not a regulation of commerce, but of police; and that, being thus considered, it was passed in the exercise of a power which rightfully belonged to the States. . . . If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the States. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment. It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the States; and for that purpose a report was required of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers. Now, we hold that both the end and the means here used are within the competency of the States. . . . We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." (11 Pet. pp. 132-139.)

The case of New York *v.* Miln was the first one in which an important judicial decision was given in the direction of the recognition of State rights. It is said that the judgment went far beyond the point which it was necessary to decide. Mr. Justice Barbour enunciated, for the first time, the doctrine that the police power reserved to the States was in itself a "complete, unqualified, and exclusive power," a doctrine

which was afterwards elaborated with dangerous persistency until it was finally destroyed by the Civil War.

It is quite probable, however, that whilst neither the extreme doctrine of the Federal exclusiveness of the commercial power contended for by Mr. Justice Story, nor the extreme doctrine of the exclusiveness of the police power of the State advocated by Mr. Justice Barbour, could be applied to the construction of the Constitution of the Commonwealth, the decision itself in New York *v.* Miln would be followed by the High Court on the ground that the demand of information by the State authorities, as to the name, age, and last place of settlement of those about to land and to become added to the population of the State, would not interfere with that freedom of commerce and intercourse required by sec. 92.

The License Cases, 5 How. 504 (1847).—These were three cases known as Thurlow *v.* Massachusetts, Fletcher *v.* Rhode Island, and Peirce *v.* New Hampshire. In each of these cases a private individual was prosecuted by a State for selling spirituous liquors within the State without having a license as required by the law of the State. In each case the validity of the law of the State was called in question, on the ground that it was repugnant to the Commerce Clause of the Federal Constitution. In the Massachusetts and Rhode Island cases the liquor sold was not imported by the defendant, but had been bought by him from the original importer. The Supreme Court had no difficulty in holding that those cases were distinguishable from Brown *v.* Maryland inasmuch as the liquor had passed beyond the hands of the original importer, had become a part of the general property of the State, and was therefore subject to the power of the State to regulate purely internal commerce and to pass police laws. In the New Hampshire case, however, the defendant had bought a barrel of gin in Boston, in the State of Massachusetts, and carried it coastwise to a port in New Hampshire, where he sold it in its original package. A strong attempt was made to commit the court to the theory that jurisdiction over commerce was, in all cases, concurrent in the nation and in the States. It is absolutely impossible, however, to say what the court decided. Although all the judges came to the same conclusion—that the State laws were valid—hardly two, much less a majority, agreed in the reasons for their judgment, and the rules of law applicable to the cases. (Pomeroy's Constitutional Law, 10th ed. pp. 293-4.) Chief Justice Taney was of opinion that even in the New Hampshire case the facts were different from those in Brown *v.* Maryland, the State statute in the latter case applying to foreign goods, in respect to the importation of which Congress had fully legislated. But Congress had not legislated in regard to goods carried from one State to another; the navigation laws did not apply to the goods which are transported, but only to the vessels which transport; the foreign importation statutes covered the introduction of articles from abroad, but no corresponding statute applied to traffic among the States. In the opinion of the Chief Justice, the question was therefore directly presented, whether the mere grant to Congress of power to regulate commerce was exclusive and prohibitory upon the States, or whether it required a statute of the national legislature, passed in pursuance to such grant, to oust the States of jurisdiction. He adopted the latter of these views, and therefore held the law of New Hampshire valid. The case which he principally relied upon, as confirmatory of his doctrines, was Willson *v.* Blackbird Creek Marsh Co. (Pomeroy's Constitutional Law, 10th ed. pp. 294-5)

Mr. Justice Woodbury took a middle course, and, for the first time in the history of the court, formulated the modern rule. In several respects, he said, the power granted is not in its nature more exclusive of action on the part of the States than are other powers granted to Congress. So far as regards the uniformity of a regulation reaching to all the States, the commercial power "must of course be exclusive," but in many local matters it not only permits but requires the concurrent and auxiliary action of the States. "There is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it.

Such are the deposit of ballast in harbours, the extension of wharves into tide water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds." (Prentice and Egan, Commerce Clause, p. 24.)

Referring to this decision, Dr. Pomeroy says:—"In reviewing these extraordinary License Cases, it is plain that the court did not overrule the former decisions of Gibbons *v.* Ogden and Brown *v.* Maryland. On the other hand, it would appear that five of the justices, Taney, Catron, Daniel, Nelson, and Woodbury, concurred in the proposition that it requires, at least, a statute of Congress, passed in pursuance of the general grant of power in the Constitution, to inhibit the State legislatures from enacting laws which regulate commerce; while two of the justices, McLean and Grier, did not adopt this view. Two, Daniel and Woodbury, pushed their conclusions much further; and two, Wayne and McKinley, were absent, or took no part in the decision. Whatever rule, however, was established by this judgment, was entirely unsettled by the next cases which came before the same high tribunal for adjudication." (Constitutional Law, 10th ed. pp. 296-7.)

How far are these cases applicable to the Constitution of the Commonwealth? It appears that in the Massachusetts and Rhode Island cases the liquor had passed out of the hands of the original importer; it had consequently ceased to form a part of inter-state commerce; it had merged into and become a constituent of the general mass of the internal commerce of a State. It was therefore liable to the local licensing laws of the State; and this would be so held under our Constitution. Such licensing laws would not be contrary to section 92, which provides that commerce and intercourse among the States shall be "absolutely free," because the liquor had passed beyond the stage of inter-state commerce; it had passed beyond Federal protection and control. In point of fact it ceased to be a part of inter-state commerce immediately after the first sale within the State. In the New Hampshire case, however, the facts were different. There Peirce had bought a barrel of gin in one State, Massachusetts, and imported it into another State, New Hampshire, where he sold it in its original package without a license, for which he was convicted. Now according to sec. 92 of our Constitution, Peirce would have been entitled to demand the free admission of the barrel of gin from one State into another, but the question then arises, what effect has sec. 113, if any, in modifying sec. 92? Section 113 is as follows:—

"All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State."

These two sections 92 and 113 have to be read together. What is the meaning of "passing into a State?" Will the doctrine of Peirce *v.* New Hampshire apply so as to prohibit the first sale in the original package except in accordance with the licensing laws of the State? If that be so, and the goods cannot be sold without a license, how will the commerce be "absolutely free" under sec. 92? These points require careful consideration. Meanwhile we may add to this note respecting Peirce *v.* New Hampshire, that it was subsequently overruled in the case of Bowman *v.* Chicago R. Co., 125 U.S. 465; Leisy *v.* Hardin, 135 U.S. 100. (See Note, § 456, *infra.*)

The Passenger Cases, 7 How. 283 (1849).—In these cases, Smith *v.* Turner from New York, and Norris *v.* Boston from Massachusetts, the defendants were prosecuted for breach of State laws. A statute of New York provided that the health officer of the port should be entitled to receive from the master of every vessel arriving in port a certain sum for each steerage passenger brought to the port from another State, or from a foreign country. This money, when collected, was applied to the support of a marine hospital. Masters neglecting to pay the sum demanded in respect to each passenger were liable to be prosecuted and fined. A similar statute was passed in Massachusetts. The defence raised in each case was that the State statute was unconstitutional; in

reply to which it was contended that the provisions of the Acts were merely rules of internal police, and that the cases were identical in principle with New York *v.* Miln. The Court distinguished the principles at issue from that affirmed in New York *v.* Miln. The police regulation in that case did not interfere with commerce in any way. No duty was laid, either upon the vessel or passengers; nothing but a report was required from the master of each vessel, and the decision was that every State had an unquestionable right to keep a register of the names of persons who came within to reside there temporarily or permanently. But in these cases the regulations imposed a tax or duty on the passengers, officers, and sailors, holding the master responsible for payment of the amount at the end of the voyage, and necessarily before the passengers had set their feet on land. The tax on each passenger, if in the discretion of the State legislature, might have been 5 dollars, or 10 dollars, or any other sum, amounting even to a prohibition of the transportation of passengers. There was no doubt that the transportation of passengers was a branch of commerce, and that the duties charged by the local regulations amounted to a tax on commercial intercourse. Except to guard its citizens against diseases and paupers the Court held that the municipal power of the State could not be exercised to prohibit the introduction of foreigners permitted to enter under the authority of Congress. But in guarding the safety, the health, and the morals of its citizens, a State was restricted to appropriate and constitutional means. The principles affirmed in this case were (1) That when the Federal authority has, in the exercise of its general power, passed a statute to regulate commerce, the States are absolutely prohibited from making any laws which will interfere with the legislation of the Federal authority. (2) That persons, as well as goods, are subject to commercial laws. (3) That the States, in adopting regulations of internal police, are not entitled to include in them provisions conflicting with the commercial power. (4) That the commercial power and the police power are not to be regarded as two equal and competing forces, but that in case of conflict the commercial power prevails. The dissenting judges were of opinion that the State laws could be sustained on the grounds of—(1) The general concurrent power of the States; (2) The authority to pass police regulations; (3) A denial that persons can be the objects of commerce; (4) The consequent result that Congress has no authority to legislate respecting the importation of persons, that matter being left exclusively to the States. (Pomeroy, Const. Law, 10th ed. p. 299.)

"This," says Dr. Pomeroy, "was the last great contest in the Supreme Court between the forces of national and of state sovereignty. The national idea was triumphant through the steadiness of two southern members of the Court, Wayne of Georgia, and Catron of Tennessee." (Constitutional Law. 10th ed. p. 299. See also Crandall *v.* Nevada, 6 Wall. 35.)

Cooley v. Port Wardens, 12 How. 299 (1851) —The question raised in this case was whether the States may pass laws establishing pilots, and prescribing the duties of masters of vessels arriving in ports in respect to such pilots. This was an action to recover half-pilotage fees, which the defendants had forced the plaintiff to pay. In March, 1803, the legislature of Pennsylvania passed an Act to establish a Board of Wardens for the Port of Philadelphia, and for the regulation of pilots and pilotages. The scope of the Act was, as indicated by its title, to deal with the whole subject of the pilotage of the port. The plaintiff claimed to be exempted from payment of the sums of money demanded under the State law, because the law contravened several provisions of the Federal Constitution. In this celebrated case the question was again discussed as to whether the Federal power over commerce was exclusively vested in Congress, or concurrently in Congress and in the States. The constitutionality of the State pilot regulations had been previously argued, but not decided. They could only be sustained on the ground that the power to regulate commerce was concurrent. But in the Passenger Cases it had been shown to what a dangerous and chaotic state a concurrent system of commercial control would lead; whilst on the other hand, to sustain the theory of exclusiveness would involve the declaration of the invalidity of pilot laws which had

remained unquestioned for over fifty years. A solution of the problem was found in the dictum first laid down by Mr. Justice Woodbury, in the License Cases, to the effect that the commercial power was partly exclusive and partly concurrent; that in matters admitting of uniformity of regulation and requiring national action the commercial power was exclusive, but that in many local matters, admitting of a variety of treatment, the concurrent action of the States was admissible. This principle was authoritatively adopted as the judgment of the Court in Cooley *v.* Port Wardens, and has now become the well established rule of the Federal Courts. In delivering the judgment of the Court, Mr. Justice Curtis said:—

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part." (12 How. p. 319.)

"The States may establish port regulations, regulations of pilotage, may improve their harbours and rivers, erect bridges and dams, and exercise many other local powers. In the exercise of its proper authority, a State may enact laws providing for the inspection of goods, to determine whether they are fit for commerce, and to protect the citizens and the market from fraud. But in all such cases, as was said in Leisy *v.* Hardin, though the States may exercise powers which may be said to partake of the nature of the power granted to the general government, they are strictly not such, but are merely local powers, which have full operation until circumscribed by the action of Congress in effectuation of the general power. In matters admitting uniform regulation throughout the country and affecting all the States, the inaction of Congress is to be taken as a declaration of its will that commerce shall be 'free and unrestricted,' so far only as concerns any general regulation by the States. It can hardly be considered that this phrase means more than freedom from such regulations as admit of uniformity, for it is only to this extent that the jurisdiction of Congress over inter-state commerce is exclusive of State regulation. On the other hand, in matters of local nature, such as are auxiliary to commerce rather than a part of it, the inaction of Congress is to be taken as an indication that for the time being, and until it sees fit to act, they may be regulated by State authority. Since the decision of Cooley *v.* Port Wardens, the rule therein laid down has, with one important exception which will be hereafter noticed, been followed in every case in the Supreme Court upon this subject. It is perhaps the most satisfactory solution which has ever been given of this vexed question, and may be considered as expressing the final judgment of the Court. It is not easy at this time to exaggerate the importance of the case by which this rule was established. It offered a logical principle for the construction of the constitutional provision, such as no previous case had offered. More than this, it marked, in 1851, the end of the struggle, lasting more than thirty years, and which had been begun in Ogden *v.* Gibbons, in the New York courts." (Prentice and Egan, Commerce Clause, pp. 27-9.)

The problem which caused such a long controversy in the Supreme Court of the United States, as to whether the power over commerce was exclusive or concurrent, or partly exclusive and partly concurrent, should never arise or occasion any trouble in the interpretation of the Constitution of the Commonwealth, in which two principles are clearly and unmistakably established: that on and after the imposition of uniform duties of customs, the power of the Federal Parliament to impose duties of customs and excise, and to grant bounties, becomes absolutely and irrevocably exclusive, and this is the limits of its exclusive power; that as to other matters relating to commerce, the States will continue to exercise concurrent authority, and the State laws in respect to such matters will be perfectly valid, until laws inconsistent therewith are passed by the Federal Parliament.

Pennsylvania v. Wheeling Bridge Co., 13 How. 518 (1851).—The defendant company was incorporated by an Act of the legislature of Virginia, which authorized them to

construct a suspension bridge across the river Ohio, at Wheeling. The bridge was constructed, and hindered the passage of boats ascending and descending the river at that point. Prior to this Congress had recognized the Ohio as a navigable stream, and a channel of commerce, but it had never authorized the erection of bridges at that part of its course. The State of Pennsylvania brought a suit in the Supreme Court against the company, praying that the bridge might be removed as a public nuisance. On behalf of Pennsylvania it was argued that the legislature of Virginia could not constitutionally authorize the erection of a bridge which obstructed free commerce on the Ohio. The Court sustained this contention; it was held that the power to regulate commerce among the States extends to the navigable streams whereon that commerce is carried; that commerce includes navigation; that Congress had recognized the Ohio as a great navigable river, and the highway of an immense commerce; that the bridge interfered with such navigation; that the Virginian statute authorizing the bridge was therefore in conflict with the power granted to and exercised by Congress. (Pomeroy, Const. Law, 10th ed. pp. 301-2.)

This case is especially interesting, owing to the development which followed. After the judgment was given declaring the bridge a nuisance and ordering its removal, Congress passed an Act legalizing the bridge as it then stood, and authorizing it to be allowed to remain. Another suit was then brought by Pennsylvania against the Bridge Company (18 How. 421), in which the question was raised whether this Act was within the constitutional authority of Congress. The Supreme Court ruled that Congress, having power to regulate commerce, could as legally obstruct commerce as free it from obstruction -could as legally fetter it as liberate it; and therefore that the Act was within the Constitution. (See Miller *v.* Mayor of New York, 109 U.S. 385; Escanaba Co. *v.* Chicago, 107 U.S. 678.)

Gilman v. Philadelphia, 3 Wall 713 (1865).—This was another bridge case, which is apparently inconsistent with Pennsylvania *v.* Wheeling Bridge Co. The Schuylkill River flows through the city of Philadelphia and empties into the Delaware; it is a tidal river for seven miles from its mouth. It is navigable for vessels drawing about 20 feet of water. A considerable trade is done upon it by barges and small steamers, licensed under the laws of the United States. Gilman was the owner of coal wharves on the river, below any bridge, but he was not the owner of any licensed vessels. The legislature of Pennsylvania authorized the city of Philadelphia to erect a new bridge across the river, below the plaintiff's wharves. The plaintiff feared that the bridge would prevent masted vessels from passing it, would greatly interrupt the navigation of the river, and would so injure his business. Congress had made the city of Philadelphia a port of commercial entry. Gilman brought a suit against the city corporation to restrain it from building the proposed bridge. The judgment of the Court was delivered by Mr. Justice Swayne; who said that the power to regulate commerce covered a wide field, and embraced a great variety of subjects. Some of these subjects called for uniform rules and national legislation; others could be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities. To this extent the power to regulate commerce might be exercised by the States. But even in respect to this latter class of rules and provisions, Congress could interpose, whenever it should be deemed necessary, by general or special laws; and their interposition would sweep away the local State legislation. Within the sphere of their authority, both the legislative and the judicial powers of the nation were supreme. Mr. Justice Clifford dissented, on the ground that Congress had already sufficiently legislated to cover the subject-matter and to deprive the State of power to build the bridge in question. This legislation consisted in the navigation laws, which, as had been repeatedly held, enabled vessels registered or enrolled and licensed to enter all navigable waters free from State interference; but especially in the statute declaring Philadelphia to be a port of entry. He asserted that Willson *v.* Blackbird Creek Marsh Co. had no application; because

the statute of Delaware was upheld in that case as a measure of police, a means to reclaim marsh lands and improve the health of the neighbourhood.

Referring to this decision, Dr. Pomeroy says: "I cannot refrain from saying that the dissenting opinion of Judge Clifford is a most overwhelming answer to the positions taken by the Court. Leaving out of view the Blackbird Creek case, the judgment in Gilman v. Philadelphia is opposed to the whole scope and tenor of all prior decisions, and is in direct conflict with Pennsylvania *v.* Wheeling Bridge Company. Indeed, these two cases are absolutely identical in their facts; in each case the plaintiff sought to protect his rights as proprietor on the banks of the river above the bridge; in each a State, by its statute authorizing a permanent bridge, had interfered with those rights; in neither had Congress directly legislated upon the subject of bridges. Yet the Court overthrew the statute of Virginia and upheld that of Pennsylvania; they deliberately adopted, in the Philadelphia case, the position of Chief Justice Taney in the dissenting opinion which he delivered in the Wheeling case, although in the latter Congress had only acted by recognizing Ohio as a navigable stream, while in the former, Congress had directly legislated by declaring Philadelphia to be a port of entry. I repeat that, while it cannot be supposed the Court intended to overrule the long series of great and most ably considered cases which have been referred to, they have placed themselves in antagonism to many of those decisions." (Const. Law, 10th ed. pp. 305-6.)

It seems to be now well settled that in the absence of Federal legislation a State may authorize a navigable stream within its limits to be obstructed by a dam, bridge, or highway (Pound *v.* Turck, 95 U.S. 459); that in the improvement of her waterways a State may alter the course of a river (Withers *v.* Buckley, 20 How. 84); that a State may practically turn a river into a canal and charge vessels for its use to pay for such improvement (Sands *v.* Manistee River Improvement Co., 123 U.S. 288; Ruggles *v.* Manistee River Improvement Co., 123 U.S. 297); that a State may improve her harbours (Mobile *v.* Kimball, 102 U.S 691); that a State may build and own wharves (Ouachita Packet Co. *v.* Aiken, 121 U.S. 444). A State, however, cannot use such improvements, or any other public property, as a means of regulating commerce. Though a State can charge rent for the use of a wharf, based on the tonnage of the vessel, or for its occupation by imported goods, which she could not do as a tax, or in the exercise of any reserved power, she cannot discriminate in her charges against vessels loaded with the products of other States. (Guy *v.* Baltimore, 100 U.S. 434.)

Case of the State Freight Tax, 15 Wall. 232 (1872).—In the Reading Railroad Co. *v.* Pennsylvania, generally known as the State Freight Tax Case, the State of Pennsylvania had imposed a tax on every ton of freight carried within the limits of the State; no distinction or discrimination was made between domestic and inter-state traffic. The tax was justified by the State, as made in the exercise of its right of taxation. It was claimed that the State had a right to tax all property within its jurisdiction, and that it was entitled to do so as long as it abstained from discrimination. The Supreme Court, however, declared the State law void on the ground that it was a regulation of commerce among the States. This judgment is valuable as affirming (1) That freight, the reward for the transportation of the subjects of commerce, whether by land or water, is a constituent of commerce; (2) That the bringing of goods from the seller to the buyer is commerce; (3) That a tax upon freight, transported from State to State, is a regulation of commerce.

Welton v. Missouri, 91 U.S. 275 (1875).—In this case Welton sold, in the State of Missouri, certain sewing machines which had been manufactured outside the State. He sold without having a State license, as required by a State Act. The Act in question provided that whoever should sell goods, wares, or merchandise "which are not the growth, produce, or manufacture of this State" by going from place to place to sell the same, was "declared to be a peddler." Other sections of the Act prohibited peddling in the State without a license, and provided a penalty for breach of the prohibition. No license was required to peddle goods the growth, produce or manufacture of the

State Welton was arrested and fined. The Supreme Court of the State declared that the State law was valid. Welton appealed to the Supreme Court of the United States, which held that the Missouri law was unconstitutional. In giving the judgment of the Court Mr. Justice Field said that the license tax was sought to be maintained as a tax upon a calling. The general power of a State to impose license taxes on businesses within its limits was admitted, but must be exercised subject to the Constitution. Where the business consisted in the sale of goods, a tax upon the business was in effect a tax upon the goods themselves. "It would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient now to hold that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."

Munn v. Illinois, 94 U.S. 113 (1876).—In this case the question raised was whether the General Assembly of Illinois could legally fix by law the maximum charges for the storage of grain in warehouses, in Chicago and other places in the State, in which grain was stored in bulk, and in which the grain of different owners was mixed together. The Supreme Court of the United States upheld the validity of the law. It was not everything which affected commerce that amounted to a regulation of commerce. The warehouses referred to were situated, and their business conducted exclusively, within the limits of the State of Illinois. They were used as instruments by those engaged in State as well as by those engaged in inter-state commerce; but they were no more necessarily a part of the commerce itself than a dray or cart by which grain could be transferred from one railway station to another. Incidentally they might become connected with inter-state commerce, but not necessarily so. Their regulation was a thing of domestic concern, and certainly, until Congress acted in reference to their inter-state relations, the State might exercise all the powers of government over them, even though in so doing it indirectly operated upon commerce outside its immediate jurisdiction. "We do not say," continued Chief Justice Waite, "that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done." (94 U.S. 135.)

Railroad Co. v. Husen, 95 U.S. 465 (1877).—In this case a statute of Missouri prohibited the driving or conveying of any Texas, Mexican, or Indian cattle into the State during certain periods of the year. It was held that this law was a regulation of commerce, and therefore contrary to the Constitution. Mr. Justice Strong said that the transportation of property from one State to another was a branch of inter-state commerce, and that though a State had full power over commerce which was completely internal, it could no more prohibit or regulate inter-state commerce than commerce with foreign nations. In reference to the argument that the statute called into question was a lawful exercise of the police power. he said:—

"What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. . . . The police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases. . . . The same principle . . . would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power . . . are self-defensive. . . . While for the purpose of self-protection it (*i.e.*, a State) may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce." (95 U.S. pp. 470-2.)

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 (1877).—The State of Florida granted to the Pensacola Telegraph Company the exclusive right to establish and maintain telegraph lines in certain counties of that State. Prior to this, Congress had passed a law providing that telegraph lines might be established over any portion of the public domain of the United States, along military and post roads, and across navigable streams and waters. The Western Union Company filed with the Postmaster-General its acceptance of the terms of the Act. The Pensacola Company thereupon instituted a suit to restrain the Western Union Company from constructing lines in derogation of its exclusive rights. In the judgment of the Supreme Court it was stated that the commercial powers granted to Congress were not confined to the instrumentalities of commerce, or the postal system, as known and used when the Constitution was adopted, but that they kept pace with the progress of the country and adapted themselves to the new developments of times and circumstances. They extended from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies were successfully brought into use to meet the demands of increasing population and wealth. These commercial powers were intended for the government of the business to which they related. They were entrusted to the Government for the good of the nation ; it was not only the right but the duty of the Federal legislature to see that intercourse among the States and the transmission of intelligence were not obstructed or unnecessarily impeded by State legislation. The Court held that the electric telegraph had become an indispensable means of inter-communication, especially in commercial transactions. It could not for a moment be doubted that this powerful agency of commerce and inter-communication came within the controlling power of Congress, certainly as against hostile State legislation. It was therefore held that the State of Florida, in attempting to confer on a single corporation the exclusive right of transmitting news by telegraph over part of its territory, had encroached upon the domain of commercial power vested in Congress, and the claim of the Pensacola Company to restrain the Western Union Company was not sustained.

Escanaba Co. v. Chicago, 107 U.S. 678 (1882).—The Escanaba Company, created by the law of Michigan, was the owner of three steam vessels engaged in the carrying trade between ports in different States, on Lake Michigan and on the navigable waters connecting it. Its vessels were enrolled and licensed for the coastal trade under the laws of the United States. They did a large business in carrying iron ore from Escanaba to the south branch of the Chicago River in the city of Chicago. In their course up the river they were required to pass through draws of several bridges, constructed over the stream by the city of Chicago. By an ordinance of the city the draws were closed for an appointed hour of the morning and evening during week days, and the time during which a draw might be left open for the passage of a vessel was limited to ten minutes. The Company complained of these obstructions and limitations, and applied for an injunction to restrain the city from enforcing the ordinance. The Court upheld the validity of the State law, on the ground that it came within the rule of matters of internal police—including in that general designation whatever would promote the peace, comfort, and convenience, of the people of the State, and embracing the construction and control of roads, canals, bridges, and other means of internal communication. Such power the State could exercise, so long as it did not unnecessarily obstruct the navigation of the river or its branches ; when that occurred Congress could interfere and remove the obstruction.

Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885).—The Gloucester Ferry Company was incorporated under the law of New Jersey, and established a ferry between Gloucester, in the State of New Jersey, and Philadelphia, in the State of Pennsylvania. At its landing place in each State it had a dock ; the one in Gloucester it owned, the one in Philadelphia it leased. The entire business of the Company consisted in ferrying passengers and freight across the river ; its boats were registered

in New Jersey, where it was domiciled and held all its property, except the lease of its dock in Pennsylvania; its boats remained in Pennsylvania only long enough to discharge and receive passengers and freight. In 1879 the legislature of Pennsylvania passed an Act imposing taxes on corporations, domestic or foreign, doing business or employing capital in Pennsylvania. The State sued the Company to recover taxes on its business done between the two States. The Supreme Court of the State sustained the tax. The Company appealed to the Supreme Court of the United States. In support of the tax, it was argued that the Company did business within the State of Pennsylvania, because it landed and received passengers and freight at its wharf in Philadelphia; that its whole income was derived from the transportation of freight and passengers between Gloucester and Philadelphia; that at each of these points its main business was transacted; that for such business it was as much dependent upon the laws and protection of one State as of the other; that as it could only purchase its wharf at Gloucester by the will of the legislature of New Jersey, so it could only lease the one in Philadelphia with the consent of the legislature of Pennsylvania. It was therefore contended that the Company was dependent equally, not only for its business, but for its power to do that business, upon both States, and consequently it might be taxed by both. The Supreme Court had no difficulty of disposing of these arguments. Mr. Justice Field, in delivering the judgment of the Court, said:—

"The business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation. . . . According to the decision in the Standard Oil Company case, and by the general law on the subject, the company has no domicile in Pennsylvania, and its capital stock representing its property is held outside of its limits It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the States of New Jersey and Pennsylvania, which is itself inter-state commerce. While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or inter-state commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. . . . The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. . . . Upon similar grounds, what are termed harbour dues or port charges, exacted by the State from vessels in its harbours, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures the State may prescribe regulations for the government of vessels whilst in its harbours; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. . . . The power of the States to regulate matters of internal police includes the establishment of ferries as well as the

construction of roads and bridges. In Gibbons *v.* Ogden, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government ; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country. . . . Such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress." (114 U.S., pp. 210-217.)

The judgment of the Supreme Court of Pennsylvania was, therefore, reversed. It must be noted, however, that this judgment does not impugn the right of States, or of towns and cities acting under State authority, to regulate the use of wharves on navigable rivers and to impose charges for such use. In the case of the Packet Co. *v.* Keokuk, 95 U.S. 80, it was said by Mr. Justice Strong : —

"The principal question presented by the record of this case is, whether a municipal corporation of a State, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportionate to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. . . . It is a tax or a duty that is prohibited ; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. . . . A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. . . . It has always been held that wharfage dues may be exacted." (95 U.S. pp. 84-5. See Cannon *v.* New Orleans, 20 Wall. 577.)

In the later case of Transportation Co. *v.* Parkersburg, 107 U.S. 691, the question raised was whether an ordinance of the city of Parkersburg, imposing a wharfage due upon all vessels discharging or receiving freight at the city wharves on the Ohio River, was valid. The plaintiff alleged that the charge demanded was not one of wharfage, but of tonnage. The court held that wharfage was a charge against a vessel for using or lying at a wharf or landing, such charge being collected by the owner of the wharf, or landing, as a rent for the temporary use of the property. On the other hand, a duty of tonnage was a charge imposed and collected by the government for the privilege of entering, trading, or lying in a port or harbour.

Bowman v. Chicago and North-western Railway Co., 125 U.S. 465 (1888).—A law of the State of Iowa prohibited common carriers from bringing intoxicating liquors into the State from any other State, without first being furnished with a certificate as prescribed. This law was declared by the Supreme Court of the United States to be invalid, as being a regulation of commerce among the States. The Court did not determine the question whether the right of transportation of an article of commerce from one State to another included, by necessary implication, the right of the consignee to sell it, in unbroken packages, at the place where transportation terminated ; that point was in terms reserved, yet the argument of the majority led irresistibly to that conclusion.

Minnesota v. Barber, 136 U.S. 313 (1890).—A law of the State of Minnesota, entitled an "Act for the protection of the public health, by providing for inspection, before slaughter, of cattle, sheep, and swine, designed for slaughter for human food" required that animals thus described should be inspected by State officers within twenty-four

hours before they were slaughtered. If found fit for slaughter it was provided that certificates to that effect should be given; if not found fit they had to be removed and destroyed. Barber was convicted before a Justice of the Peace of Minnesota, of having wrongly sold, for human food, part of an animal slaughtered in the State of Illinois, but which had not been inspected in Minnesota. The State Courts held that the Act was repugnant to the Constitution, and void, and annulled the conviction.

The State authorities appealed to the Supreme Court of the United States. It was argued that the statute was passed in good faith for the purpose expressed in its title—to protect the health of the people of Minnesota. Mr. Justice Harland, in delivering the opinion of the court, said that the good faith of the State was to be presumed, but that presumption could not control the final determination of the question whether the State law was unconstitutional or not. There might be no purpose on the part of a State legislature to violate the provisions of the great instrument of government, and yet a statute enacted by it under the forms of law might be destructive of rights intended to be secured by the Constitution. Dealing with the arguments on behalf of the State, the Court said that the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce involved the transportation from one part of the country to another of animal meat designed for food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, any fresh meat from animals slaughtered outside of that State, and to compel the people of Minnesota either to purchase meat taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing meat, when desired for their own domestic use, at points beyond the State, that object was attained by the Act in question. The duty of the Government, to maintain the Constitution, would not permit it to shut its eyes to these obvious and necessary results of the Minnesota statute. If this legislation did not make such discrimination against the products and business of other States, in favour of the products and business of Minnesota, as interfered with and burdened commerce among the several States, it would be difficult to enact legislation that would have that result. In the opinion of the Court, the statute in question was in violation of the Constitution and void.

Leisy v. Hardin, 135 U.S. 100 (1890).—The plaintiffs were brewers doing business in the State of Illinois, and they shipped beer in sealed packages to Keokuk, in the State of Iowa, where it was offered for sale. By the law of Iowa, the manufacture or sale of intoxicating liquors, or the keeping of them with the intent to sell, except for medicinal, chemical, and sacramental purposes, was prohibited. A quantity of the beer imported by the plaintiffs was seized by Hardin, the city marshal of Keokuk, purporting to act under the authority of the law of the State, and the plaintiffs sued Hardin to recover the value of the beer seized. The local court gave judgment for the plaintiff, but the Supreme Court of Iowa reversed that decision. The plaintiffs then appealed to the Supreme Court of the United States. The sole question involved was the validity of the State prohibition law. Chief Justice Fuller delivered the judgment of the Court, which applied the principles established in Bowman *v.* Chicago to the sale of liquor imported from another State, in the package in which it was imported. This was no new principle; it had been decided by Chief Justice Marshall, in Brown *v.* Maryland, that a package remained the subject of inter-State commerce until the importer sold it, or broke the package in which it was imported. The Court therefore held that the law of Iowa, so far as it prohibited the sale by the importer, in the packages of importation, of liquor brought from other States, was invalid, because it was in conflict with the will of Congress. The Court interpreted the silence of Congress, in not passing any law to regulate the sale of imported liquors and in not allowing the States to do so, to indicate its will that such commerce should be free and untrammelled. Referring to the Federal law at the time of the adoption of prohibition in Iowa, Chief Justice Fuller said:—

"Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson in Gibbons *v.* Ogden, 9 Wheat. 1,238, in 'a frank and candid co-operation for the general good.'" (135 U.S. pp. 124-5.)

Referring to the case of Peirce *v.* New Hampshire (5 How. 504), Chief Justice Fuller said that, in so far as it rested on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, it must be regarded as having been distinctly overthrown by numerous cases. In consequence of the decision in Leisy *v.* Hardin, Congress on 8th Aug., 1890, passed a measure, now known as the Wilson Act, the text of which is as follows:—

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise"

A section containing provisions similar in substance to that of the Wilson Act has been embodied in the Constitution of the Commonwealth. (See sec. 113.)

Addyston Pipe and Steel Co. v. United States, 175 U.S 211 (1899).—In this, the most recent case on the meaning of the commerce clause, it was decided that Congress, under its power to regulate commerce, may forbid contracts and combinations between private individuals which operate directly and substantially in restraint of trade. Six companies, situated in four different States, entered in 1894 into a combination, agreeing that there should be no competition between them, in certain States and Territories, in regard to the manufacture and sale of cast-iron pipes. The object and effect of the combination was to enhance the prices of their goods. The United States took proceedings against them, under the Federal Act of 1890, entitled "an Act to protect trade and commerce against unlawful restraints and monopolies," and prayed for a perpetual injunction against the defendants working under the combination agreement, as being in restraint of trade. The Trial Court dismissed the case, but the Circuit Court reversed this decision, and ordered the injunction to be granted. The defendants then appealed to the Supreme Court of the United States.

On behalf of the appellants it was argued that the power of Congress was limited to preventing interference by the State legislatures, or by regulations made under the authority of a State by some political department thereof—including congressional power over common carriers, and elevator, gas, and water companies, for reasons stated to be peculiar to such carriers and companies—but that it did not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts had inter-state commerce for their object, and resulted in a direct and substantial obstruction to or regulation of that commerce. The whole purpose of the commerce clause, it was urged, was to guard against discriminating legislation by

the States. The clause which forbade Congress to pass any law impairing the obligation of contracts was also relied on.

The judgment of the Court was delivered by Mr. Justice Peckham. He maintained the absolute and unlimited power of Congress to regulate inter-state trade and commerce, and declined to recognize the suggested limitation. The opinion of the Court is clearly expressed in the following extract:—

"If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate, inter-state commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The private contracts may indeed be as far-reaching in their effect upon inter-state commerce as would the legislation of a single State of the same character. . . . What sound reason can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." (175 U.S. pp. 229-30.)

The Court held that under the commerce power Congress may legislate to declare void and prohibit the performance of any contract between individuals or corporations, where the natural and direct effect of such a contract is, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any extent inter-state or foreign commerce; that the provision in the Constitution regarding the liberty of the citizen is to some extent limited by the commerce clause, and the power of Congress to regulate inter-state commerce comprises the right to enact a law prohibiting a citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less extent commerce among the States; and that, since the Anti-Trust Act of 1890, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of inter-state commerce, by preventing or restricting its sale, thereby regulates inter-state commerce to that extent, and thus trenches upon the powers of the national legislature, and violates the statute. The contracts in this case were held to have this effect, and to violate the Anti-Trust Act; and the judgment of the Circuit Court, though held to be too wide so far as it extended to internal commerce, was affirmed so far as inter-state commerce was concerned.

Beginning and End of Federal Control.—"Any article of foreign commerce is protected against the power of the States from the moment, in the case of an export, that this quality attaches to it, and to the moment, in the case of an import, when it is divested of the same; *i. e.*, from the moment, in the first case, when it is delivered to the first common carrier for exportation, and to the moment, in the second case, when it has passed into the hands of the purchaser of the unbroken package from the original importer, or has been broken up for retail by the original importer." (Coe *v.* Errol, 116 U.S. 517; Turpin *v.* Burgess, 117 U.S. 504; Brown *v.* Maryland, 12 Wheat. 419. Burgess, Political Sc. ii. 135.)

Extent of the Commercial Power.—"The commercial system of the United States has also been employed for the purpose of revenue; sometimes for the purpose of prohibition, sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation and the shipping and mercantile interests by bounties, by discriminating duties, and by special preferences and privileges, and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty." (Story, Comm. § 1076.)

Traffic and Intercourse.—"Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribed rules for carrying on that intercourse." (Story, Comm. § 1061.)

"It may, therefore, be safely affirmed that the terms of the Constitution have at all times been understood to include a power over navigation, as well as trade; over intercourse, as well as traffic, and that, in the practice of other countries, and especially in

our own, there has been no diversity of judgment or opinion. During our whole colonial history, this was acted upon by the British Parliament as an uncontestable doctrine. That Government regulated not only our traffic with foreign nations, but our navigation and intercourse as unquestioned functions of the power to regulate commerce." (Story, Comm. § 1064.)

"This power of the Constitution extends to commerce with foreign nations, and among the several States, and with the Indian tribes. In regard to foreign nations, it is universally admitted that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another to which they do not extend. Commerce as used in the Constitution is a unit, every part of which is indicated by the term." (*Id.* § 1065.)

Navigation and Shipping (see Notes, § 410, *infra*).—The power to regulate commerce includes the regulation of navigation. (Cooley *v.* Port Wardens, 12 How. 299, 315; the Barque *Chusan*, 2 Story, 455.) A bill providing for the recording of mortgage, hypothecation, or conveyance of any vessel, is a regulation of commerce, and is consequently within the power over commerce. (White's Bank *v.* Smith, 7 Wall. 646.) Under its power to regulate commerce the Federal Legislature has authority to establish a lien on vessels of the Union in favour of material-men, uniform throughout the whole country. In particular cases, until the Federal Legislature acts, the States may continue to legislate. Hence, a lien granted by State law to material-men who furnish necessaries to a vessel in its home port in such State is valid. (The *Lottawanna*, 21 Wall. 588.) The power over vessels is co-extensive with the power over the cargo. (The Brig *Wilson*, 1 Brock. 423.) Condensed from Baker, Annot. Const. p. 21 and 34.

Dams and Bridges across Navigable Waters (see Notes, § 417, *infra*).—A bridge erected across a navigable river so as to obstruct navigation is a nuisance, and an Act of a State Legislature authorizing its construction affords no justification to the person erecting it. (Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518.) The power to regulate commerce comprehends the control for that purpose of all the navigable waters of the Union which are accessible from a State other than that in which they lie. It is for the Federal Legislature to determine when its full powers will be exercised, and what regulations it will make. (Gilman *v.* Philadelphia, 3 Wall. 713.) A bridge constructed in accordance with Federal and State legislation is a lawful structure; and it cannot thereafter be treated as a public nuisance. (Miller *v.* Mayor of New York, 109 U.S. 385.) Condensed from Baker, Annot. Const. p. 21.

River Within a State (see Notes, § 417, *infra*).—If a river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, it is not a navigable water of the Union, and a federal law for the enrolment and license of vessels does not apply. (The *Montello*, 11 Wall. 411.) Where a river is wholly within the limits of a State, the State can authorize any improvement which, in its judgment, will enhance its value as a means of transportation from part of the State to another. The internal commerce of a State—that is, commerce which is wholly confined within its limits—is as much under its control as foreign or inter-state commerce is under the control of the general government. (Mobile *v.* Kimball, 102 U.S. 691; Huse *v.* Glover, 119 U.S. 543; Sands *v.* Manistee Riv. Imp. Co., 123 U.S. 288.) Until the Federal Legislature acts respecting navigable streams entirely within a State, the State has plenary powers; but it is not concluded by anything that the State may have done, from abating any erections that may have been made, and preventing any other from being made, except in conformity with such regulations as it may impose. (Willamette Iron Bridge Co. *v.* Hatch, 125 U.S. 1.) Condensed from Baker, Annot. Const. p. 23.

The Penobscot River is wholly within the State of Maine. The lower eight miles is crossed by several dams, and is not navigable. Above that there is imperfect navigation. A law of the State providing for the improvement of this upper navigation, and granting exclusive privileges to the company improving the same, is constitutional. (Veazie *v.* Moor, 14 How. 568. Baker, Annot. Const. p. 21.)

Improvement of Navigation and Removal of Obstructions. (See Notes, § 417 *infra*.)—The right to regulate commerce includes the right to regulate and improve navigable waters and ports, and the Federal legislature may for that purpose close to navigation one of several channels in a navigable stream. (South Carolina *v.* Georgia, 93 U.S. 4. Baker, Annot. Const. p. 22.)

The Federal Legislature has the control of all navigable rivers between the States, or connecting with the ocean, so as to preserve and protect free navigation. As a corollary of this, it has the paramount right to determine what shall be deemed an obstruction to commerce. (Miller *v.* Mayor of N.Y., 109 U.S. 385. Baker, Annot. Const. p. 22.)

A federal act appropriating money for the improvement of navigation of Willamette River, a stream wholly within the State of Oregon, was no assumption of police power. Nor does it, by conferring the privilege of a port of entry on a town, conflict with the police power of the State, exercised in bridging a navigable stream of the State at that point. (Willamette Iron Bridge Co. *v.* Hatch, 125 U.S. 1. Baker, Annot. Const. p. 23.)

The Federal Legislature may authorize the erection of railroad bridges across navigable waters to facilitate commerce among the States. (Railroad Co. *v.* Richmond, 19 Wall. 584. Baker. Annot. Const. p. 23.)

The Federal Legislature has power to prevent the obstruction of any navigable river which is a means of commerce between any two or more States. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more States. The local right is to cross such water. The general commercial right is paramount to the State authority. (Works *v.* Junction R.R. Co., 5 McLean, 426. Baker. Annot. Const. p. 24.)

No State can obstruct a navigable stream which extends to other States or is connected with a river or lake which falls into the sea. (Palmer *v.* Cuyahoga Co., 3 McLean, 226. Baker, Annot. Const. p. 24.)

A steam boat enrolled and licensed under a federal act is entitled to the protection of the general government while engaged in carrying on commerce between different States; her owners have a right to use the navigable streams of the country free from all material obstructions to navigation. (Jolly *v.* Terre Haute Draw-bridge Co., 6 McLean, 237. Baker, Annot. Const. p. 24.)

Commerce embraces navigation; and the improvements of the harbours and bays along our coasts, and of navigable rivers within the States connecting with such bays and coasts, falls within the commercial power. (Mobile *v.* Kimball, 102 U.S. 691. Baker, Annot. Const. p. 26.)

Railways, Federal Control of.—The Federal Legislature has authority, in the exercise of its power to regulate commerce among the States, to either construct, or authorize persons to construct, railroads across the States and territories of the Union. (California *v.* Pac. R.R. Co., 127 U.S. 1; Cherokee Nation *v.* South Kansas, 135 U.S. 641. Baker, Annot. Const. p. 41. See note, § 221, *infra*.)

Telegraphs.—Communications by telegraph are in their nature both postal and commercial, and when passing between different States of the Union such communications are "commerce among the several States," and subject to federal regulation. A general license tax imposed by State law upon such company, doing inter-state as well as domestic business, is unconstitutional. The property of such company situated within a State may be taxed by the State, not its inter-state business. (Leloup *v.* Port of Mobile, 127 U.S. 640. Baker, Annot Const. p. 31.)

The telegraph is an instrument of commerce, and when used between different States is an instrument of inter-state commerce and subject to federal control. A State cannot tax on messages sent out of the State. A tax on messages between private parties sent from point to point wholly within the State is not repugnant to this clause. (Telegraph Co. *v.* Texas, 105 U.S. 460; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U.S. 1. Baker, Annot. Const. pp. 31, 33.)

Whatever authority a State may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States. (W.U. Tel. Co. *v.* Pendleton, 122 U.S. 347. Baker, Annot. Const. p. 40.)

No tax can be imposed by a State upon telegraphic messages sent into the State from without, or out of the State from within. Sending a telegraphic message is commerce, and when the same passes from point to point in different States it is commerce among the several States. (West. Union Tel. Co. *v.* Alabama, 132 U.S. 472. Baker. Annot. Const. p. 20.)

Pilotage.—The power to regulate commerce, as conferred on the Federal Legislature, does not exclude the exercise of authority by the States to regulate pilots. (Steamship Co. *v.* Joliffe, 2 Wall. 450. Baker, Annot. Const. p 24.)

Pilot regulations are regulations of commerce. State pilotage laws, however, are valid, but are subject to the power of the Federal Legislature over the matter. (*Ex parte* McNiel, 13 Wall. 236.) A statute of Louisiana authorizing the port officers of New Orleans to demand, in addition to other fees, the sum of five cents whether called upon to perform any service or not, for every vessel arriving in port, is in violation of this clause. (Steamship Co. *v.* Port Wardens, 6 Wall. 31; Spraigue *v.* Thompson, 118 U.S. 90. Baker, Annot. Const. pp. 24, 25.)

Commercial Marine.—The whole commercial marine of the country is placed by the Constitution under Federal regulation, and all Federal laws on that subject, whether in relation to foreign or coastwise trade, are supreme; and where a State law contravenes such Federal laws it must give way. (Sinnot *v.* Davenport, 22 How. 227; Foster *v.* Davenport, *id* 244. Baker, Annot. Const. p. 25.)

Roads, Bridges, and Canals.—The Federal Legislature has power to regulate commerce, but this has never been construed to include the means whereby commerce is carried on within a State. It has never attempted to regulate canals, turnpikes, and bridges, which do not interfere with Federal commerce. The establishment of post-offices and post-roads does not affect or control the absolute power of the State over its highways and bridges. The police power to make bridges is as absolutely vested in a State as is the commercial power in Congress. (Milnor *v.* New Jersey R.R., cited Baker, Annot. Const. p. 25.)

Federal Tax on Passengers.—A Federal Act imposing upon the owners of steam sailing vessels a tax of fifty cents for every passenger, not a citizen of the Union, who is brought from a foreign port, is a valid exercise of the power to regulate commerce. The right to make such regulation is exclusively in the Federal Legislature, and any such regulation when imposed by a State is invalid. (Edye *v.* Robertson, 112 U.S. 580. Baker, Annot. Const. p. 28.)

Torts in Connection with Commerce.—Until the Federal Legislature has made some regulation upon the subject of the liability of parties for marine torts resulting in death of the person injured, a State law giving to the representatives of such person a right of action where his death was caused by the negligence of another, within the limits of such State, is not void as an interference with the commerce clause. (Sherlock *v.* Alling, 93 U.S. 99. Baker, Annot. Const. p. 34.)

A State law which imposes no tax, but simply declares a general principle respecting liability of all persons within the State for torts resulting in the death of the party injured, and applicable alike to all persons, whether engaged in navigation or not, is not repugnant to the commerce clause. (Sherlock *v.* Alling, 93 U.S. 99. *Id.*)

State Legislation affecting Commerce.—It may be said generally that, until the Federal Legislature has dealt with the subject, the legislation of a State, not directed against commerce, but relating to the rights, duties, and liabilities of citizens, and only indirectly affecting the operations of commerce, is binding upon citizens within its jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit. Legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. (Sherlock *v.* Alling, 93 U.S. 99; State Tax on Gross Receipts Case, 15 Wall. 284. Baker, Annot. Const. p. 35.)

American and Canadian Powers Contrasted.—In the case of Thurlow *v.* Massachusetts, 1847, 5 How. 586, Chief Justice Taney said that although Congress had, under the Constitution, power to regulate the importation of goods, yet where Congress had made no regulation on the subject, traffic in unregulated articles became subject to State laws as soon as they were introduced into the territory of a State, and a tax could be imposed upon them, or a license required, according to the discretion of the State Legislature. This doctrine was cited in several leading Canadian cases with a view to applying it to the interpretation of the Canadian Constitution. Referring to the suggested analogy of the two Constitutions, Chief Justice Richie, in Regina *v.* Justices of King's County, said:—"Cases from the United States Courts were cited as bearing on this question, but there is a very clear distinction between the powers of Congress and the powers of the Dominion Parliament. In the United States, Congress has not the same full power of regulating trade and commerce that belong to the Dominion Parliament. The power of Congress, as we understand it, is confined to 'regulating commerce with foreign nations and among the several States,' giving no right to interfere with the internal commerce of an individual State; that it does not extend to that commerce which was completely internal, carried on within the particular State, and which did not extend to, or affect, other States, but is restricted to that commerce which concerns more States than one, reserving the completely internal commerce of a State for the State itself, and, therefore, State license laws have been held constitutional and valid." (Per Ritchie, C.J., in Reg. *v.* Justices of King's County, 1875, 15 N. Bruns. [2 Pugs.] 535. Wheeler, C.C. 59. In another case the same learned judge

said:—"Much has been said as to the analogy of the Dominion Parliament and local Legislatures with the Congress of the Federal Government and the State Legislatures of the United States; but the Constitution of the United States and the Constitution of the States, as regards the powers which each may exercise, are so different from the relative powers of the Dominion Parliament and the Provincial Legislatures that the cases to be found in the American books with regard to the State Legislatures, in regard to prohibiting the sale of intoxicating liquors, afford no guide whatever in the determination of the powers of the local Legislatures and the Dominion of Canada. The Government of the United States is one of enumerated powers, and the Governments of the States possess all the general powers of legislation. Here we have the exact opposite. The powers of the Provincial Governments are enumerated, and the Dominion Government possess the general powers of legislation." (Per Ritchie, C.J., in City of Fredericton *v.* Reg., 1880, 3 S.C.R. [Can.] 505. Wheeler, C.C. pp. 60-1.)

Commercial Contracts.—The legislature of the province of Ontario passed an Act 39 Vic. c. 24, intituled an Act to secure uniform conditions in policies of Fire Insurance. It provides that the conditions set forth in the schedule to the Act should be deemed to be part of every policy of fire insurance in force in Ontario, unless expressly varied by the policy itself. This Act was impeached by an Insurance Company, as being in excess of the legislative power of the Parliament of the Province. On appeal to the Privy Council it was held valid. Sir Montague E. Smith; in delivering the judgment of the Judicial Committee, said:—

"A question was raised, which led to much discussion in the Courts below, and at this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity, made by insurers, can scarcely be considered trading contracts, nor were insurers who made them held to be 'traders' under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire-insurance properly falls within the description of 'a trade' must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not trade. The words 'regulation of trade and commerce,' in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade, ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the other classes of subjects enumerated in sec. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency. 'Regulation of trade and commerce' may have been used in some such sense as the words 'regulations of trade' in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in other Acts of State. Article V. of the Act of Union enacted that all the subjects of the United Kingdom should have 'full freedom and intercourse of trade and navigation' to and from all places in the United Kingdom and the colonies, and Article VI. enacted that all parts of the United Kingdom from and after the Union should be under the same 'prohibitions, restrictions, and regulations of trade.' Parliament has, at various times since the Union, passed laws affecting and regulating specific trades in one part of the United Kingdom only, without it being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy and various other matters. Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain, on the present occasion, from any attempt to define the limits of the authority of the

Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single Province." (Citizens Insurance Co. *v.* Parsons, 7 App. Ca. pp. 111-3.)

Commercial Power of the Dominion.—In considering the Canadian Constitutional Cases, and in comparing them with those of the United States, attention must be paid to the fact that the Dominion has by express words in the Constitution exclusive legislative authority over "the regulation of trade and commerce," whilst the Provinces have exclusive legislative authority to make laws in relation to—(1) Direct taxation within the Province in order to the raising of a revenue for provincial purposes. (2) Municipal Institutions. (3) Shop, saloon, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes. (4) Property and civil rights. (5) Matters of a merely local, private, or provincial nature. In the interpretation of the Canadian Constitution the great problem has been to reconcile the operation of the legislative power of the Dominion, within the exclusive area assigned to the Dominion, with the operation of the legislative power of the Provinces within the exclusive area assigned to the Provinces. In some legislation of the Dominion, under the trade and commerce section, there has been a tendency to encroach upon the local, private, and municipal authority of the Provinces and their power to deal with civil rights and property. The occasional conflict and overlapping of these two powers will be seen illustrated in a few of the leading cases which have arisen under the Constitution of the Dominion.

In 1877 a brewer named John Severn was prosecuted by the provincial authorities in Ontario for selling liquor by retail without having a provincial license, as required by the local Act 37 Vic. c. 32. The Supreme Court of Canada held that the provincial Act was *ultra vires*, being in conflict with the power of the Federal Parliament to regulate commerce. (Severn *v.* The Queen [1877], 2 S.C.R. [Can.] 70.) It will be seen that the accuracy of this decision was subsequently doubted. In the case of Reg. *v.* The Justices of King's County, 15 N. Bruns. (2 Pugs.) 535, the facts were that in February, 1875, one McManus applied to the Justices in session for a tavern license. In the exercise of the discretion conferred upon them by the New Brunswick Act, 36 Vic. c. 10, the Justices refused to grant the license. McManus was shortly afterwards fined for selling without a license. He then applied for a mandamus to compel the Justices to grant him a license. The provincial authorities opposed the application and contended—(1) That the power given to the Parliament of Canada by the B.N.A. Act, 1867, sec. 91, sub-sec. 2, meant trade and commerce with foreign countries; and that the power to make laws respecting tavern licenses belonged exclusively to the provincial legislatures by sec. 92; (2) that by the Act of Assembly, 36 Vic. c. 10, s. 2, it was entirely in the discretion of sessions whether they granted licenses or not; that it was an arbitrary discretion, which could not be questioned. In delivering the judgment of the Court, Ritchie, C.J., said:—

"To the Dominion of Canada is given the power to legislate on the 'regulation of trade and commerce,' and the power of 'raising money by any mode or system of taxation.' The regulation of trade and commerce must involve full power over the matter to be regulated, and must necessarily exclude the interference of all other bodies that would attempt to intermeddle with the same thing. The power thus given to the Dominion Parliament is general, without limitation or restriction, and therefore must include traffic in articles of merchandise, not only in connection with foreign countries, but also that which is internal between different Provinces of the Dominion as well as that which is carried on within the limits of an individual Province. As a matter of trade and commerce, the right to sell is inseparably connected with the law permitting importation If, then, the Dominion Parliament authorize the importation of any article of merchandise into the Dominion, and places no restriction on its being dealt with in the due course of trade and commerce, or on its consumption, but exacts and receives duties thereon on such importation, it would be in direct conflict with such legislation. and with such right to raise money by any mode or system of taxation, if the local legislature of the Province into which the article was so legally imported, and

on which a revenue was sought to be raised, could so legislate as to prohibit its being bought and sold and to prevent trade or traffic therein, and thus destroy its commercial value and with it all trade and commerce in the article so prohibited, and thus render it practically valueless as an article of commerce on which a revenue could be levied. Again, how can the local legislature prohibit or authorize the sessions to prohibit (by arbitrarily refusing to grant any license) the sale of spirituous liquors of all kinds without coming into direct conflict with the Dominion Legislature on the subject of Inland Revenue, involving the right of manufacturing and distilling, or making of spirits, &c., as regulated by the Act 31 Vic. c 8, and the subsequent Acts in amendment thereof, and the excise duties leviable thereby, and the licenses authorized to be granted thereunder?" Rule absolute for a mandamus. (Wheeler, C.C. 59.)

In 1878 the Dominion Parliament passed the Canada Temperance Act, 1878, which was intended to enable the people of cities and counties, throughout Canada, to prohibit the sale of intoxicating liquors therein, subject to certain exceptions where they might be required for medicinal or sacramental purposes. The substantial principle of the Act was the suppression of the liquor traffic in municipal districts, severally, by a separate vote in each. What was intended to be effected was local prohibition by local option. The prohibitions of the Act were to be brought into force in each district by the determination of the persons entitled to vote at the election of members of Parliament. A bare majority was to decide in each voting district. If upon a poll being taken the majority of electors were against the adoption of the prohibitions of the Act, the question could not be re-opened for a period of three years.

In the case of the Queen *v.* the City of Fredericton (1879), 19 N. Bruns. (3 Pugs. and Burb.) 139, the question was raised as to the validity of the Canada Temperance Act of 1878. The Supreme Court of New Brunswick held that the Act was beyond the power of the Dominion Parliament to pass. It was admitted that the Dominion Parliament could pass an Act to prohibit the sale of liquor. What was denied was the power to authorize the inhabitants of each town or parish to regulate or prohibit the sale of liquor within its limits. On appeal to the Supreme Court of Canada this decision was reversed and the validity of the Canada Temperance Act was confirmed.

"With us the Government of the Provinces is one of enumerated powers, which are specified in the B.N.A. Act, and in this respect differs from the Constitution of the Dominion Parliament, which, as has been stated, is authorized 'to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces;' and that 'any matter coming within any of the classes of subjects enumerated shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.' Therefore 'the regulation of trade and commerce' being one of the classes of subjects enumerated in sec. 91, is not to be deemed to come within any of the classes of a local or private nature assigned to the Legislatures of the Provinces. To my mind it seems very clear that the general jurisdiction or sovereignty which is thus conferred emphatically negatives the idea that there is not within the Dominion Legislature power or authority to deal with the question of prohibition in respect to the sale or traffic in intoxicating liquors or any other article of trade or commerce. It is said a power to regulate does not include a power to prohibit. Apart from the general legislative power which I think belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange indeed that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the sale and traffic if they deemed such prohibition conducive to the peace, order, and good government of Canada. There seems to be no doubt on this point in the United States." (Per Chief Justice Ritchie, in City of Fredericton Case, 3 S.C.R. (Can.) 505; Wheeler, C.C. 61.)

In the case of Russell *v.* The Queen (1882) 7 App. Cas. 829, the appellant had been convicted by the Police Magistrate of Fredericton, New Brunswick, for unlawfully selling liquor contrary to the provisions of the Canada Temperance Act, 1878. It was contended that it was not competent for the Parliament of Canada to pass such Act on the ground that it involved an invasion of jurisdiction exclusively belonging to the Provincial Legislatures. In deference to the judgment of the Supreme Court of Canada in the City of Fredericton case, the Supreme Court of New Brunswick refused to quash

the conviction. Russell then appealed to the Privy Council, which sustained the validity of the Act.

"The declared object of Parliament in passing the Act is that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one Province more than another, but as desirable everywhere throughout the Dominion. The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it. It is true that the prohibitory and penal parts of the Acts are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion. The manner of bringing the prohibition and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one Province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what district it should come into effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character. Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in sec. 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce,' enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada." (Per Sir Montague E. Smith, in Russell *v.* The Queen, 7 App. Ca. 841-2.)

The next important case involving the interpretation of the Canadian Constitution was that of Hodge *v.* The Queen (1883) 9 App. Ca. 117. The appellant had been convicted for unlawfully keeping open a billiard-room in connection with a tavern in Toronto, Ontario, during the time prohibited by the Ontario Liquor License Act, and contrary to the resolutions of the License Commissioners. The operation of this Act was confined to municipalities within the Province of Ontario. License Commissioners were appointed to meet in each municipality, and were empowered to pass, under the name of "resolutions," by-laws or rules defining the conditions and qualifications requisite for obtaining licenses for the sale by retail of intoxicating liquors and for limiting the number of licenses, and to impose penalties for the infraction of their resolutions. The appellant challenged the validity of the Provincial law. The Privy Council sustained the validity of the law, on the grounds that the powers conferred by the Act in question were in the nature of police or municipal regulations of a local character for the good government of taverns, and calculated to preserve public decency and to repress drunkenness and disorderly conduct. As such they could not be said to interfere with the general regulation of trade and commerce which exclusively belonged to the Dominion Parliament, and they did not conflict with the provisions of the Canada Temperance Act, which had not yet been locally adopted. There was therefore no repugnancy between the Provincial law and the Dominion law.

In 1883-4 the Dominion Parliament passed amending Liquor License Acts designed to supplement and enforce the Canada Temperance Act, 1878. The Government of the Dominion was authorized to issue licenses, and no person who was not the holder of a

license was to be allowed to deal in intoxicating liquors. Various classes of licenses were provided for ; such as wholesale licenses, saloon licenses, hotel licenses and vessel licenses. Provision was made for limiting the number of licenses to be issued in the various licensing districts. In those parts of Canada where the Temperance Act had not been adopted by local option, it was intended to regulate the traffic by reducing the number of licenses. In the case of the Governor-General of the Dominion *v.* the Four Provinces, 1885 (Wheeler, C.C. 144), the Privy Council was called upon to consider the constitutionality of the amending Acts of 1883-4. Their Lordships decided that both the amending Acts were not within the legislative authority of the Parliament of Canada.

The latest and most important Canadian case dealing with the constitutional power of the Dominion and the Provinces, is that of the Att.-Gen. of Ontario *v.* the Att -Gen. of the Dominion (1896), App. Cas. 348. The principal question raised in that case was whether the Legislature of Ontario had jurisdiction to pass the Act 53 Vic. No. 56, as explained by Act 54 Vic. No. 46, intituled "An Act Respecting Local Option in the Matter of Liquor Selling." This law gave the Council of every city, town, or village, authority to prohibit the sale by retail of intoxicating liquors, provided that by-laws intended to prohibit the sale should be submitted to and approved by the electors of the municipality. The Supreme Court of Canada held that the Act was invalid. (24 S.C.R. Can. 170.) Leave to appeal to the Privy Council was granted. Their Lordships held that the liquor law prohibitions authorized by the Legislature of Ontario were within the powers of a Provincial Legislature, but such prohibitions would be inoperative in any locality which had adopted or might hereafter adopt the local option provisions of the Canada Temperance Act.

"If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass sec. 18, or any similar law, had been superseded. In that case, no Provincial prohibitions, such as are sanctioned by sec 18, could have been enforced by a municipality, without coming into conflict with the paramount law of Canada. For the same reason Provincial prohibitions in force within a particular district will necessarily become inoperative, whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in the districts of the Province of Ontario where the prohibitions of the Canadian Act are not, and may never be, in force. In a district which has, by the votes of its electors, rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll ; and it hardly admits of doubt, that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted, that so long as any district delays or refuses to accept the prohibitions which it has authorized, the Provincial Parliament is to be debarred from exercising the legislative authority given by sec. 92, for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled ; and it is a grave question whether it would be lawful. Even if the provisions of sec. 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act. Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact sec. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the Province, which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886." (Per Lord Watson, 1896, Appeal Cases 348.)

"Severn's case was reviewed by the Privy Council, in 1885, in the Bank of Toronto *v.* Lambe (12 App. Cas. 575, 586). In that case the Judicial Committee decided that a Province could impose direct taxation on commercial corporations carrying on their business in the Province. Lord Hobhouse said : 'Since the Severn case was decided the question has been more carefully sifted.' The words 'regulation of trade and commerce' are indeed very wide, and in Severn's case it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in Citizens Insurance Co. *v.* Parsons." (Wheeler, C.C. p. 54.)

Does Regulation Include Prohibition?—"It is said a power to regulate does not include a power to prohibit. Apart from the general legislative power which I

think belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange indeed that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the importation or exportation of any article of trade and commerce, or, having that power, could not prohibit the sale and traffic if they deemed such prohibition conducive to the peace, order and good government of Canada. There seems to be no doubt on this point in the United States." (Per Ritchie, C.J., Wheeler, C.C. p. 61.)

"The object of the Canada Temperance Act of 1886 is not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate naturally if not necessarily assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in Municipal Corporation of the City of Toronto *v.* Virgo, 7 App. Ca. 93." (Per Lord Watson in Att.-Gen. of Ontario *v.* Att.-Gen. of the Dominion, 1896, App. Ca. p. 363.)

"Their lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." (Per Lord Davey in the Municipal Corporation of the City of Toronto *v.* Virgo, 1896, App. Ca. 93.)

"It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its own cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore failing *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada should not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where prohibition was urgently needed." (Per Lord Watson in the Att.-Gen. of Ontario *v.* Att.-Gen. of the Dominion, 1896, App. Ca. p. 365.)

It is to be noticed that the legislative power given to the Parliament of the Commonwealth is not a power to make laws with respect to "the regulation of" trade and commerce, but a power to make laws "with respect to trade and commerce." (See Historical Note, p. 515, and Note, § 162, *supra.*)

Liquor Laws Under This Constitution.—The Federal Parliament is not equipped with the same general control over the liquor traffic as that exercised by the Parliament of Canada in passing the Canada Temperance Act, 1878. The Parliament of Canada has power to regulate trade and commerce generally; it is not confined to inter-state and external commerce. The Parliament of the Commonwealth has power to deal only with trade and commerce (1) with other countries and (2) among the States. This excludes the trade and commerce which begins and ends in a State. A federal law authorizing the establishment of a system of local option, under which the sale of liquor could be prohibited in defined localities, would not be a law relating to trade and commerce "among the States," but a law relating to trade and commerce in those defined localities "within the States." In addition to this the power to legislate concerning the liquor traffic is expressly reserved to the States as a State right by section 113 of the Constitution, which provides that "all intoxicating liquids passing into a State or remaining there for use, consumption, sale or storage, shall be subject to the laws of the State, as if such liquids had been produced in the State." (See Notes, § 456, *infra.*)

Whilst the Federal Parliament has no power to directly prohibit the manufacture of intoxicants or to establish the local option system in any State, it has the exclusive power to impose duties of customs and excise, which will enable it to tax heavily or lightly all intoxicating liquids imported into the Commonwealth or produced in any State. This power may be exercised in a manner calculated to influence the liquor traffic in a material degree (sec. 90). It has also the exclusive authority to grant bounties on the production or import of goods (sec. 90). This will enable it, if thought necessary, to directly encourage the manufacture of intoxicants by a pecuniary subsidy. The Parliament of a State would probably be enabled, under sec. 113, to prohibit the

production or sale of intoxicants within the State limits, but should the Federal Parliament pass a law offering bounties for the production or export of those intoxicants, an inconsistency would arise, and the State law in that case would be invalid to the extent of the inconsistency. (See sec. 110 and Note, § 456, *infra*.)

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51. (ii.) Taxation[164]; but so as not to discriminate between States or parts of States:

Historical Note.—The Constitution of the United States empowers Congress "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." (Art. I., sec. 8, subs. 1.) It also provides that "direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers." (Art I., sec. 2, subs. 3.) Sec. 91 of the British North America Act gives the Parliament of Canada exclusive power in respect of "the raising of money by any mode or system of taxation" (subs. 3); whilst sec. 92 gives to the Provincial Legislatures exclusive power in respect of "direct taxation within the Province in order to the raising of a revenue for provincial purposes" (subs. 2).

Earl Grey's Committee of the Privy Council, in 1849, recommended that the General Assembly should have power to make laws with respect to "the imposition of duties upon imports and exports" (p. 85, *supra*). Wentworth's Committee in 1853 specified "Intercolonial tariffs" as a federal subject (p. 91, *supra*).

In the Commonwealth Bill of 1891, the taxation power was contained in two sub-clauses:—"(2) Customs and excise [and bounties], but so that duties of customs and excise [and bounties] shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods exported from one State to another. (3) Raising money by any other mode or system of taxation; but so that all such taxation shall be uniform throughout the Commonwealth." In Committee, some members doubted the wisdom of giving the Federal Government general powers of direct taxation; but the danger of limiting the taxing powers was apparent, and the sub-clause was agreed to. (Conv. Deb., Syd., 1891, pp. 670-9.)

At the Adelaide session both these sub-clauses were adopted. In Committee, there was some discussion about the words prohibiting a tax on goods exported from one State to another. (Conv. Deb., Adel., pp. 761-7.)

At the Sydney session, amendments by the Legislative Council of New South Wales, to omit the taxing powers, were negatived. There were some discussion as to export duties, and the meaning of the word "excise." (Conv. Deb., Syd., 1897, pp. 1065-8.)

At the Melbourne session, before the first report, the taxation power was thrown into one sub-clause thus:—"Taxation, but so that all taxation shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods passing from one State to another." Subsequently, however, it was thought that a doubt might arise as to the meaning of "uniform," in view of Mr. Justice Field's judgment in the Income Tax cases" (Pollock *v.* Farmers' Loan and Trust Co., 157 U.S. 586), and the sub-clause was amended to read:—"Taxation, but not so as to discriminate between States or parts of States, or between persons or things passing from one State to another." (Conv. Deb., Melb., pp. 1990, 2397.) After the fourth report, verbal amendments were made—the last words being omitted as superfluous.

§ 164. "Taxation."

Nature of the Taxing Power.—The origin of modern taxation may be traced to the feudal aids, burdens and services originally exacted by the Crown from its tenants-in-chief. After property in land underwent subdivision, and new kinds of property sprang into existence, taxation became less feudal in its character, and the ancient aids, burdens and services were commuted into money grants and subsidies freely and voluntarily voted by Parliament representing the taxpayers. (May, 10th ed. p. 553.) Taxation may be now defined as any exaction of money or revenue, by the authority of a State, from its subjects or citizens and others within its jurisdiction, for the purpose of defraying the cost of government, promoting the common welfare, and defending it against aggression from without. Taxation may assume various shapes, and be known by different names; thus, taxes on land, its capital or annual value=a land tax; taxes on fixtures annexed to land=a hearth tax, a house tax; taxes on goods, chattels, and commodities generally=duties of customs and duties of excise, imposts; taxes on the transfer of property=registration fees and succession duties; taxes on passing over roads or along rivers=tolls; taxes on individuals=a poll tax, capitation tax; taxes on the produce of property generally, as well as on the earnings of labour=income tax; taxes on certain trades and occupations=license fees.

The term taxation covers every conceivable exaction which it is possible for a government to make, whether under the name of a tax, or under such names as rates, assessments, duties, imposts, excise, licenses, fees, tolls, &c. (Hylton *v.* United States, 3 Dall. 171; United States *v.* Tappan, 11 Wheat. 419.)

Limits of the Taxing Power.—From the foregoing definition it appears that the taxing power of the Federal Parliament is very wide and comprehensive, and that it is capable of operating against every individual and on every conceivable form of realizable property. At the same time there are certain limitations, qualifications and restraints to be found in or inferred from several sections of the Constitution, which may be here grouped in the sequence in which they occur, for the purpose of showing how the general grant of taxing power is cut down.

Discriminations.—The Federal Parliament may not impose a tax which discriminates between States or parts of States (s. 51—ii.) This is a limitation which has been provided for federal reasons, viz., for the protection of States which might not possess sufficient strength in the Federal Parliament to resist the imposition of a system of taxation designed to press more heavily on people or property in some States than on people or property in other States. To discriminate obviously means to make differences in the nature, burden, incidence and enforcement of taxing law; to impose a high tax on commodities or persons in one State and a low tax on the same class of commodities or persons in another State, would be to discriminate. Such discriminations are forbidden, and uniformity of taxation throughout the Commonwealth is an essential condition of the validity of every taxing scheme. Any deviation from this rule would invalidate a tax. The provision against discrimination is practically the same in substance as the requirement of Art. 1, s. 8, sub-s. 1, of the United States Constitution that "all duties, imposts and excises shall be uniform throughout the United States.' It has been held in that country that "uniform" means at the same rate on the same article wherever found. (Head Money Cases, 112 U.S. 580; Burgess, Pol. Sci. ii. 151.)

Mode of Exercising the Taxing Power.—Next, there is an important regulation or qualification of the mode in which the taxing power is to be exercised by the Parliament. Laws imposing taxation must deal only with the imposition of taxation; any provision in a tax-raising law, dealing with matter foreign to the tax, is declared to be a nullity, of no effect (sec. 55). Kindred to this is the mandate that laws imposing taxation must deal with one subject of taxation only. To this there is an exception in the case of customs duties and excise duties. A law imposing customs duties may include any number of items of taxation, and a law imposing excise duties may deal with

any number of items of taxation. It would be very inconvenient, and almost unworkable, to require a separate Act for every item in the tariff. With respect to other taxes the rule is that each tax must be passed by a separate law.

Restraint on the Taxing Power.—Whilst the Federal Parliament has general power to legislate with respect to trade and commerce, and to lay and collect taxes on trade and commerce, throughout the Commonwealth, there are two fundamental prohibitions: It cannot impose a tax on any property belonging to a State (sec. 114); and, it cannot tax inter-state trade and commerce—that is, trade and commerce flowing from one State into another (sec. 92). The Federal Parliament may impose excise duties on the production of commodities throughout the Commonwealth, and those excise duties may be collected on the taxable articles wherever and whenever they are found, but it may not impose a tax on the carriage or transport of those articles or of any commodities from one State into another. Nor may it tax the commercial instrumentalities, used in connection with inter-state business. This is conclusively established by sec. 92, which declares that, on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, "shall be absolutely free." Cases illustrating the principle of equality and uniformity of taxation required by the Constitution of the United States of America will be found in Cooley's Cons. Lim. 6th ed. pp. 608-18.

Preferences.—Another restraint on the taxing power of the Federal Parliament is contained in sec. 99, which provides that "The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State, or any part thereof, over another State or any part thereof." Without this prohibition a Federal revenue law or a Federal commercial law might be made so favourable in its incidence, and so mild and ineffective in its enforcement, in one State, as to have the effect of drawing trade and commerce from another State to that State. Such a preference would, under this section, be as unlawful as a discrimination under s. 51—ii.

State Property and Officers.—The Commonwealth is by section 114 prevented from imposing a tax on property of any kind belonging to a State. It may be argued, by necessary implication, that the Federal Parliament could not levy a tax on the salaries of officers of a State Government, because it would thereby conflict with the laws of a State made in pursuance of the powers reserved to it by the Constitution. (Buffington *v.* Day, 11 Wall. 113; Dobbins *v.* Erie County, 16 Pet. 435.)

Area of Federal Taxation.—The power of the Federal Parliament to lay and collect taxes is co-extensive with the limits of the Commonwealth. It has therefore power to impose and enforce taxation within the Territories as well as within the States. The taxing power of the Federal Parliament is exclusive within Federal territory forming no part of a State. (Loughborough *v.* Blake, 5 Wheat. 317.)

Taxing Power Not Exclusive.—The power of taxation vested in the Federal Parliament is not exclusive, except to the extent and in respect of matters as to which it is declared exclusive by the Constitution, or is so by necessary implication. The only taxes which by express words are exclusively vested in the Federal Parliament are duties of customs and excise (sec. 90). Upon the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise becomes exclusive. With respect to other subjects of taxation the States possess the concurrent power of levying taxes, within their jurisdiction, subject to the restrictions, (1) that they cannot tax public property of any kind belonging to the Commonwealth (s. 114); (2) that by necessary implication they cannot tax any of the constitutional means or instruments employed by the Commonwealth (McCulloch *v.* Maryland, 4 Wheat. 316); (3) that they cannot tax the compensation or official income of officers of the Commonwealth. (Dobbins *v.* Erie County, 16 Pet. 435; Leprohon *v.* City of Ottowa, 1878, 2 Ontario App. Rep. 522; Wheeler, C.C. p. 70.

Power of States to Tax Corporations.—Important questions may hereafter be raised as to the power of States to tax banks, insurance companies, and other corporations established under the provisions of Federal law. Several leading American and Canadian cases may be here cited and compared, with the prefatory observation that the American cases will be found more applicable to the Constitution of the Commonwealth than some of the latest Canadian decisions. The first important case on this branch of Federal law was that of McCulloch *v.* Maryland, 4 Wheat. 316, in which it was held that a law of the State of Maryland imposing a tax upon notes issued by a branch of the Bank of the United States, chartered by Federal law and established in that State, was unconstitutional. It was held to be a tax on the operations of the bank, and therefore a tax on a means or instrumentality employed by the Government of the Union in pursuance of the Constitution. It was said that the power to tax implied the power to impair, and possibly to destroy, an institution established by Federal authority. As such it was an abuse and a usurpation of power which the people of a single State could not give or exercise through its legislature. But it was carefully stated that the decision applied only to a tax on the operations of the bank, not to a tax on its property. "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional." (Per Marshall, C.J., McCulloch *v.* Maryland, 4 Wheat. p. 436. See Union Pacific R. Co. *v.* Peniston, 18 Wall. 5.) Referring to the decision in McCulloch *v.* Maryland, William Pinckney is reported to have said that in it he saw "a pledge of the immortality of the Union;" whilst Kent declares that "a case could not be selected, from the decisions of the Supreme Court of the United States, superior to this one of McCulloch *v.* The State of Maryland for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the Court, and an undue assertion of State power overruled and defeated." (Kent, Comm. I. 427.)

This principle was afterwards followed and affirmed in other cases. In Osborn *v.* The Bank of the United States, 9 Wheat. 738, the Court adhered to its prior decision, ruling that a State could not tax the franchise of the Bank of the United States. In Dobbins *v.* Erie County, 16 Pet. 435, it was ruled that the compensation of an officer of the United States is fixed by the laws thereof, and a State law seeking to tax such compensation is unconstitutional, because it conflicts with the law of Congress made in pursuance of the powers conferred by the Constitution. . The rule of exemption of Federal agencies and instrumentalities from State taxation was, in a modified form, applied in the case of California *v.* Central Pacific R. Co., 127 U.S. 1, in which it was decided that a law of California, by which the franchise or business conferred by Act of Congress upon a railroad corporation was taxed, was repugnant to the law and Constitution of the United States; that franchises conferred by Congress cannot be taxed by States without the consent of Congress.

An attempt was unsuccessfully made to extend the exemption to other cases. In Thomson *v.* Union Pacific R. Co., 9 Wall. 579, it was held that a railroad constructed under the direction and by authority of Congress, for the postal and military purposes of the United States, but the stock of which was owned by private parties, was not exempt from taxation by the States through which it ran, in the absence of any legislation by Congress declaring such exemption. In the Union Pacific R. Co. *v.* Peniston, 18 Wall. 5, the doctrine of exemption was not applied to the case of a State tax upon the real and personal estate of the Union Pacific R. Co., a corporation chartered by Congress and the whole of whose stock was owned by individuals, but which Congress assisted by donations and loans, over which it reserved and exercised special rights, and which, among other

things, was bound at all times to transmit despatches and transport mails and munitions of war for the government whenever required. The Court expressly distinguished this case from McCulloch *v.* Maryland, *supra*, on the ground that the tax here involved was not a tax upon the operations of the company, but only a tax upon the property of the company, which did not interfere with the efficiency of the governmental agency.

Decisions similar in principle to that of McCulloch *v.* Maryland have been given in Canada, under the Constitution of the Dominion, notwithstanding the fact that it differs from that of the United States in assigning one area of legislative power exclusively to Federal authority, and another area exclusively to the Provinces. In Leprohon *v.* City of Ottawa (1877-8), 40 Upper Canada Rep. 478, the Ontario Court of Appeal gave a decision somewhat similar to that of Dobbins *v.* Erie Company, overruling the judgment of a majority of the Court of Queen's Bench, and confirming the judgment of Moss, J., at the trial, holding unanimously that a provincial legislature cannot impose a tax upon the official income of an officer of the Dominion government. All the judges who supported the view of the Court of Appeal based their reasoning upon the principle affirmed in McCulloch *v.* Maryland. This case was followed in 1881 in *exparte* Owen, 20 N. Bruns. (4 Pugs. and Burb.) p. 487, in which the Supreme Court of New Brunswick held that the income of a Federal officer in the Customs, who resided in the city of St. Johns, was not subject to provincial taxation. In Coté *v.* Watson, 1877, 3 Quebec L. R. 157, it was held that the Quebec License Act, 1870, was *ultra vires*, in so far as it sought to impose a tax on the proceeds of sale of an insolvent's effects, when made under the Dominion Insolvent Act of 1869, 32 and 33 Vic. c. 16 (the said tax being in the form of a penalty recoverable against the Dominion assignee in insolvency for selling the goods of the insolvent by auction without a license). In Evans *v.* Hudon, 1877, 22 Lower Can. Jur. 268, it was decided that a provincial legislature has no power to declare liable to seizure the salaries of employees of the Federal Government. In 1884 it was held, in the case of Ackman *v.* Town of Moncton, 24 New Bruns. 103, that the provincial legislature could not empower a municipality to levy a tax on the salary of an employee of the Intercolonial railway, received by him from the Dominion government. In Regina *v.* Bowell (1896) 4 Brit. Columb. 498, Drake, J., held that the imposition of a poll tax upon an officer of the Dominion government—viz., a collector of customs for the port of Vancouver—was *ultra vires*. In Hillimore *v.* Colbourne, 1896, 32 Can. L.J. (N.S.) 201, the case of Leprohon *v.* City of Ottawa was distinguished by the Supreme Court of Nova Scotia. (Lefroy, Legislative Power in Canada, p. 677.)

The soundness of some of these decisions under the Canadian Constitution seems, according to the opinion of Mr. Lefroy (Legisl. Power in Canada, p. 677) to have been shaken by the judgment of the Privy Council in the appeal case of the Bank of Toronto *v.* Lambe, 12 App. Cas. 575, upholding the validity of an Act passed by the Quebec legislature, whereby a direct tax was imposed on the paid-up capital of every bank doing business in the Province. Against the tax it was argued that the provincial legislature might lay on taxes so heavy as to crush a bank out of existence, and so nullify the power of the Dominion Parliament to erect banks. The principle of McCulloch *v.* Maryland was relied on in support of the argument against the tax. In reviewing the authorities Lord Hobhouse said :—

"Their lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the Constitution of the United States. Under that constitution, as their lordships understand, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution, Chief Justice Marshall found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with

the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated Provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament." (12 App. Cas. 587.)

In the same direction was the decision of Weatherbe, J., in the Town of Windsor *v.* Commercial Bank of Windsor, 3 R. and G. (Nov. Scot.) 420, to the effect that "all property, except that of the Dominion or the Provinces, may be made equally liable to assessment for municipal purposes by provincial legislation." In the case of a bank doing business in Windsor under the General Banking Act of the Dominion of Canada, which held, in addition to real and other personal property, notes of the Dominion of Canada, as a portion of its cash reserve required by the Dominion Act, it was decided that the assessors for the town of Windsor were right in assessing on the Dominion notes, they not being the property of the Dominion. It must be noticed that the decision of the Privy Council in the Bank of Toronto *v.* Lambe turned on the distinction between the American and Canadian Constitutions; the validity of the reasoning in the case of McCulloch *v.* Maryland was not impugned. The difference between the two Constitutions was thus referred to by Palmer, J., in Ackman v. Town of Moncton, 24 New Bruns. 103:—

"In the United States, the States themselves granted the Federal Government its power of legislation on the specific subjects, and consequently parted with it and all additional power to enable their grantees to legislate generally and effectually on those subjects, and they did not reserve out of such grant to themselves power to legislate on any specified subject exclusively; and, therefore, there is nothing to prevent the operation of such grant so as to include all that may be fairly necessary to enable the Federal Legislature to legislate fully and effectually with reference to all the subjects granted, and to that extent to operate as a prohibition of any legislation by the grantors that would operate to affect such subject; while with us the powers to both are given by one instrument, and all of them are made exclusive, and in construing such instrument there does not appear to be any more reason for restricting provincial legislatures from legislating on such subjects exclusively assigned to them, than the Dominion Parliament from legislating on subjects exclusively put under its control. This construction not only prevents the *a fortiori* deduction from the principle of the American cases, but makes the principle of them, so far as they affect the questions of conflict of powers between the Federal and State legislatures, entirely inapplicable to the construction of our Constitution."

Further, the same learned judge said that in his opinion cases decided by the courts of the United States, under that Constitution, were generally of little value on questions of conflict of power between the Dominion Parliament and the provincial legislatures under the British North America Act. This arises from the fact that, by reason of their having certain specified subjects of legislation exclusively assigned to them, the provincial legislatures of Canada cannot be so restricted in their actions as the State legislatures under the American Constitution. (Lefroy, Leg. Pow. in Canada, p. 667.) The States of the Commonwealth occupy positions corresponding to those of the American Union, the mode of distribution of powers under the Constitution of the Commonwealth resembling the American rather than the Canadian model; consequently the American cases are more valuable as aids in the interpretation of the Constitution of the Commonwealth than they have been found in the case of the Dominion.

There is one obvious difference between cases such as McCulloch *v.* Maryland, Dobbins *v.* Erie County, and Leprohon *v.* City of Ottawa, in which attempts were made to tax institutions and persons coming within the definition of "Federal Agencies and Instrumentalities," and cases such as Thomson *v.* Union Pacific R. Co., Union Pacific R. Co. *v.* Peniston, The Bank of Toronto *v.* Lambe, in which the bodies held to be

taxable by the States and by the Provinces, although created by federal law, were clearly not agencies and instrumentalities employed in the execution and maintenance of federal authority.

Examples of Federal Taxing Power.—In addition to the numerous cases of commercial and trading taxes cited in our review of sub-sec. i. (trade and commerce), the following may be added as illustrations of the general taxing power:—

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. . . . We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give" (Marshall, C.J., in McCulloch *v.* Maryland, 4 Wheat. pp. 429-30.)

The doctrine which exempts the instruments of the Federal government from State taxation, is founded on the implied necessity for the use of such instruments by the government. Legislation which does not impair the usefulness of such instruments to serve the government is not within the rule of exemption. (National Bank *v.* Kentucky, 9 Wall. 353. See Pomeroy, Const. Law, p. 253.)

The exemption of agencies of the Federal Government from taxation by the States is dependent, not upon the nature of the agents nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States; but a tax upon their operations, being a direct obstruction to the exercise of Federal powers, may not be. This doctrine was applied to the case of a tax by a State upon the real and personal property, as distinguished from its franchises, of the Union Pacific railway company—a corporation chartered by Congress for private gain, and all whose stock was owned by individuals, but which Congress assisted by donations and loans, and over which it reserved and exercised many special rights, and which amongst other things was bound at all times to transmit despatches and transport mails, troops, munitions of war, &c., for the government whenever so desired. (Railroad Co. *v.* Peniston, 18 Wall. 5. See Pomeroy, Const. Law, 253; Baker, Annot. Const. p. 172.)

"The principles to be deduced from the [American] cases appear to be, that the National government and the State governments are, as it were, distinct sovereignties; that the means and instrumentalities necessary for the carrying on of either government are not to be impaired by the other; that as the power to tax involves the power to impair, the exercise of such a power by the one government on the income of the officers of the other is inconsistent with independent sovereignty of the other; and that in such cases exemption from taxation, although not expressed in the national Constitution, exists by necessary implication." (Harrison, C.J., in Leprohon *v.* City of Ottawa, 40 Upper Canada Rep. 478.)

"The Supreme Court, however, has declared that the general principles of the Constitution forbid Congress to tax the necessary governmental instrumentalities of the States, such as the salaries of officers and the revenue of municipal corporations, on the ground that such a power would enable the Congress to destroy the States, which nothing short of the amending power, the sovereignty, should be able to do in a Federal system of government. The United States courts determine, of course, in what these necessary instrumentalities, in any particular case, consist." (Collector *v.* Day, 11 Wall. 113; cited Burgess, Political Sc. II. p. 151.)

A Federal law imposing a tax on the sale of lottery tickets is valid, although their sale is prohibited by State law. (License Tax Cases, 5 Wall 462; cited Baker, Annot Const. p. 16.)

A Federal excise tax, imposed on a license to manufacture and sell intoxicating liquors, is no bar to a prosecution under State laws prohibiting such manufacture and sale within the State. (License Tax Cases, 5 Wall. 462; Pervear *v.* Commonwealth, 5 Wall. 475. *Id.*)

A Federal law imposing a tax on State banks or banking associations held valid. (National Bank *v.* United States, 101 U.S 1. *Id.*)

A Federal tax on distilled spirits is not unconstitutional. It is in the nature of an excise, and the only limitation on the power of Congress in the imposition of taxes of this character is that they shall "be uniform throughout the United States." (United States *v.* Singer, 15 Wall. 111 ; Same *v.* Van Buskirk, 15 Wall. 123. *Id.* p. 17.)

The Act imposing the succession tax is valid. It is neither a tax on land nor a capitation tax, although it is made a lien on the land to enforce its collection. Scholey *v.* Rew. 23 Wall. 331. *Id.*)

In the exercise of this power Congress may raise money in any way not forbidden by the Constitution, and as a means thereto it may tax employments. (United States *v.* Angell, 11 Fed. Rep. 34. *Id.*)

No Apportionment of Taxes.—The taxing power of Congress is seriously hampered by Art. I. sec. 3, of the Constitution, which provides that "direct taxes" shall be apportioned among the several States according to their respective numbers. In 1894, Congress passed an unapportioned income tax. The tax was imposed on the annual income of individuals exceeding 4000 dollars and the income of corporations of all amounts excepting mutual insurance companies and ecclesiastical bodies. At least four-fifths of the tax was payable by four States—New York, New Jersey, Pennsylvania, and Massachusetts. "In a number of the States whose representatives voted for the tax its incidence did not affect more than a very few individuals. The constitutionality of this proceeding, by the consent of the Attorney-General, who waived all questions of jurisdiction, was brought before the Supreme Court before the tax was payable. In their first decision the Court held unanimously that so much of the tax as applied to the income from municipal bonds was void, since those securities could not be taxed by the United States ; and by a majority of four to two, that so much as applied to rents was also void, as a tax upon real estate, and consequently a direct tax which must be apportioned. They divided equally on the questions whether the invalidity of this part destroyed the rest ; and whether the tax on the general income from personal property was also void as a direct tax. A re-argument was ordered, which Mr. Justice Jackson, whose illness had prevented his previous presence, left his death-bed to attend. He voted to sustain so much as did not apply to municipal bonds ; but Mr. Justice Shires, who on the first decision had voted to sustain so much as did not apply to rents, changed his mind ; and by a majority of five to four the whole income-tax was held to be void, as a direct tax which had not been apportioned." (Pollock *v.* Farmers' Loan and Trust Co., 157 U.S. 429 and 158 U.S. 601. Foster's Comm. I. p. 421.)

Such a question as that raised in Pollock *v.* Farmers' Loan and Trust Co. could not be raised under the Constitution of the Commonwealth, in which there is no rule for the apportionment of direct taxes or of any taxes among the States. See, however, the rules against "Discriminations" and "Preferences," *supra*.

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51. (iii.) Bounties[165] on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth :

Historical Note.—In the Commonwealth Bill of 1891, this provision was embodied in sub-clause 2, "customs, excise and bounties," and in that form it was adopted at the Adelaide and Sydney sessions in 1897. (Conv. Deb., Syd., 1897, pp. 1065-8.) At the Melbourne session, before the first report, it was placed in a sub-clause by itself.

§ 165. "Bounties."

The trade and commerce sub-section would probably have been sufficient to confer on the Federal Parliament power to grant bonuses, bounties, and subsidies on the production or the export of goods ; that is to say, on the growth or manufacture of goods to be consumed within the Commonwealth, as well as on the growth or manufacture of goods to be exported from the Commonwealth. This sub-section has been inserted for

the purpose of placing the bounty-granting power of the Parliament beyond doubt, and also for the purpose of associating with and grouping around the power several restrictions and directions. It may facilitate the study of this power to present a survey of the constitutional provisions relating to it.

First comes the requirement (sub-sec. 3) that such bounties shall be uniform throughout the Commonwealth. If they are not uniform the law on which they are founded is null and void. The rule as to uniformity means not merely that the bounty must be general throughout the Commonwealth, but also that there must be a uniform or equal bounty on each class of goods which is the object of the bounty. (Sturges *v.* Crowninshield, 4 Wheat. 122.) The Supreme Court of the United States has interpreted the word "uniform," in similar association, to mean the same amount upon the same article wherever found. (Head Money Cases, 112 U.S. 580; Burgess, Political Sc. ii. 151.)

The next question to consider is, at what stage in the history of the Commonwealth does this bounty-regulating power come into operation? Sec. 86 provides that on the establishment of the Commonwealth the control of the payment of bounties shall pass to the Executive Government of the Commonwealth. Does this mean the control of the payment of bounties authorized by the Federal Parliament, or does it mean the control of the payment of bounties authorized under grants or agreements lawfully made by the governments of the States before 30th June, 1898?

This leads to the consideration of sec. 90. By the first paragraph of that section, the power of the Parliament to grant bounties on the production or export of goods becomes exclusive on the imposition of uniform duties of customs and excise. The preparation and adoption of such uniform duties will necessarily occupy a considerable time; by sec. 88 they must be imposed within two years of the establishment of the Commonwealth. By the second paragraph of sec. 90, it is enacted that, after the imposition of uniform duties, the bounty laws of the States shall cease to have effect. This is followed by a proviso—which requires careful examination—that certain grants or agreements made by States for bounties shall be preserved.

At the Adelaide sitting of the Convention, when the section relating to the cessation of State bounties, as drafted by the constitutional committee, was under discussion, attention was drawn to the fact that no provision was made for the protection of existing bounty arrangements. The State bounty laws, and contracts made thereunder, were to be absolutely swept away as soon as uniform duties were imposed. It was contended that where a colony had, prior to federation, entered into arrangements with the promoters of certain industries to grant bonuses and bounties for the assistance and development of those industries, such arrangements ought to be protected and preserved, even after the establishment of the Commonwealth; otherwise the sudden withdrawal of State aid from those who had invested capital, in the expectation of the continuance of that aid for a certain time, would be an unjust breach of faith on the part of the government, and would be ruinous to those who had entered upon productive enterprises on the strength of a public agreement. In illustration of the argument, it was mentioned that the government of South Australia had made contracts with stock-breeders in the Northern Territory, to pay them bonuses on the export of cattle. Those contracts had several years to run, and if federation were accomplished and uniform duties imposed before the expiration of the term, the government of South Australia would, under the clause as it then stood, be prevented from completing its contract. Victoria was under similar obligations, which her representatives were anxious should remain in full force and unimpaired by the Constitution.

An effort was made to show that the repeal of State laws offering bounties on the production or export of goods would not *ipso facto* invalidate any agreement made under such laws before their repeal. Legal authorities were cited, showing that where an enactment would prejudicially affect vested rights, or the legal character of past Acts,

the presumption against a retrospective operation is strongest. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation. Thus the provision of the Statute of Frauds, that no action should be brought to charge any person on any agreement made in consideration of marriage, unless the agreement were in writing, was held not to apply to an agreement which had been made before the Act was passed. The Mortmain Act, in the same way, was held not to apply to a devise made before it was enacted. So it was held that the Act 8 and 9 Vic. c. 109, which made all wagers void, and enacted that no action should be brought for a wager, applied only to wagers made after the Act was passed. (Maxwell, Interpretation of Statutes, 3rd ed. 299.)

This assurance, however, did not satisfy the representatives of the colonies interested. Eventually an addendum was made to the proposition, which, after various modifications at subsequent stages, at last assumed the phraseology in which it is presented in clause 90 of the Constitution, viz., any grant of or agreement for any bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Another branch of the bounty question is dealt with by sec. 91, in which a limited measure of bounty-granting power is reserved to the States. In the course of the general debate at Adelaide, it was said that there were a number of local industries, peculiar and special to particular States, and with which the Commonwealth Parliament would have no concern. Thus the Victorian Parliament had been in the habit of granting prospecting votes for the encouragement of gold mining. New South Wales might see the advisability of granting a similar assistance for the production of iron. It was urged as extremely desirable that the greatest possible facility, consistent with equality and freedom of inter-state trade, should be reserved to the States, in order to enable them to promote any policy for the development of their natural resources. It was first suggested by Mr. Trenwith, that the right to vote grants in aid of gold and other metal-mining should not be exclusively vested in the Federal Parliament, but that the States should have a concurrent power, and that as regards other local industries, not capable of full specification, and in which the Commonwealth as a whole was not concerned, bounties might be given by the States with the consent of the Federal Parliament. This would secure the object aimed at without detracting from the supreme control and supervision of the highest legislative authority. A section allowing the States to subsidize mining for gold, silver, or other metals, was readily agreed to. (Sec. 91.) It was only after a prolonged debate in Melbourne, and in response to the earnest appeal of the Premier of Victoria, supported by his colleagues, that an addition to the mining section, enabling a State, with the consent of both Houses of the Federal Parliament, to grant aids to or bounties on the production or export of goods was made. (Sec. 91.)

For further discussion of State and Federal powers with regard to bounties, see notes to secs. 86, 90, and 91.

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51. (iv.) Borrowing money[166] on the public credit of the Commonwealth :

Historical Note.—The Constitution of the United States empowers Congress "to borrow money on the credit of the United States." (Art. I. sec. vii. sub-s. 2.) The British North America Act, sec. 91, sub-s. (4), gives the Dominion Parliament power as to "The borrowing of money on the public credit," whilst sec. 92, sub-s. (3), gives each Provincial Legislature power as to "The borrowing of money on the sole credit of the Province." In the Commonwealth Bill of 1891 the sub-clause appeared in its present form. In Committee, the only debate was on the suggestion that there should be power

to borrow in order to pay off the debts of the States. (Conv. Deb. Syd., 1891, pp. 679-83.) In the Convention of 1897-8 the sub-clause was adopted and agreed to without debate.

§ 166. "Borrowing Money."

Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, the authority of Congress to define the quality and force of these notes as currency is as broad as the like power over metallic currency under the power to coin money and regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes as regards the national government or individuals, and this whether in time of war or peace. (Juilliard *v.* Greenman, 110 U.S. 421. Baker, Annot. Const. 19.)

A tax imposed by a State or under its authority on stock issued for loans made to the United States is unconstitutional. (Weston *v.* City of Charleston, 2 Pet. 449. *Id.* p. 17.)

The stock of the United States, constituting the whole or part of the capital stock of a State Bank, is not subject to State taxation. A tax on Federal stock is regarded as a tax upon the exercise of the borrowing powers conferred upon Congress. It is immaterial that the tax is on the aggregate property of the taxpayer, and the stock is not taxed by name. (Bank Tax Case, 2 Wall. 200.)

Securities of the United States are exempt from State taxation ; and this exemption extends to the capital stock of a corporation if made up of such securities. (Provident Institution *v.* Massachusetts, 6 Wall. 611. *Id.* p. 17.)

United States notes are exempt from taxation by State or municipal authority. (Mitchell *v.* County Commissioners, 91 U.S. 206. *Id.* p. 18.)

A tax by a State upon the bonds of the United States is a tax upon the borrowing power of Congress, and is invalid. But the fact that a corporation has invested part of its capital in United States bonds does not prevent the State from taxing the corporate franchises or business of the corporation. (Home Insurance Co. *v.* New York, 134 U.S. 594. *Id.* p. 19.)

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51. (v.) Postal[167], telegraphic, telephonic, and other like services :

Historical Note.—The corresponding power in the Constitution of the United States is "to establish post-offices and post-roads ;" in the British North America Act, "Postal service." Earl Grey's Committee of the Privy Council in 1849 suggested "The conveyance of letters" as a federal subject (p. 85, *supra*). Wentworth's Constitutional Committee in 1853 specified "Postage between the said colonies ;" and the draft Bill annexed to Wentworth's Memorial in 1857 specified "Intercolonial telegraphs and postage" (pp. 91-94, *supra*). In the Federal Council of Australasia Act, 1885, posts and telegraphs, curiously enough, were not mentioned.

In the Commonwealth Bill of 1891, "Postal and telegraphic services" were specified (sub-cl. 8). At the Adelaide session, 1897, the same words were adopted in the first draft. In Committee, Mr. Holder moved to add the words "without the boundaries of the Commonwealth," on the ground that inland posts and telegraphs were matters of purely local concern. This was defeated by 30 votes to 5. On Mr. Wise's motion, the words "telephonic and other like services" were added. (Conv. Deb., Adel., pp. 767-75.)

At the Sydney session, a suggestion by the Legislative Assembly of South Australia (similar to a suggestion by the Legislative Assembly of Western Australia) to add the words "outside the limits of the Commonwealth" was negatived. (Conv. Deb., Syd., 1897, pp. 1068-9.)

§ 167. "Postal."

Postal, telegraphic and telephonic departments will not be transferred to the Federal Government at the establishment of the Commonwealth, but on a subsequent date, fixed and proclaimed by the Governor-General, acting on the advice of the Federal Administration. When these important departments are taken over by the Commonwealth, all the property of every kind of each State, used exclusively in connection with them, will become vested in the Commonwealth. The Commonwealth will also be able to acquire any property of each State used, but not exclusively used, in connection with those departments. The Commonwealth will compensate each State for the value of property passing to it under the Constitution, as well as for the value of property partially used in connection with transferred departments which the Federal Government may, in the exercise of its discretion, decide to acquire. The procedure for determining the amount of compensation is detailed in sec. 85. In taking over these valuable assets, the Commonwealth is bound to assume the obligations of each State in connection therewith, current at the date of transfer. (Sec. 85—iv.)

Under the power to establish post-offices and post-roads, the mail operations of the United States are regulated. Postmasters are appointed and their duties prescribed; mail contracts are made and carriers of mails regulated; provisions are made for the punishment of depredations on the mail. These powers are incident to the main power. (Sturtevants *v.* City of Alton, 3 McLean, 393. Baker, Annot. Const. p. 47.)

The powers conferred are not confined to the instrumentalities in use when the Constitution was adopted. Congress, in its exercise, should keep pace with the progress of the country and adapt the regulations to the development of time and circumstances. The powers were conferred for the government of business for all time and under all circumstances. To this end Congress may establish telegraph lines, and in this, is not limited in its operation to such military and post-roads as are on the public domain. (Pensacola Tel. Co. *v.* Western Union Tel. Co. 96 U.S. 1, *id.* p. 47.)

The postal power of the United States embraces the regulation of the entire postal system of the country, and enables Congress to designate what shall be carried in the mail and what excluded. A law excluding circulars of lotteries, &c., is a valid exercise of the power. But when any matter is excluded from the mails, Congress cannot forbid its transportation by other means, so as to interfere with the freedom of the press. (*Ex parte* Jackson, 96 U.S. 727, *id.* p. 47.)

"We may also class the power of Congress over the postal service with, but not under, the power to regulate commerce with foreign nations and among commonwealths. I say with, but not under, because this power extends to postal communication within a single commonwealth, as well as among the commonwealths and with foreign States, and because the Congress has interpreted its power in this respect as authorizing it not simply to regulate the postal business, but to authorize the administration to do the postal business, and to do it exclusively; *i.e.*, Congress has claimed and exercised the power of establishing a governmental monopoly of the postal business over all governmental postal routes, and, since Congress may declare every route a governmental postal route, the monopoly is complete at the option of the Congress. The Court has ratified the interpretation which Congress has placed upon its power in this respect." (Burgess Political Sc. II. p. 139-40.)

"Again, Congress must not so exaggerate the conception of mail matter as to claim the express business as a governmental monopoly. It cannot prohibit from carriage in other ways than through the United States mail anything which was not regarded as mail matter at the time of the formation of the constitution." (*Id.* p. 140.)

"Whether, under the power to establish post offices and post roads, the legislature of the United States may make the telegraph a governmental monopoly cannot be regarded as entirely settled, although the Congressional Act of 1866, and the decision of the Supreme Court in the case of The Pensacola Telegraph Company *v.* The Western Union Telegraph Company, seem to indicate that both the Congress and the Court interpret the constitution as vesting this power in Congress." (*Id.* 140-1.)

51. (vi.) The naval and military defence[163] of the Commonwealth and of the several States, and the control of the forces to execute and maintain[169] the laws of the Commonwealth:

Historical Note.—The war powers of the United States (Art. I. sec. viii. sub-ss. 11-16) are those of a sovereign State, and include the power to declare war. The corresponding provision of the British North America Act is "Militia, Military and Naval Service and Defence" (sec. 91, sub-s. 7).

"Defence" was specified as a federal subject in the Bill attached to Wentworth's Memorial in 1857 (p. 94, *supra*). By the Federal Council of Australasia Act, 1885, the subject of "general defences" might be referred to the Federal Council. The opportunity for Sir Henry Parkes' action which led to the Sydney Convention of 1891 was Major-General Edwards' report on the necessity for federal defence. In the Commonwealth Bill of 1891 there were two sub-clauses dealing with the matter:—"(6) The military and naval defence of the Commonwealth and the several States, and the calling out of the forces to execute and maintain the laws of the Commonwealth, or of any State or part of the Commonwealth; (7) Munitions of war." The latter sub-section was added in Committee, at Mr. Fitzgerald's suggestion. (Conv. Deb., Syd., 1891, pp. 683-4.)

At the Adelaide session, 1897, the sub-clause was worded:—"The military and naval defence of the Commonwealth and the several States, and the calling out of the forces to execute and maintain the laws of the Commonwealth." A verbal transposition was made at the Sydney session; and at the Melbourne session, after the fourth report, "control" was substituted for "calling out."

§ 168. "Naval and Military Defence."

In 1858 the military expenditure incurred by the Imperial Government in the various colonies and dependencies of the Crown amounted to nearly £4,000,000 sterling. Towards that large sum the communities for whose defence and safety it was incurred contributed only £380,000. In few of those colonies or dependencies was there any militia established, or any local provision made for defence. In 1859 a Departmental Committee consisting of Sir T. Elliott of the Colonial Office, Mr. Hamilton of the Treasury, and Mr. Godley of the War Office, submitted a report to the Imperial Government on the question of the defence of the colonies, in which the injurious consequences of the old policy of encouraging the colonies to rely solely on the Mother country for protection were pointed out. Not only did it impose an unfair burden on the British taxpayer, but it also retarded the development of the spirit of self-reliance and self-defence in the colonies, and discouraged any effort to share in the responsibility of maintaining intact their free institutions and their national existence. The report led to an important reform, which was inaugurated shortly afterward.

On 4th March, 1862, Mr. Arthur Mills proposed in the House of Commons the following resolution, which was carried unanimously:—

"That this House (while fully recognising the claims of all portions of the British Empire to Imperial aid in their protection against perils arising from the consequences of Imperial policy) is of opinion that colonies exercising the rights of self-government ought to undertake the main responsibility of providing for their own internal order and security, and ought to assist in their own external defence."

A fundamental change was brought about by the gradual withdrawal of the Imperial troops, previously scattered throughout every part of the Empire, and by the self-governing colonies undertaking the responsibility of their own military defence. (Todd's Parl. Gov. in Col., 1st ed. p. 295.)

In 1873 the Under-Secretary of State for the Colonies was in a position to inform Parliament that the military expenditure in connection with the colonies was only such

as was necessary for Imperial purposes. The barracks, fortifications and landed property used for defence purposes, and the arms and munitions of war in actual use in each colony, were handed over to the local Government, subject only to the condition, that if at any future time troops should be sent to the colony at its request, or in the furtherance of colonial interests, suitable accommodation should be provided for them. (*Id.* p. 298.)

On the application of the Governments of New South Wales, Victoria, South Australia, and Queensland, the Imperial Government decided in 1876 to instruct Major-General Sir W. F. D. Jervois and Lieutenant-Colonel Scratchley to inspect the existing fortifications, ports, harbours, and coastal defences, of the various Australian colonies, and to advise the local Governments as to the engineering and other means required to place the naval and military defences of Australia in a state of efficiency. In accordance with the recommendations of those distinguished officers, provision was made by the Australian Legislatures for the purchase of war vessels, the erection of forts, and the improvement of harbour defences. (See p. 115, *supra.*)

At the Colonial Conference held in London in 1887 the representatives of the colonies expressed a desire that the Imperial Government should appoint a military officer of high standing to advise the Australian Governments as to the best method of organizing the local forces in order to secure their joint co-operation in time of need. Accordingly in 1889 Major-General Edwards, R.E., C.B., was sent to Australia to inspect and report upon the defences of the colonies. In his able and elaborate report he pointed out the imperfections of the existing system of defence, which was based on purely local administration with no provision for united action in time of emergency, and he submitted a plan for a uniform system of military organization to be brought into operation throughout Australia. He suggested that the troops of the various colonies might act in the field as a united force under one command whenever required, so that they might be in readiness to be removed to repel invasion at any given point. The following is a summary of General Edwards' proposals :—

(1.) Federation of the forces :
(2.) An officer of the rank of Lieutenant-General to be appointed to advise and inspect in time of peace and to command in time of war :
(3.) A uniform system of organization and armament, and a common defence Act :
(4.) Amalgamation of the permanent forces into a "fortress corps" :
(5.) A federal military college for the education of the officers :
(6.) The extension of the rifle clubs :
(7.) A uniform gauge for the railways :
(8.) A federal small-arm manufactory, gun wharf and ordnance store.

"In urging the necessity of a federal military college, the general pays a tribute to the Canadian royal military college. He says : - 'Nothing is more necessary for the efficiency of an army than the proper education of its officers, but at present no means exist in Australia to meet this important want. Canada was formerly in the same difficulty before she was federated, and it was only overcome by the establishment of the royal military college at Kingston. Having had personal experience of the officers educated there, I can testify to the excellence of their instruction. In addition to the primary object of the college, the course affords a thoroughly practical, scientific and sound training in all branches essential to a high and general education. The tendency of it has been to cause the students to feel a greater pride in their country, and to look at it from the broad standpoint of Canadians, whose aspirations are not circumscribed by the limits of a municipality. A college such as this would be eminently adapted for the education of the officers of the Australian forces.'" (Todd, Par. Gov. in Col. 2nd ed pp. 399-401.)

The Australasian Naval Defence Act, 51 and 52 Vic. c. 32, assented to 20th Dec. 1887, was passed to give legal effect to the terms of a provisional agreement between the Imperial Government and the Governments of the Australasian colonies, subject to parliamentary ratification. (See p. 116, *supra.*) Under the terms of this compact, the

Admiralty undertook to construct and equip a fleet of five fast cruisers, each of 2575 tons displacement and 7500 horse power, and two torpedo gunboats, on the most approved modern build, each 750 tons and 4500 horse power, for the protection of the floating trade in Australasian waters, and in order to secure the defence of certain ports and coaling stations. Of these vessels, three cruisers and one gunboat were to be kept continually in commission, the remainder to be held in reserve irrespective of the usual strength of Her Majesty's naval force employed at the Australian station. The Act stipulated that these sea-going ships should be furnished by the Imperial Government, the colonies paying 5 per cent. interest annually on the prime cost, such payment not to exceed £35,000 a year; the colonies in addition bearing the actual charges of their maintenance, including retired pay to officers and pensions to men, provided that the annual cost under this head should not exceed £91,000. The ships were to be under the sole control and orders of the naval commander-in-chief on the Australian station, but to be retained within the limits of that station, and only otherwise employed by consent of the colonial governments. The agreement was to become binding between the governments as soon as the colonial legislatures passed special appropriations for the fulfilment of its conditions. For the boundaries of the Australian station, as defined in the Act, see p. 116, *supra*.

The agreement was ratified in 1887 by similar Acts passed by the various Australian legislatures. It was made for a period of ten years at least, and it could only be terminated then or thereafter upon two years' notice. The ninth annual contribution of £126,000 for cost and maintenance of coastal defence was allotted among the various Australasian colonies, on the basis of population, as follows:—

Colony.	Estimated Population on 31st December, 1898.	Amount of Allotment.
		£
Victoria	1,175,490	33,083
New South Wales ...	1,346,240	37,886
Queensland	498,533	14,030
South Australia ...	367,934	10,355
Western Australia ...	168,150	4,732
Tasmania	177,341	4,990
New Zealand... ...	743,463	20,924
Total	4,477,151	£126,000

The report of General Edwards, recommending a federation of the naval and military forces, was one of the strongest arguments ever submitted in favour of the political federation of the Australian colonies. Most of the leading statesmen of the day were of opinion that there could be no successful federation for naval and military purposes unless the forces were placed under one command; that there could not be one command except under one government, and one common system of taxation by a representative parliament. These views were expressed with unanswerable force and admirable precision by Sir Henry Parkes in moving the preliminary resolutions on which the Draft Bill of 1891 was founded. "I then come," said the venerable President of the Convention, "to one to which I expect an almost unanimous agreement: That the military and naval defences of Australia shall be entrusted to federal forces, under one command. Whatever our views may be on other points, I think we shall all be agreed upon this: that for the defence of Australasia to be economical, to be efficient, to be equal to the emergency that may arise at any time, it must be of a federal character, and must be under one command. I am seeking to simplify my words as much as possible. I do not mean that the land forces and the naval forces shall be under one commander-in-chief; but that they should be under one kindred command—that the naval officer in command, equally with the military officer, shall be a federal officer, and

amenable to the national government of Australasia. Now these are the conditions which appear to me to be essentially requisite that we should decide in one way or the other—that should be strictly defined by this Convention before we can proceed to construct a bill to confer a constitution." (Conv. Deb., Syd., 1891, p. 25.)

Under the Constitution the Federal Parliament, like the American Congress, has power to raise and maintain an army and a navy; it is charged to take over from the States their naval and military departments, their forces, their fortifications and defence works and buildings, their ships of war, their war materials and armaments (secs. 69 and 85); it may acquire from the States or from private persons landed and other property necessary for naval and military purposes. (Sec. 51—xxxi.) In fact it has full and exclusive authority for the construction of defence works and for the recruitment, organization, and discipline of the whole of the naval and military forces of the Commonwealth; it can do everything in the development of its naval and military system which can be accomplished by legislation, except that it may not assume the functions of the commander-in-chief, which by sec. 68 are vested in the Governor-General as the Queen's representative. (Burgess II. 153-5.)

The States are forbidden to raise or maintain any naval or military forces without the consent of Parliament. (Sec. 114.) The American Courts have gone so far as to express the opinion that the States cannot obstruct or embarrass the power of Congress, in the creation of military forces, by prohibiting the people from keeping or bearing arms. (Presser *v.* Illinois, 116 U.S. 252.) This inhibition is derived from the power of Congress to construct the whole military organization of the nation. (Burgess II. 151.) The States of the Commonwealth are no doubt similarly inhibited. The military jurisdiction of Congress is subject to one limitation, viz., that army appropriation shall not, at any one time, provide for a longer period than two years. (Art. I., sec. 8, ss. 12.)

The Parliament of the Commonwealth is not so hampered in its appropriations. But the plenitude of its naval and military power is, apparently, subject to limitation in the purpose for which it must be used. It could not enter upon naval and military enterprises solely with a view to foreign conquest and aggression; its power is to be used for the defence of the Commonwealth and of the several States, and for the preservation of law and order within its limits. As to the exclusiveness of this power, see notes to sec. 114.

The control of the general government over this subject is plenary and exclusive. It determines how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, the period of service, and the compensation to be allowed It provides for the rules that shall govern the army, defines military offences, and prescribes punishment; and no State can interfere with the discharge of these national duties by *habeas corpus* or other proceedings. (Tarble's Case, 13 Wall. 397. Baker, Annot. Const. p. 52.)

The Constitution of the United States empowers Congress to "raise and support armies" and to "provide and maintain a navy." Independently of the express clause in the Constitution, this must include the power to "make all laws which shall be necessary and proper for carrying into effect the foregoing powers." (United States *v.* Bainbridge, 1 Mason, 71. *Id.*)

Congress has power to provide for the trial and punishment of military and naval offenders, in the manner practised by civilized nations. (Dynes *v.* Hoover, 20 How. 65. *Id.* p. 53.)

The power to maintain a navy authorizes the Federal government to buy or build ships of war, to equip them for war, and to despatch them to any part of the globe. (United States *v.* Rhodes, 1 Abb. [U.S.] 28. *Id.*)

A war ship of a friendly foreign nation, while within a port of the Union and demeaning itself in a friendly manner, is not within the ordinary jurisdiction of the federal courts. The Exchange *v.* McFaddon, 7 Cranch, 116. *Id.*)

§ 169. "To Execute and Maintain the Laws."

As to the duty of the Federal Government to protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence, see Notes to sec. 119 (§§ 466-7, *infra*). (See also Martin *v.* Mott, 12 Wheat. 19; Luther *v.* Borden, 7 How. 8. Baker. Annot. Const. p. 53.)

The power which may be conferred under these words is meant to be exercised when some sudden emergency renders it necessary, in order to maintain the public peace. (Luther *v.* Borden, 7 How. 8.)

An Act of Pennsylvania providing that the officers and men of the militia of that State neglecting or refusing to serve when called into service by the President shall be liable to penalties prescribed by Congress, and providing for trial of such delinquents by State court-martial, &c., is not repugnant to the Constitution of the United States. (Houston *v.* Moore, 5 Wheat. 1. Baker, Annot. Const. p. 53.)

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51. (vii.) Lighthouses[170], lightships, beacons, and buoys:

Historical Note.—Earl Grey's Committee of the Privy Council in 1849 suggested "The erection and maintenance of beacons and light-houses" (p. 85, *supra*); and Wentworth's Constitutional Committee in 1853, and his Memorial in 1857, specified "Beacons and light-houses on the coast." Sec. 91 of the British North America Act specifies "Beacons, buoys, light-houses" (sub-s. 9.)

In the Commonwealth Bill of 1891 the sub-clause ran:—"Ocean beacons and buoys, and ocean light-houses and light-ships." These words were adopted by the Adelaide session, 1897. At the Sydney session, a suggestion by the House of Assembly of Tasmania, to omit "ocean" whenever occurring, was supported by Mr. N. J. Brown, on the ground that it would be impossible to define what was, and what was not, an ocean light; that very often what was from one point of view a river beacon or light was, from another point of view, an ocean beacon or light. As against this it was contended that it was desirable to preserve the line of demarcation generally recognized between what should be Federal power and what should be State power; reserving to the Commonwealth control over external and coastal services of this kind, whilst matters capable of internal regulation, such as lights, beacons, and buoys situated in harbours and rivers should remain under the control of the States. This reasoning for the time prevailed, and the word "Ocean" was retained. (Conv. Deb., Syd., 1897, pp. 1067-71.) At the Melbourne session, before the first report, the word "Ocean" was omitted at the suggestion of the Drafting Committee, thus greatly enlarging the jurisdiction of the Federal Parliament, in accordance with the suggestion of the Tasmanian Assembly.

§ 170. "Lighthouses," &c.

These works and services will be taken over from the States on a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth (sec. 69).

Federal legislation under this sub-section will deal with the construction, equipment, conduct, and management of light-houses, light ships, light-sirens, beacons, buoys, and signals, for shipping throughout the Commonwealth, and over its adjacent seas. It will also provide for the imposition and collection of dues to be paid by the owners or masters of ships which pass the lights, signals, &c., and which derive benefits therefrom.

At the Australasian Maritime Conference, held at Hobart in 1894, at which all the colonies except Western Australia and New Zealand were represented, it was recommended "that the whole system of lighting the highway, coast, and harbour lights of Australasia be borne *pro rata* on the basis of the population;" and it was also resolved, "That in pursuance of the foregoing resolution, and after having carefully considered

the questions relating to the light-house system of Australia, and further having ascertained that in many cases lights are most needed in the colonies possessing the smallest population, this Conference is of opinion that the future erection and maintenance of light houses should be conducted under a Federal system, whereby the cost would be proportionately borne by the colonies that may now or hereafter join such Federation upon a population basis."

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51. (viii.) Astronomical and meteorological[171] observations:

Historical Note—These words were first inserted at the Adelaide session, 1897. In Committee Mr. Reid questioned the necessity of retaining them, but the sub-clause was agreed to. (Conv. Deb., Adel., pp. 775-6.)

§ 171. "Astronomical, &c."

"It is very desirable that we should have uniformity throughout Australia with regard to these things. I am not so much wedded to the astronomical, but, in regard to the meteorological observations, it is most essential that there should be uniformity throughout Australia. On a former occasion I pointed out that one of our best observers, Mr. Wragge, was very anxious we should have these observations in Tasmania. There was no obligation on the part of the Tasmanian Government to establish these observations on Mount Wellington, but there is a general consensus of opinion among the best men that these observations would be invaluable to Australia. Why should the Government of Tasmania be called upon to meet an expenditure of this kind when it is admitted by the best men in Australia and elsewhere that these observations would be of more value to Australia than they could be to Tasmania, which happens to be the position from which they could be taken? If there is anything which ought to be the subject of a Commonwealth law, it is these observations, which will undoubtedly prove of great value to shipping and other interests of Australia." (Sir J. Abbott, Conv. Deb., Adel., 1897, p 775-6.)

"With regard to the astronomical observations it is very important that they should be under Federal management. Take the case of the United Kingdom at the present time. There we have an observatory at Greenwich which I apprehend is the chief northern observatory of the empire. There is an observatory in Dublin, and another in Edinburgh, both admirably managed institutions, but we do not hear of them conflicting with the observatory at Greenwich, which maintains the paramount position in the United Kingdom. The same is the case with the Washington observatory of the United States. So also we should have an observatory in the Commonwealth which should rank before the other observatories. It commends itself to our intelligence that there should be a federal observatory, to take precedence over other observatories. I think there are obvious reasons that the meteorological observations should be placed under one general control, and I trust that the Convention will not object to the clause as it stands." (Mr. C. H. Grant. *Id.* p. 776.)

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51. (ix.) Quarantine[172]:

Historical Note.—"Quarantine and the establishment and maintenance of marine hospitals" is specified in sec. 91 of the British North America Act (sub-s. 16). "Quarantine" was one of the subjects which might be referred to the Federal Council of Australasia under the Act of 1885. It was included in the Commonwealth Bill of 1891, and in the Adelaide draft of 1897. At the Sydney session, Mr. R. E. O'Connor thought the sub-clause should be restricted to infection from outside, and moved to substitute "Public health in relation to infection in contagion from outside the Commonwealth." This was negatived by 19 to 13 votes. (Conv. Deb. Syd., 1897, pp. 1071-3.)

§ 172. "Quarantine."

Scope.—Quarantine was originally the term of forty days, during which a ship arriving in port, and suspected of being intected with a malignant or contagious disease, was required to remain isolated and was forbidden all intercourse with the shore. Hence it came to mean restraint or inhibition of intercourse; also the place where the infected or prohibited vessels were stationed. With the expansion of sanitary science and legislation, quarantine has acquired a much wider signification than that which it first possessed. It is now comprehensive enough to cover any forced stoppage of travel, or of transit, or of communication, as well as compulsion to remain at a distance, or in a given place, without intercourse, on account of any malignant, contagious, or dangerous disease on land as well as by sea. (Webster's Internat. Dict.)

Quarantine in the United States.—The Constitution of the United States of America does not expressly confer on Congress jurisdiction to deal with quarantine. Laws relating to quarantine may, although not so intended, operate as a regulation of trade and commerce. Congress, like the Federal Parliament, has the exclusive power to regulate inter-state and foreign commerce. Hence it follows, that inasmuch as quarantine regulation necessarily involves temporary interference with and restraint of the movements of commerce, and of those engaged in it, the power of the States to deal with quarantine, although not taken from them and handed over to Congress, is strictly speaking very limited. In practice, however, the States pass quarantine regulations until Congress shall have interposed by independent legislation over the subject, or shall have forbidden State laws in relation thereto. So far Congress has not passed laws inconsistent with State quarantine laws; on the contrary it has adopted some of the State laws bearing on the subject. (Morgan's Steamship Co. *v.* Louisiana, 118 U S. 455.)

Quarantine Under the Commonwealth.—The Federal Parliament has received a clearer and fuller grant of power relating to quarantine than Congress. It is given to Congress by implication; it is conveyed to the Federal Parliament directly. Out of that express grant amplifications and developments may flow which could not have been evolved from an implication. The Federal Parliament may deal with quarantine without reference to the interests of trade and commerce, but as an independent question having regard to the sanitary condition and welfare of the Commonwealth as a whole. It will be able to provide for the isolation, segregation, remedial and preventive treatment of animals and plants and their diseases wherever found within the Commonwealth. It would probably be able, if deemed desirable, to grapple with such problems as the tick plague or a phylloxera pest, in stamping out which the whole of Australia is interested. Such a power would only be exercised in cases of universal interest and of far-reaching importance, and for the purpose of reinforcing and not superseding the ordinary sanitary laws, institutions and authorities in operation within the respective States.

Canadian Cases.—By the Canadian Constitution, sec. 91, sub-sec. 11, the Dominion Parliament has exclusive jurisdiction over quarantine and the establishment and maintenance of marine hospitals. In Ringfret *v.* Pope, 12 Quebec L.R. p. 303, it was held that the preservation of the public health within the Province was a matter of merely local or private nature which, by sec. 92, sub-sec. 16, is exclusively within the jurisdiction of the provincial legislature. Cross, J., dissented from this decision, so far as it concerned the establishment of a central board of health with a system of subordinate boards. He said:—"Although the provincial legislature might make and enforce police regulations directly, or by giving that power to be executed by the municipalities so as to promote health within their several jurisdictions, or deal with the subject in a sense that was purely local, the Dominion legislature could deal with it in a general sense, and take appropriate measures to prevent or mitigate an epidemic, endemic or contagious disease, with which the Dominion, or any part of it, was threatened." In 1869 a Bill providing for vaccination was not proceeded with in the Dominion Parliament, as it was

considered doubtful if it was within its jurisdiction. (Bourinot's Parliamentary Procedure and Practice, 2nd ed. p. 674, citing Com. Deb. 1869, p. 64; Sen. Deb. 1879, p. 47; Lefroy, p. 659.)

The Legislature of British Columbia passed an Act enabling the Corporation of Vancouver to make by-laws for regulating, with a view to preventing the spread of infectious disease, the entry and departure of ships at the port of Vancouver, and the landing of passengers and cargoes from ships or from railroad cars. In the case of the Canadian Pacific Navigation Co. *v.* The City of Vancouver, 2 Brit. Columb. 193, it was held that this was not an infringement of the Dominion power to regulate trade and commerce. But according to the report of Sir John Thompson, Minister of Justice of Canada, dated 28th January, 1889, respecting the Nova Scotia Acts of 1888, authorizing the Governor in Council to regulate "with a view of preventing the spread of infectious disease, the entry or departure of boats or vessels at the different ports or places in Nova Scotia," and the report of the same Minister, dated 21st March, 1891, on the Manitoba Act respecting the diseases of animals, it would seem that, in the opinion of the federal authorities of Canada, such legislation is an invasion of the Dominion power over quarantine. "The British North America Act," says Sir John Thompson, "gives exclusive legislative power to the Parliament of Canada in respect of quarantine, navigation and shipping. It would clearly not be competent for a provincial legislature to make an enactment relating to the arrival of vessels, vehicles, passengers or cargoes from places outside the province, but it may be that provincial control may be exercised in relation to transport from one port of the Province to another, subject, of course, to any regulation on the subject of quarantine by the federal authority."

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51. (x.) Fisheries[173] in Australian waters beyond territorial limits[174]:

Historical Note.—Sec. 91 of the British North America Act empowers the Parliament of Canada to make laws as to "sea coast and inland fisheries" (sub-s. 12). "Fisheries in Australasian waters beyond territorial limits" was one of the independent legislative powers of the Federal Council, under the Act of 1885; and the sub-clause in its present form was inserted in the Commonwealth Bill of 1891. In the Adelaide draft of 1897, it was adopted, with the addition of the words "and in rivers which flow through or in two or more States." In Committee these added words were omitted. (Conv. Deb., Adel., pp. 776-8.) At the Sydney session, Mr. Kingston suggested "Australasian" for Australian, and also the insertion of some definition of Australasian waters; but no amendment was moved. (Conv. Deb., Syd., 1897, pp. 1073-4.) At the Melbourne session, after the first report, Mr. Barton moved an amendment to make the sub-clause read "Sea fisheries in Australian waters." Mr. Kingston and others, however, pointed out the necessity of express words, in order to give power outside territorial limits, and the amendment, by general consent, was negatived. (Conv. Deb., Melb., pp. 1855-74.)

§ 173. "Fisheries."

A fishery, at common law, is a right incidental and annexed to the lordship or ownership of the soil over which the waters, the habitat of the fish, flow. On the sea coast, within three miles of the shore, and in the bays, arms, rivers, and creeks connected with the sea and within the tidal pulsation, fisheries are presumed to belong to the Crown, which can dispose of the right to private persons by license or lease. In non-tidal waters it is presumed that the fisheries belong to the persons who own the riparian lands over which the waters flow, or the land adjacent thereto. (Murphy *v.* Ryan, 1868, Ir. Rep. 2 C.L. 143.) At common law, therefore, the right of the public to fish

under the supervision and protection of the Crown extends to all tidal waters within the territorial limits. (Pearce *v.* Scotcher, 1882, 9 Q.B.D. 162.) Private persons, however, may, by either an express or an implied grant from the Crown, acquire the exclusive right of fishery in the tidal waters. (Wilson *v.* Crossfield, 1885, 1 Times L.R. 601.)

Fishery laws may be defined as general laws for the regulation and conservation of the fishing trade; such as laws for the protection and preservation of fish; forbidding fish to be taken in an improper manner, as by objectionable appliances or noxious substances; prohibiting unnecessary waste and destruction of fish, and the taking, buying, or selling of fish in certain seasons; providing that fishermen, fishing boats, and ships shall be licensed and registered; and regulating the employment of labour in connection with such boats and ships.

It has been held in Canada that in order to determine the nature of laws which the Dominion Parliament may pass in relation to "sea coast and inland fisheries" it is necessary to look to the laws in relation to fisheries which the provincial legislatures were before, and at the time of federation, in the habit of enacting. (The Queen *v.* Robertson, 6 S.C.R. [Can.] pp. 52, 121.)

The right to regulate fisheries does not imply or convey a right to prejudice or invade private property. Thus it has been decided in Canada that the British North America Act, in assigning to the Parliament of Canada the right to legislate with respect to "sea coast and inland fisheries," did not give authority to deal with matters of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the right of individuals therein. (The Queen *v.* Robertson, 6 S.C.R. [Can.] 52, followed and confirmed by the same Court in *Re* Provincial Fisheries, 26 S.C.R. [Can.] 444.)

The Merchant Shipping Act, 1894, contains elaborate regulations relating to fishing boats and fishermen employed on the waters surrounding the British Islands. Among these may be mentioned sec. 399, in which special provisions are made for trawlers of 25 tons and upwards. The skipper of every trawler of that tonnage going to sea from a port in England or Ireland must make an agreement with his crew (not including sea-fishing boys) under a penalty of £5. This agreement must be in a form approved by the Board of Trade, dated at the time of its first signature, and signed first by the skipper; it must contain the nature and duration of the voyage or engagement, the number and description of the crew, the time for beginning work, the capacity in which each seaman serves, his remuneration, the scale of provisions, and regulations as to conduct on board, fines, allowance of provisions, and punishments for misconduct approved by the Board of Trade and adopted by the parties, who may add stipulations at their will, if not contrary to law, with regard to advance and allotment of wages. (Sec. 400.) Similar agreements may be made by the owner or registered managing owner instead of the skipper, in the same way as by the skipper.

§ 174 "Australian Waters Beyond Territorial Limits."

The sub-section, as originally drawn by the Constitutional Committee of the Convention, contained words conferring jurisdiction over "fisheries in rivers which flow through or in two or more States." The representatives of New South Wales objected to the power in that form, on the ground that it would enable the Parliament to interfere in matters of purely local concern, which could be more efficiently and economically supervised by the State authorities. The words objected to were struck out, and the States were accordingly allowed to retain the control of fisheries within their territorial limits, whilst the Federal Parliament was assigned jurisdiction over fisheries in Australian waters beyond the three-mile limit. This is a somewhat remarkable instance of the intended extra-territorial operation of some of the laws of the Commonwealth.

Weighty reasons were advanced in the Convention, both for and against the retention of the words "Australian waters beyond territorial limits." In opposition to the words reference was made to the vagueness of the expression "Australian waters."

Mr. Kingston thought it important that some definition of the term "Australian waters" should be inserted. "I do not know," he said, "if the hon. and learned member, Mr. Barton, is satisfied in his own mind as to what meaning would be attached to the term. I think that there was some provision in connection with the Federal Council by which, under an Imperial order, these waters were defined; and legislation was adopted by the colony of Western Australia and Queensland in the exercise of powers conferred on the Council in regard to those matters. The clause applies only to matters beyond territorial limits, which increases the difficulty." (Conv. Deb., Syd., 1897, p. 1073.)

In the absence of a definition, it was said, complicated questions might arise in practice as to how far from the Australian coast "Australian waters" might be deemed to extend, and whether at a given time a fishing boat was within those waters. More important still was the innovating proposal to give the Federal Parliament power to legislate respecting fisheries beyond its territorial limits. Outside those limits the ocean was the highway of all nations, and no country could claim to exercise exclusive jurisdiction over the high seas. It was not conceivable that any law affecting fisheries outside the territorial limit would be legally operative. It was not sufficient to say that the Imperial Parliament would give the Commonwealth power to legislate in respect of matters occurring beyond those limits. The Imperial Parliament could not effectively grant the Commonwealth a power which, according to the law of nations, it did not possess. Suppose the Federal Parliament passed such a law, and the captain and crew of a foreign ship violated it, in contempt and defiance of the Commonwealth, would not the law in that case be made a laughing stock? Then, again, the power as it stood in the sub-section recognized two legislative authorities, with respect to fisheries, one within, and the other beyond the three-mile limit. This might lead to a clashing of State regulations with Federal regulations. The boundary line between State jurisdiction and Federal jurisdiction would be vague and not capable of easy and satisfactory delimitation. Persons engaged in the fishing trade might very often be unable to say whether they were liable to and bound to obey State laws or Federal laws. A vessel engaged in trawling should not be under one set of laws when fishing close to the coast, and under another set when compelled to go further out to sea in order to find fish. Rather than risk such doubt and possible conflict it might be advisable to omit the sub-section altogether and allow the fishing trade to be governed by the laws relating to trade and commerce, or by the laws relating to navigation and shipping, which were within the competence of the Federal Parliament. Such laws would enable the Federal authorities to issue fishing licenses and attach all necessary and proper conditions, and such a course would meet all the requirements of the case. (Mr. E. Barton, Conv. Deb., Melb., pp. 1857-8-9.)

The arguments in support of retaining the words admitted the difficulties pointed out, but claimed that there were powerful considerations which more than outweighed those difficulties In the first place this was by no means a new and untried grant of power. By section 15 (*c*) of the Federal Council of Australasia Act (48 and 49 Vic. c. 60), power was given to that body to legislate in respect of "fisheries beyond territorial limits"—the identical words used in this sub-section; the only condition to the exercise of its jurisdiction being (1) that its laws should be enforced only in colonies which had adopted the Act and which were represented in the Council, and (2) that proposed laws relating to sec. 15 (*c*) should be reserved for the signification of Her Majesty's pleasure. This had not remained a dormant power, but had been exercised.

In January, 1888, the Federal Council passed an Act to regulate pearl-shell and beche-de-mer fisheries in Australasian waters, adjacent to the colony of Queensland. The preamble recited:

"Whereas, by certain Acts of the Parliament of the colony of Queensland, provision has been made for regulating the pearl-shell and beche-de-mer fisheries in the territorial waters of that colony; and whereas, by reason of the geographical position of many of

the islands forming portion of that colony, vessels employed in such fisheries are, in the prosecution of their business, sometimes beyond the territorial jurisdiction of Queensland; and whereas it is expedient that the provisions of the said Acts should extend and apply to such vessels during all the time they are so employed, and that for that purpose the provisions of the said Act, so far as they are applicable to extra-territorial waters, should be extended to such waters by an Act of the Federal Council of Australasia."

The Act contained provisions to regulate the pearl-shell and beche-de-mer fisheries in Australasian waters adjacent to the colony of Queensland. Such waters were defined as being within the following limits:—

"All waters within a line drawn from Sandy Cape northwards to the south-eastern limit of the Great Barrier Reef; thence following the line of the Great Barrier Reef to their north-eastern extremity near the latitude of 9½° south: thence in a north-westerly direction embracing East Anchor and Bramble Cay; thence from Bramble Cay in a line west by south (south 79° west true) embracing Warrior Reef, Saibai and Tuan Island; thence diverging in a north-westerly direction so as to embrace the group known as the Talbot islands; thence to and embracing the Deliverance island and on in a west by southern direction (true) to the meridian of 138° of east longitude; and thence by that meridian southerly to the shore of Queensland."

This Act was reserved for the Royal assent, which was proclaimed on 19th July, 1888. In February, 1889, the Federal Council passed an Act to regulate the pearl-shell and beche-de-mer fisheries in Australasian waters adjacent to the colony of Western Australia. It contained provisions substantially similar to those of the Queensland Act. The extra-territorial waters, within which it was declared to be in force, were defined in the schedule as follows:

"A parallelogram of which the north-western corner is in longitude 112° 15' east and latitude 13° 30' south; of which the north-eastern corner is in longitude 129° east and latitude 30° 30'; and of which the south-west corner is in longitude 112° 52' east and latitude 35° 8' south; and of which the south-eastern corner is longitude 129° east and latitude 35° 8' south."

Both the Queensland and West Australian Acts are remarkable for the stringency of their provisions relating to the employment of coloured labour, showing that "laws with respect to fisheries" are capable of comprehending regulations controlling the employment of labour used in connection with fisheries. These Acts are still in force, their operation being preserved by clause 7 of the Commonwealth Constitution Act. Thus, it was pointed out, extra-territorial laws relating to fisheries had been already sanctioned by the Imperial Government, and enforced by the Governments of the two colonies over a wide expanse of ocean, the boundaries of which were defined within parallels of latitude and degrees of longitude. The pearl-shell and beche-de-mer trade had been regulated; the fisheries had been protected; fees had been collected; labour had been supervised, and everything expected and desired had been obtained. Here, therefore, they had an illustration of the practicability of the grant of power contemplated. Having received such a grant in the Federal Council Act, it would not be wise for Australia to surrender it by omitting a similar enabling provision from the Constitution of the Commonwealth. The power should appear on the face of the Constitution; they ought not to trust any implication hidden away in other clauses.

The practical arguments were strengthened by broader and more patriotic considerations. Such spheres of influence and control as had been already granted by the Imperial Parliament to the Federal Council should be reserved for and transferred to the Commonwealth. The people of such a continent as Australia, unique in its isolation and configuration, should have the right of control over waters outside the ordinary territorial limits. We should begin our career as a Commonwealth by mapping out a sphere of influence, and of commercial trading operations, all round the continent, and for some considerable distance from the coast. Within that sphere the Commonwealth would represent and protect, not merely Australian interests, but Imperial interests. We were taking over general powers from the States and from the Federal Council, and those powers should be accepted undiminished, and maintained unimpaired, without abandon-

ing one jot or yielding one tittle of what had been acquired by the labours and triumphs of the pioneers of Australian progress. (See speeches of Mr. C. C. Kingston, Sir John Forrest, Mr. A. Deakin, and Mr. R. E. O'Connor. Conv. Deb., Melb., pp. 1861-3 and 1872.)

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51. (xi.) Census[175] and statistics :

Historical Note.—Sec. 91 of the British North America Act specifies "The census and statistics." (Subs. 6.) The sub-clause "Census and statistics" was in the Commonwealth Bill of 1891, and was adopted by the Convention of 1897-8 without debate.

§ 175. "Census."

A census is the periodical numbering of the people of a country. Since the beginning of the nineteenth century a census has been taken of the inhabitants of Great Britain and Ireland every ten years, and the practice now extends throughout the English speaking portions of the Queen's dominions. The object of the census is to supply statistical information respecting number and conditions of the population, and respecting the resources and developments of the country. As the census is taken between the same hours of the same day of the same year, the necessity for uniform legislation in contiguous countries is apparent. For the purpose of a census the whole country is divided into districts, called enumerators' divisions, over which schedules are distributed requiring particulars as to name, sex, age, profession or occupation, marriage, relation to the head of the family, birthplace, and whether deaf, or dumb, or blind, or imbecile, or lunatic. When the schedules so filled up are collected, the details are verified and the results sent to the Registrar-General, who prepares a final abstract thereof, which is submitted to Parliament.

The Parliament of Canada has exclusive jurisdiction of census and statistics. The legislature of British Columbia passed an Act respecting the registration of births, deaths, and marriages in that Province. On 2nd January, 1879, the Minister of Justice of the Dominion called attention to the fact that the Act might be questioned as being connected with statistics.

The census and statistical departments of the States will be taken over by the Federal Government, as soon as enabling legislation is passed by the Federal Parliament.

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51. (xii.) Currency[176], coinage[177], and legal tender[178] :

Historical Note.—The Constitution of the United States empowers Congress "to coin money, regulate the value thereof, and of foreign coin ;" and "to provide for the punishment of counterfeiting the securities and current coin of the United States." (Art. I. sec. viii. sub-secs. 5-6.) Sec. 91 of the British North America Act specifies "currency and coinage" and "legal tender" (sub-secs. 14-20).

"Coinage" was specified as a federal subject in the Bill attached to Wentworth's Memorial in 1857. "Currency, coinage, and legal tender" were specified in the Commonwealth Bill of 1891, and the sub-clause was adopted by the Convention of 1897-8 without debate.

§ 176. "Currency."

Currency in this connection means the acceptance, reception, passing or circulation from hand to hand, from person to person, of metallic money, or of government or bank notes as substitute for metallic money.

The only gold coin now current in England is that coined during the present reign at the London Mint, or the Australian branch mints. Pre-Victorian gold was decried by proclamation in 1890. The designs current are those of 1838, 1870, 1887, and 1893. The Pre-Victorian gold has been called in in several colonies; in Australasia and in New Zealand in 1890; in the Cape and Fiji in 1893. All silver coin coined since 1816 is still current and legal tender. The designs now legally current are those of 1817 and 1893. Besides this general currency, in 1849 florins were made current coin. The design was altered in 1852, and double florins were made current under the proclamation of 1887. Until 1861 copper coins of the face value of 1d., ½d., and ¼d. were coined as part of the currency. They were then superseded by bronze money of the same denominations, and the copper coinage was decried as to the United Kingdom in 1869, and as to all colonies in which they were current in 1876. The designs adopted in 1861 were superseded by a new design in 1895. (Encyc. of Laws of England, iii. p. 75.)

The Federal Legislature has power, by suitable legislation, to restrain the circulation, as money, of any notes not issued by its own authority. (Veazie Bank *v.* Fenno, 8 Wall. 533. Baker Annot. Const. p. 46.)

The Federal Legislature has power to provide by law for the punishment of the offence of counterfeiting notes of foreign banks, or for having in possession a plate from which such counterfeit notes may be printed. (United States *v.* Arjona, 120 U.S. 479. *Id.*)

This clause does not prevent a State from passing laws to punish the offence of circulating counterfeit coin of the Union. Counterfeiting and circulating counterfeit coin are offences essentially different in their character. The former is an offence against the government; the latter is a private wrong. (Fox *v.* Ohio, 5 How. 410. *Id.* p. 47.)

§ 177. "Coinage."

Coinage is the act or process of converting metal into money for circulation. The coining and legitimation of money is one of the exclusive prerogatives of the Crown, but from the earliest times it has been regulated by Act of Parliament.

Sterling money (gold and silver money) of a given weight and fineness, seems to have been first established in 1351 by 25 Edw. III., st. 5, c. 13, but for a long time after that date the Crown exercised, or as Blackstone says (1 Com. 278), usurped, as part of its prerogative, the right to debase the coin. It was not until the time of Charles II. that the currency was put on a comparatively sound footing. The standard and value of English coin was extended to Scotland in 1706. Prior to 1870 the coinage and management of the mint were regulated by a series of enactments, wholly or partly repealed by and specified in the Coinage Act, 1870, 33 and 34 Vic. c. 10, on which the regulation of coin of the realm and the colonies now mainly depends. That Act fixes the standard of coins, prohibits the issue, except from the mint, of any piece of metal as token or coin, under a penalty of £20, recovered summarily; directs all contracts to be made in currency; regulates the purchase and coining of gold bullion; and directs mint profits to be paid into the exchequer. The exercise of the prerogative of coinage is defined and controlled, but the powers are left very wide. The purity of the coinage and the conformity to standard is ascertained annually by the trial of the pyx, which is held under an Order in Council of 1871. At this trial a jury of six competent freemen of the Goldsmiths' Company examine coins of each minting, set apart for testing by the standard trial plates and standard weights, which are kept in the custody of the Board of Trade, and produced on notice for the occasion. The Chancellor of the Exchequer is master of the mint, which is managed and regulated by the Treasury, subject to the Act of 1870. (Encyc. of the Laws of England, iii. p. 74.)

The language of the American Constitution, by its proper signification, is limited to the facts or to the faculty in Congress of coining and stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces or alters nothing; it is an offence punishable by State law, since it leaves the legal coin as it was—affects its intrinsic value in no wise whatever. (Fox *v.* Ohio, 5 How. 410-413; compare with United States *v.* Marigold, 9 How. 560. Baker, Annot. Const. p. 47.)

Under this power, as well as under the power to regulate commerce, Congress has authority to enact laws providing for the punishment of persons who bring into the United States, with intent to pass the same, any false or counterfeit coin, and also to

punish persons for passing, altering, publishing or selling any such false or counterfeit coin. (United States *v.* Marigold, 9 How. 560, *id.*)

The Mint opened in Sydney on 14th May, 1855, and that opened in Melbourne on 12th June, 1872, are Imperial Institutions, being branches of the Royal Mint. They were established, and are now administered, by the Imperial Government at the request of the Colonial Governments, which guarantee it against loss. The Queen's proclamation, pursuant to which these branches were opened, declared that the coin issued therefrom was to be a legal tender for payment within the United Kingdom. The Parliament of New South Wales and the Parliament of Victoria have made permanent provision, by special appropriations, for defraying the salaries, allowances, expenses, and contingencies connected with the branch mints in their respective colonies. The Victorian special appropriation is £20,000 per year; that of New South Wales is £15,000 per year. All fees, dues, and charges collected at the branch mints are accounted for and handed over by the deputy masters to the Treasurers of their respective colonies and paid into the consolidated revenue.

The West Australian Government has obtained the sanction of the Imperial Government for the establishment of a branch mint in Perth, of which the foundation stone was laid by Sir John Forrest on 23rd September, 1896. The building was completed and handed over to the Mint authorities in October, 1898, and the necessary machinery has since been erected. The expenditure involved up to the present has been about £30,000. The Parliament of Western Australia has appropriated the sum of £20,000 per year towards the maintenance of the Mint. On the authority of the Master of the Imperial Mint, it is stated that the new Mint will probably relieve the Melbourne Mint of a third of the deposits presented there. This will affect materially the profits of the Melbourne Mint, which have for some years past been of a most satisfactory character. The Perth Mint was opened for the reception of bullion on the 20th June, 1899.

The following statement of the capital value of the Sydney and Melbourne Mint properties, the annual interest payable thereon, the ordinary annual expenditure, the annual receipts, and the net cost per annum, has been compiled from returns presented to the Convention. (Votes and proceedings of Melbourne Session, p. 232; Victorian Federation Papers, 296.)

SYDNEY MINT.

CAPITAL.—Estimated present value land and building (rough approximation)		£70,000
MAINTENANCE.—Annual interest on outlay	£3,000	
Annual subsidy...	15,000	
Total	£18,000	
REVENUE, 1895-6, Fees, dues, charges, &c.	£15,119	
Net annual expenditure		£2,881

MELBOURNE MINT.

CAPITAL.—Estimated present value of land and building (rough approximation)		£70,000
MAINTENANCE.—Annual interest on outlay	£3,395	
Annual subsidy...	20,000	
Total	£23,395	
REVENUE, 1895-6, Fees, dues, charges, &c.	£21,194	
Net annual expenditure		£2,201

§ 178. "Legal Tender."

Definition.—Legal tender is the act of tending, in the performance of a contract, or in satisfaction of a claim, that which the law prescribes or permits, and at such time and place as the law prescribes or permits. (Webster's Internat Dict.) In the United Kingdom all coin current under proclamation, whether British, foreign, or colonial, is legal tender. British gold coin is legal tender for any amount, unless defaced or deficient in weight; British silver up to forty shillings, and British bronze up to a shilling (Coinage Act, 1870 [33 and 34 Vic. c. 10] s. 4.) Bank of England notes are legal tender in England for all sums above £5, except by the Bank itself and its branches. (Bank of England Act, 1833 [3 and 4 Wm. IV. c. 98, s. 6].) The notes are treated as cash and not as securities for money, and they pass by mere delivery. (Miller *v.* Race [1758] 1 Burr. 452.) The notes of a county bank are good tender, if not objected to at the time of tender. (Polglass *v.* Oliver [1831] 2 Crompt. and Jarv. 15.) In Australasia and New Zealand, by an Order in Council of 1896, it is provided that the rules as to the amount for which British coin is legal tender are the same as in the United Kingdom. (Imperial Statutory Rules and Orders, 1896.)

Coinage and Legal Tender.—By section 114 the States are forbidden to coin any money or to make anything but gold and silver coin a legal tender in payment of debts. The prohibition is similar to Art. I. sec. 10, subs. 1 of the United States Constitution. Hence it appears that under both Constitutions the creation and regulation of the monetary system is a power conferred on the Federal Parliament. It is a general power; the Parliament is not limited in the choice of metals to which it will give the quality of money. It may choose some other metal than gold and silver, and impress upon it a legal tender quality. But if a State endeavoured to compel a person to accept anything but gold or silver as a legal tender, the person aggrieved could appeal to the Courts of the Commonwealth for relief. (Burgess, Political Sci. II. p. 143.)

Legal Tender in the United States.—The Congress of the United States is expressly empowered to create and regulate the value of metal money. It has, however, been decided by the Supreme Court that, although the power to legislate concerning legal tender and paper money is not expressly conferred upon Congress, yet it has, by necessary intendment, such a power, and it can make anything a legal tender in payment of debt. (Juilliard *v.* Greenman, 110 U.S. 421.) The legal tender cases are very instructive, as illustrating the expansive and elastic capacity of a written constitution and the possibilities of its inherent and necessary powers. This subject will be referred to more fully in our note on "Paper Money," *infra*. At the present stage abstracts of the ruling cases are given.

In the Constitution of the United States there is no express grant of power to Congress to declare what shall be a legal tender, but this power has been uniformly exercised and unquestioned. This universal recognition is tantamount to a direct constitutional declaration, and the power can now be considered settled. (Martin *v.* Hunter's Lessee, 1 Wheat. 304; Cohens *v.* Virginia, 6 Wheat. 421; Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Anderson *v.* Dunn, 6 Wheat. 204. Baker, Annot. Const. p. 46.)

A Federal law making United States treasury notes legal tender is, when applied to contracts in existence prior thereto, unconstitutional. (Willard *v.* Tayloe, 8 Wall. 557; Hepburn *v.* Griswold, 8 Wall. 603; Broderick *v.* Magraw, 8 Wall. 639.) The decisions in the above cases are overruled, and the acts of Congress making United States treasury notes legal tender are held to be valid when applied to antecedent, as well as to subsequent contracts. (Legal Tender Cases [1871] 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 604; Norwich Railroad *v.* Johnson, 15 Wall. 195; Juilliard *v.* Greenman, [1884] 110 U.S. 421. Baker, Annot. Const. p. 46.)

Imperial Control.—Australian governors are at present required by their instructions not to assent to any Bill affecting the currency of the colony, unless such bill contains a clause suspending its operation until the signification of the Queen's pleasure thereon, or unless there is urgent necessity requiring it to be brought into immediate operation. In either of these cases he is authorized to assent to the bill, and remit it

to the Queen at the earliest opportunity (p. 399, *supra*). This paragraph was omitted from the Draft instructions under the Sign Manual and Signet to the Governor-General of Canada, dated 5th October, 1878, and in all probability it will not be found in the instructions to the Governor-General of the Commonwealth.

In 1851 a Canadian Act in relation to coinage was disallowed by the Queen in Council, on the grounds (1) that the Act proposed to confer upon the Governor-General the right of coining—a prerogative reserved by constitutional law to the sovereign; (2) that it purported to alter the current rates of certain foreign coins—a provision which, being enacted without the previous assent of Her Majesty in Council, was an interference with Imperial control over the value of currency money in circulation throughout the realm. By the British North America Act of 1867, the Imperial Parliament has specially empowered the Parliament of Canada to exercise "exclusive legislative authority" in relation to "currency and coinage." The Acts passed in Canada upon the subject of the currency in 1868 and in 1871 expressly conserve the prerogative of the Crown in the matter of coinage, and authorize Her Majesty to fix by proclamation from time to time the rates at which coins in circulation in Canada, or struck off by order of Her Majesty for use in Canada, shall pass current. (Todd's Parl. Gov. in Col. 2nd ed. p. 176.)

"In 1866 a ministerial crisis occurred in Queensland. Owing to serious financial embarrassments in that colony, ministers had tendered to the governor (Sir G. F. Bowen) their advice that, in order to sustain the public credit, there should be an immediate issue of inconvertible paper currency, in the shape of legal tender notes, to an amount not exceeding £200,000. The governor demurred to this proposal, inasmuch as he was expressly forbidden, by the royal instructions—'which are a part of the constitutional law of the colony'—to assent to any bill of this nature, unless upon urgent necessity, as aforesaid. He distinctly declared that in no event would he give the royal assent to any such bill. He suggested, however, another mode of meeting the financial difficulty—viz., by obtaining legislative sanction to the issue of treasury bills, coupled with the imposition of additional taxation; a course which had proved successful, under similar circumstances, in other colonies, and in the mother country." (Todd's Parl. Gov. in Col. 2nd ed. p. 185.)

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51. (xiii.) Banking[179], other than State banking[180]; also State banking extending beyond the limits of the State concerned[181], the incorporation of banks[182], and the issue of paper money[183]:

Historical Note.—Sec. 91 of the British North America Act specifies "Banking, incorporation of banks, and the issue of paper money" (sub-s. 20). These words were adopted in the Commonwealth Bill of 1891. In committee, the question of State savings banks was raised, but no amendment was moved. (Conv. Deb., Syd., 1891, pp. 684-5.) At the Adelaide session, 1897, the same words were used. The question of State banks was again mentioned, but no amendment was moved. (Conv. Deb., Adel., pp. 778-9.) At the Sydney session, a suggestion by the Legislative Assembly of New South Wales and the Legislative Council of Tasmania, to insert after "banking" the words "excluding State banking not extending beyond the limits of the State concerned," was agreed to (Conv. Deb., Syd., 1897, pp. 1074-5), and the sub-section was verbally amended.

§ 179. "Banking."

Banking is the business of a bank or banker. A bank is an institution formed for the deposit, custody, investment, loan, exchange or issue of money, or for facilitating the transmission of money by drafts or bills of exchange; it is an establishment generally incorporated for the purpose of performing one or more of those functions. (Webster's Internat. Dict.) This definition covers every possible phase or combination of banking, viz., the deposit, custody, investment, loan, exchange, issue and transmission of money.

It is wide enough to embrace every person, partnership or corporate body, under whatever name, carrying on business in money. Legislation relating to banking would, therefore, include laws regulating the inception, organization and conduct of such a business; the terms, conditions and securities for good faith under which it could be carried on; the powers, rights and privileges to be exercised and enjoyed by bankers; the obligations and responsibilities of bankers.

This sub-section presents another suitable opportunity for drawing attention to a subject elsewhere referred to (see "Legal Tender," § 178, *supra*), viz., the vast area of implied powers which may exist within the four corners of a written Constitution such as this. In the Constitution of the United States no power is in express terms given to Congress to incorporate banks. Yet the genius of Alexander Hamilton discerned that such a power might be deduced by inference or implication, from a clause in the Constitution authorizing Congress to make all laws "necessary and proper for carrying into execution the foregoing powers." (Art. i. sec. viii. sub-s. 18, U.S. Constitution, to which sec. 51—xxxvii. of this Constitution corresponds.) The power to charter a bank to facilitate the financial measures of the Federal Government was (argued Hamilton) subsidiary and incidental to the power to tax and to borrow. "Every power vested in a government is, in its nature, sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution." (Hamilton's Works, Lodge's ed. vol. iii. p. 181.) Accordingly he urged upon Congress the importance of chartering a National Bank of the United States, as an aid and instrument of the Federal Government in its financial operations. The Bill passed Congress in 1791, and thus the first bank of the United States was established. (Von Holst, p. 126.)

The validity of the Act to create a national bank was tested in the Supreme Court of the United States in the great case of McCulloch *v.* Maryland, 4 Wheat. 316. By a liberal interpretation of the Constitution, the Court, under the presidency of Chief Justice Marshall, held that Congress had the power to incorporate the subscribers of the United States Bank, and that its notes and branches were exempt from State taxation.

"In 1879, ministers submitted a bill to the Imperial Parliament to deal with certain colonial banks which were in operation under royal charters. These charters had been granted before it had become customary to establish joint stock banks under a general law; and the banks were subject to the supervision and control of the Treasury and of other Imperial departments, in respect to divers matters. By this bill it was proposed to do away with this imperial responsibility, and to subject all banks holding royal charters to the laws of the particular colonies wherein they were situated. This would have the further effect of preventing any unfair advantages on such corporations in comparison with other banks established under colonial laws. The bill was dropped in 1879, but reintroduced in 1880, and referred to a select committee, which reported evidence taken thereon; but owing to the then pending dissolution of Parliament it was not pressed in that session. Nevertheless, the general principle of the measure was approved by the house; and the opinion of the Treasury was expressed that, in a self-governing colony, the action of the local legislature would override a royal charter, within the limits of the jurisdiction of that legislature." (Todd's Parl. Gov. in Col. 2nd ed. p. 220.)

§ 180. "Other than State Banking."

These words exclude from the jurisdiction of the Federal Parliament all laws relating to State banking. In the Sydney Convention (Debates, p. 1075) attention was called by Mr. Glynn to the vagueness of the phrase "State banking." It was said that there are no real "State Banks" in any country in the world. There are great financial organizations such as the Bank of England, the Bank of France, the German Bank, and the Bank of the United States of America, over which the Government exercises certain control: which have certain exclusive privileges, including the conduct of government business, but which are not strictly speaking State Banks. A State Bank, properly so called, is an institution which is solely managed by the Government and the capital of

which has been solely provided by the Government. The nearest known approach to a State Bank, within the above definition, is the Post Office Savings Bank, which is purely a State Institution. Such banks, and similar ones, which might be founded by the States, would under the above words be exeepted from Federal control.

Exceptions to Grants of Power.—The words, "other than State banking," are equivalent to "except State banking;" they are words marking an exception to the general grant of power to legislate concerning banking. The Supreme Court of the United States, in construing the Constitution as to grants of powers to the United States, and the restrictions upon the States, has ever held that an exeeption of any particular case presupposes that those which are not excepted are embraced within the grant of power, and have laid it down as a general rule that, where no exception is made in terms, none will be made by mere implication or construction. (Rhode Island *v.* Massachusetts, 12 Pet. 657.) It is a rule of construction that the exception from a power marks its extent. (Gibbons *v.* Ogden, 9 Wheat. 191.) The fact that some powers are specified has been therefore held to import that those not specified were withheld, according to the old maxim, *expressio unius exclusio alterius*, which Lord Bacon concisely explains by saying, "as exeeption strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated."

§ 181. "State Banking Extending Beyond the Limits of the State Concerned."

State Banking.—Should a State establish a State Bank which extends its business operations beyond the limits of the State, such extra-state operations would be subjeet to Federal laws relating to banking.

§ 182. "Incorporation of Banks."

By virtue of this power the Federal Parliament could establish banks by speeial Aets, a process known as Private Bills Legislation, or it could pass a general law dealing with the banking business, and authorizing the incorporation and registration of banking companies, subjeet to compliance with certain formalities and conditions. Compliance with those formalities and conditions would result in the ereation of a banking corporation, as effective in its constitution as a corporation formed by a special legislative fiat. When a corporate body is established by a special Act, that Act is called its charter or deed of settlement; when it is established under a law of general application, its memorandum of association, lodged with the proper officer upon its registration, is its charter. The law usually determines the general powers, rights, privileges, liabilities, and responsibilities of corporations: within certain limits, however, many of these legal incidents may be regulated by contract.

An Act of Incorporation is an Act ereating an artificial or fictitious person, the peculiarity of which is that it has a legal existence separate and distinct from the individual units of which it is composed. Its members may change, but the corporate entity remains; it has perpetual succession and it never dies, unless its dissolution or winding-up is brought about by operation of law.

In the Merchants' Bank of Canada *v.* Smith (1884), 8 Ont. App. 15, 8 S.C.R. (Can.) 512, it was held that a receipt given by a warehouseman was a valid receipt within the Dominion Act, 35 Vic. e. 5, s. 46, and that that Act was *intra vires* the Dominion Parliament under sub-secs. 2 and 15 of sec. 91, relating to the regulation of trade and commerce and banking. In Tennant *v.* Union Bank of Canada (1894), App. Cas. 31, it was decided that warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming with the class of subjects described in those sub-sections, and that the provisions of the Dominion Bank Act, Rev. Stat. (Can.) c. 120, secs. 45, 53 and 54, respecting such receipts, are *intra vires*.

What an Act of incorporation does, "is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, but it may nevertheless be subject, in carrying on that business, to the law of the locality wherein it does so." In *Re* Grand Junction R. Co., 44 Upper Canada Reps. 317, Cameron, J., said: "Creating a corporation can hardly be said to be making a law;" and the same learned judge said, in Clegg *v.* Grand Trunk R. Co., 10 Ontario Reps. 714: "I wish to be free to consider whether a corporation created by the Dominion Parliament must not, outside of its corporate powers and functions, be regarded as a single entity which is, as far as the exercise of civil rights are concerned, not expressly provided for by the Act of incorporation, subject to the laws respecting such rights within the Province in which it may carry on its authorized business or exercise its corporate powers; and whether in this respect a corporation can have any greater or higher rights than a natural person." But Mr. Lefroy contends that, although the Dominion Parliament can give to a corporation it is creating any powers and functions it likes, outside "provincial objects" within the meaning of sub-sec. 11 of sec. 92 of the British North America Act, it can only regulate its exercise of civil rights in respect to the classes of subjects enumerated in section 91. (Lefroy, Leg. Pow. in Canada, p. 626.)

§ 183. "The Issue of Paper Money."

The Federal Parliament has power to legalize or prohibit the issue of paper money. In this respect it has received a grant of power conspicuously more liberal than that which was intended, by the framers of the American Constitution, to be conceded to Congress. At the time when that Constitution was framed general apprehension was felt throughout the States at the dangerous strength acquired by the movement in favour of paper money. During the War of Independence, the drain on the financial resources of the country was very great, and consequently distress was wide-spread and deep-seated. (Fiske, Critical Period of American History, p. 67.) In order to raise supplies the Congress of the Confederation established an inconvertible paper currency. In 1780 the continental paper currency had become so discredited that it utterly collapsed. In 1786, it is said, that as starving men dream of dainty banquets, so a craze for fictitious wealth, in the shape of paper money, ran like an epidemic through the country. (Critical Period of American History, p. 168.) "Several States sought to apply the paper money remedy for public distress; each making the attempt in its own way. In seven States, at least, the 'rag-money party,' as it was called, dominated the legislatures. North Carolina issued a large amount of paper. It was no sooner placed in circulation by the Government than the value of the paper dollar fell to seventy per cent. of its face value. In South Carolina, paper money was issued, but the planters and merchants refused to take it at its face value. In Georgia, paper money was made a legal tender, and refusal to accept it was declared an offence. In Pennsylvania a guarded attempt was made to issue money in the shape of bills of credit, which, however, were not made legal tender for the payment of private debts, but the value of these bills soon fell 12 per cent. below par. In New York a million dollars were issued in bills of credit, which were made a legal tender, but their value similarly declined. A 'Rag-Money Bill' was passed in New Jersey, but the merchants of New York and Philadelphia, who traded with New Jersey, refused to accept the money, and it became worthless. In Rhode Island the paper money agitation reached a white heat. Half a million dollars were issued in scrip to be loaned to the farmers on the security of a mortgage of their land. The merchants refused to take the paper dollars at their face value. An act was passed commanding everyone to take paper money, as equivalent for gold, under a penalty of 5000 dollars, and loss of the right of suffrage. The merchants thereupon shut up their shops. A terrible crisis followed. The unhappy little State was nicknamed 'Rogues Island.' The rag-money movement was happily defeated in Massachusetts. Shay's rebellion, in January, 1787, brought matters to a climax, and

hastened the calling of a Convention to frame a national Constitution." (Critical Period of American History, p. 177.)

Consequently, when the Federal Convention met in August, 1787, its members had a full knowledge of the dangers of a paper currency. When it was proposed to give the government of the Union power to borrow money and emit bills on the credit of the United States, Gouverneur Morris "recited the history of paper emissions and the perseverance of the legislative assemblies in repeating them, though well aware of all their distressing effects, and drew the inference that, were the national legislature formed, and a war to break out, this ruinous expedient, if not guarded against, would be again resorted to. He moved to strike out the power to emit bills on the credit of the United States." If the government of the Union had credit, he said, it could borrow money without bills; if it had no credit such bills would be unjust and useless. Other members expressed a mortal dread and hatred of paper money, and urged the necessity of disarming the central government of such a power; they regarded that as a favourable moment to shut and bar the door against paper money for ever. James Wilson said "paper money could never succeed whilst its mischiefs were remembered, and so long as it could be resorted to it would discourage other resources." John Langdon "would rather reject the whole plan of Union than give the power." Accordingly, the authority to issue bills of credit that would be a legal tender was refused to the Federal Government by the votes of nine States against two. "Thus," wrote Madison "the pretext for a paper currency, and particularly for making bills a legal tender, either for public or private debts, was cut off." (Bancroft, Constit. Hist. ii. p. 134.)

"This is the interpretation of the clause, made at the time of its adoption alike by its authors and by its opponents, accepted by all the statesmen of that age, not open to dispute because too clear for argument, and never disputed so long as any one man who took part in framing the Constitution remained alive. History cannot name a man who has gained enduring honour by causing the issue of paper money." (Bancroft, Constit. Hist. ii. pp. 134-5-6.)

"In the plan of government concerted between the members from Connecticut, especially Sherman and Ellsworth, there was this further article: 'That the legislatures of the individual States ought not to possess a right to emit bills of credit for currency, or to make any tender laws for the payment or discharge of debts or contracts in any manner different from the agreement of the parties, or in any manner to obstruct or impede the recovery of debts, whereby the interests of foreigners or the citizens of any other State may be affected.' The committee of detail had reported: 'No State, without the consent of the legislature of the United States, shall emit bills of credit.' With a nobler and safer trust in the power of truth and right over opinions, Sherman, scorning compromise, cried out: 'This is the favourable crisis for crushing paper money,' and, joining Wilson, they two proposed to make the prohibition absolute. Gorham feared that the absolute prohibition would rouse the most desperate opposition; but four northern States and four southern States, Maryland being divided, New Jersey absent, and Virginia alone in the negative, placed in the Constitution these unequivocal words: 'No State shall emit bills of credit.' The second part of the clause, 'No State shall make anything but gold and silver coin a tender in payment of debts,' was accepted without a dissentient State. So the adoption of the Constitution is to be the end for ever of paper money, whether issued by the several States or by the United States, if the Constitution shall be rightly interpreted and honestly obeyed." (*Id.* pp. 136-7.)

Never were the founders of a plan of government more resolved to deprive a legislative body of a legislative power than were the framers of the Constitution of the United States of America, in their determination not to clothe Congress with authority to issue paper money. At the same time, they created a judicial tribunal to interpret and uphold that Constitution, and the time came when that tribunal decided, in solemn judgment, that the Constitution had *de jure* actually granted to Congress a power which its authors had openly denied it. On 25th February, 1862, during the financial strain of the civil war, Congress passed an Act making the United States treasury notes lawful money. It was sought to justify this measure on the ground that Congress had power to coin money; that it had the power to borrow money on the credit of the United States; that it had power to declare and carry on war, and that to issue treasury notes and make them legal tender was a necessary incident of the combined power to coin and

borrow money and prosecute a war. The validity of this Act was tested in the Supreme Court, and a number of conflicting decisions were given thereon. In the case of Willard *v.* Tayloe, 1870, 8 Wall. 557, the Court, as then constituted, decided that the Act could not be constitutionally applied to contracts in existence prior thereto, and that a contract entered into before the Act must be paid in coin; in Hepburn *v.* Griswold, 1870, 8 Wall. 603, it was decided that making bills of credit a legal tender was inconsistent with the spirit of the Constitution, and in violation of it.

These decisions were afterwards revised and overruled by the Court, when differently constituted, which decided that the Act of Congress was valid. (Legal Tender Cases [1871], 12 Wall. 457.) It was there stated by the Court that the true rule of construction was to keep in view the object for which powers were granted. It was impossible to know what the non-enumerated powers are, and what is their nature and extent, without considering the purpose they were intended to subserve. These purposes were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for the carrying into execution the enumerated powers. It is not indispensable to the existence of any power, claimed for the Federal Government, that it can be found specified in words in the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them, and infer from them all that the power claimed has been conferred. (Baker, Annot. Const. p. 15.)

In time of peace (1878) an Act of Congress was passed authorizing the issue of treasury notes and making them a legal tender. The Act was sustained not on the ground that it was a war power, but on the ground that it was an inherent incident of the Federal authority, under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed. The authority of Congress to define the quality and force of these notes, as currency, was as broad as the like power over metallic currency under the power to coin money and regulate the value thereof. Under the two powers, taken together, Congress was authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or individuals, and this whether in time of war or peace. (Juilliard *v.* Greenman [1884], 110 U.S. 421. Baker, Annot. Const. pp. 15 and 19.)

Referring to these conflicting decisions of the Supreme Court on a constitutional question of great moment, Bryce says:—

"Two of its later acts are thought by some to have affected public confidence. One of these was the reversal, first in 1871, and again, upon broader but not inconsistent grounds, in 1884, of the decision given in 1870, which declared invalid the Act of Congress making government paper a legal tender for debts. The original decision of 1870 was rendered by a majority of five to three. The Court afterwards changed by the creation of an additional judgeship, and by the appointment of a new member to fill a vacancy which occurred after the settlement, though before the delivery, of the first decision. Then the question was brought up again in a new case between different parties, and decided in the opposite sense (*i.e.*, in favour of the power of Congress to pass legal tender Acts) by a majority of five to four. Finally, in 1884, another suit having brought up a point practically the same, though under a later statute passed by Congress, the Court determined with only one dissentient voice that the power existed. This last decision excited some criticism, especially among the more conservative lawyers, because it seemed to remove restrictions hitherto supposed to exist on the authority of Congress, recognizing the right to establish a forced paper currency as an attribute of the sovereignty of the national government. But be the decision right or wrong, a point on which high authorities are still divided, the reversal by the highest court in the land of its own previous decision may have tended to unsettle men's reliance on the stability of the law; while the manner of the earlier reversal, following as it did on the creation of a new judgeship and the appointment of two justices, both known to be in favour of the view which the majority of the court had just disapproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness." (Bryce, Amer. Com. vol. i. p. 263.)

Development of Implied Powers.—"The three lines along which this development of the implied power of the Government has chiefly progressed," says Bryce, "have been those marked out by the three express powers of taxing and borrowing money, of regulating commerce, and of carrying on war. Each has produced a progeny of subsidiary powers, some of which in their turn have been surrounded by an unexpected offspring. Thus from the taxing and borrowing powers there sprang the powers to charter a national bank and exempt its branches and its notes from taxation by a State (a serious restriction on State authority) to create a system of custom-houses and revenue cutters, to establish a tariff for the protection of native industry. Thus the regulation of commerce has been construed to include legislation regarding every kind of transportation of goods and passengers, whether from abroad or from one State to another, regarding navigation, maritime and internal pilotage, maritime contracts, &c., together with the control of all navigable waters, the construction of all public works helpful to commerce between States or with foreign countries, the power to prohibit immigration, and finally a power to establish a railway commission and control all interstate traffic. The war power proved itself even more elastic. The executive and the majority in Congress found themselves, during the War of Secession, obliged to stretch this power to cover many acts trenching on the ordinary rights of the States and of individuals, till there ensued something approaching a suspension of constitutional guarantees in favour of the Federal Government. The courts have occasionally gone even further afield, and have professed to deduce certain powers of the legislature from the sovereignty inherent in the National government. In its last decision on the legal tender question, a majority of the Supreme Court seems to have placed upon this ground, though with special reference to the section enabling Congress to borrow money, its affirmation of that competence of Congress to declare paper money a legal tender for debts, which the earlier decision of 1871 had referred to the war power. This position evoked a controversy of wide scope, for the question, what sovereignty involves, is evidently at least as much a question of political as legal science, and may be pushed to great lengths upon considerations with which law proper has little to do." (Bryce, Amer. Com. I. pp. 371-2.)

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51. (xiv.) Insurance[184], other than State insurance[185]; also State insurance extending beyond the limits of the State concerned:

Historical Note.—This sub-section was first introduced in the Adelaide draft in the following form:—"Insurance, including State insurance extending beyond the limits of the State concerned." In Committee, it was amended by omitting the words "including State insurance extending," &c. Mr. Walker opposed the exception of State insurance. (Conv. Deb., Adel., pp. 779-82.)

At Sydney, a suggestion of the Legislative Council of New South Wales to insert "Assurance and" was negatived as unnecessary; and another suggestion by the same Chamber to omit the words "excluding State insurance," &c., was also negatived. A drafting amendment was subsequently made. (Conv. Deb., Syd., 1897, pp. 1075-6.)

§ 184. "Insurance."

Insurance is the act of insuring or assuring against loss or damage by a contingent event. A contract whereby for a stipulated consideration, called a premium, one party called the insurer undertakes to indemnify or guarantee another party called the insured against loss, is called fire, accident or marine insurance, as the case may be; a contract whereby the insurer guarantees the insured against the negligence or default of another is called indemnity insurance; a contract whereby the insurer undertakes to pay the

representatives or nominees of the insured a certain sum of money, upon the death of the insured, is called life insurance; a contract containing a combination of life insurance with investment, as that if the insured die before a specified time the insurance money becomes due at once and is payable to the representatives or nominees of the insured, but if the insured survives that time it is payable to himself or at his direction —is called endowment insurance.

It has recently become usual to speak of "assurance" when the contingency "assured" against is one which must happen sooner or later—*e.g.*, death; and to speak of "insurance" when the contingency "insured" against is one which may never happen —*e.g.*, fire or shipwreck. The word "insurance," however, is still used generally as including both insurance and assurance, and that is clearly its scope in this sub-section. (See Historical Note, *supra.*)

Under the Constitution of the United States, which gives no power to Congress to deal with insurance, it has been decided that the business of insurance is not commerce; and a corporation of one State doing insurance in another is not engaged in commerce among the States. (Liverpool Insurance Co. *v.* Massachusetts, 10 Wall. 566.) Issuing a policy of insurance is not a transaction of commerce, and so is not subject to congressional regulation. (Paul *v.* Virginia, 8 Wall. 168.) A law of a State which requires insurance companies of other States to file bond and security, &c., before issuing policies in such State, is not a regulation of commerce, and is constitutional. (Paul *v.* Virginia, 8 Wall. 168; Doyle *v.* Continental Insurance Co., 94 U.S. 535.)

The Federal control over insurance extends, in the same manner as the Federal control over banking, to any form of insurance throughout the Commonwealth, except insurance organized and carried on by the government of a State and confined to the limits of the State.

§ 185. "Other than State Insurance."

These are words of exception, reserving to a State the control over insurance business organized and conducted by the government of the State. (See rule for construing exceptions, *supra*, § 180, "Other than State Banking.")

Overlapping Powers.—The extent to which the law relating to insurance may, for a time, be considered as a divisible power, partly exercised by the Federal Parliament and partly exercised by the State legislatures, is illustrated by one of the leading Canadian cases. (Citizens' Insurance Co. *v.* Parsons, 7 App. Cas. 96. [1881].) As an insurance case, the Citizens' Insurance Co. *v.* Parsons is appropriately mentioned in connection with this sub-section, but it is a remarkably apt exemplification of the competing and overlapping operation of powers in a Federal Constitution, and of the manner in which one subject may be governed by two sets of laws. Thus a power to make laws with respect to insurance is apparently a wide power. But does it include the power to regulate the manner in which contracts relating to insurance must be made? Suppose the Federal Parliament should pass a Federal Insurance Act, providing for the incorporation of insurance companies and defining their legal rights, privileges, duties, and responsibilities: Could such a law remove insurance companies, and the subject of insurance, absolutely from the domain of State legislation? The case of the Citizens' Insurance Co. *v.* Parsons throws some light on this problem, though it is necessary to bear in mind the caution already given that the Canadian Constitution, with its two areas of exclusive powers, is unlike the Constitution of the Commonwealth.

In that case the question raised was as to the constitutionality of the Ontario Act, 39 Vic. c. 24, to secure uniform conditions in policies of fire insurance, and whether such an act was *ultra vires* as being in excess of provincial authority. This company was incorporated under an Act passed by the Dominion Parliament, which claimed jurisdiction to deal with insurance, not by virtue of a specific grant of power (as in the Constitution of the Commonwealth), but by virtue of its exclusive power to regulate

trade and commerce and its residuary power to legislate for the peace, order, and good government of Canada in respect of all matters not exclusively assigned to the Provinces. A general insurance law, 38 Vic. c. 20, was passed by the Dominion Parliament, which, among other things, required all insurance companies, whether incorporated by foreign, Dominion, or provincial authority, to obtain licenses from the Minister of Finance as a condition of their carrying on business within the Dominion. Such licenses could only be granted upon compliance with the conditions of the Act. The legislature of Ontario passed the Act 39 Vic. c. 24, providing that certain conditions set forth in the schedule thereto should be deemed to be part of every policy of fire insurance, thereafter entered into in Ontario, with respect to any property therein; that such conditions should be printed on every policy with the heading "statutory conditions;" that if a company or insurer desired to vary such conditions, or to omit any of them, or to add new conditions, these variations should be added in conspicuous type. This Act was passed by the legislature of Ontario under the exclusive power of the Provinces to pass laws in relation to "property and civil rights in the Province." (British North America Act, sec. 92, subs. 13.)

The Act was impeached by the Citizens' Insurance Co. as an excess of legislative power, and as an encroachment on the jurisdiction assigned to the Dominion Parliament. The Privy Council upheld the Act on the ground that it related to property and civil rights within the Province. In delivering the judgment of the Board, Sir Montague E. Smith said that "property and civil rights" were sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts, and such rights were not included in any of the enumerated classes of subjects exclusively assigned to the Parliament of the Dominion by sec. 91 of the British North America Act. In looking at section 91, it would be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned, namely, "bills of exchange and promissory notes" (sub-sec. 18) which it would have been unnecessary to specify, if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.

The difference between the Canadian Constitution and that of the Commonwealth in respect to insurance is:—(1) That the Parliament of the Dominion is not specifically assigned jurisdiction in reference to that subject; its jurisdiction is based on its general and residuary power; whereas the Parliament of the Commonwealth is explicitly empowered to make laws in respect to insurance; (2) that the Provinces of Canada are assigned exclusive authority to make laws with respect to "property and civil rights," whereas the States of the Commonwealth are given no such exclusive power, their authority over "property and civil rights" being part of their general and residuary power. By virtue of the power reserved to the State Parliaments, under sec. 107 of this Constitution, they would be able to pass laws determining the manner in which contracts should be made and the conditions and incidents presumed to be annexed thereto, in the absence of express agreement to the contrary. And such laws would be binding on companies incorporated by Federal law, until they became inconsistent with the law of the Commonwealth. Whether the Federal Parliament could pass laws determining the manner in which Federal corporations should enter into contracts is a question for judicial determination when the case arises.

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51. (xv.) Weights and measures[186]:

Historical Note.—The Constitution of the United States empowers Congress "to fix the standard of weights and measures." (Art. I. sec. 8, sub-s. 5.) "Weights and measures" are specified in the British North America Act (sec. 91, sub-s. 17). Earl Grey's Committee in 1849 proposed to give the General Assembly legislative power as to the regulation of weights and measures (p. 85, *supra*). This subject was also included in Wentworth's Memorial in 1857 (p. 94, *supra*) in the Federal Council of Australasia

Act, 1885 (p. 112, *supra*), and in the Commonwealth Bill of 1891. It appeared in the Adelaide draft of 1897, and was adopted without debate.

§ 186. "Weights and Measures."

The power to fix the standard of weights and measures is necessarily a branch of the power to regulate trade and commerce; and it could, no doubt, have been exercised by the Federal Parliament even if this sub-section did not appear in the Constitution. It is not an exclusive power vested in the Federal Parliament, as against the States. The Federal Parliament is under no immediate obligation to occupy the ground capable of being covered by legislation of this description. Until it does so the States will continue to regulate the local systems of weights and measures; and their laws will not be superseded until the Federal Parliament passes a uniform system applicable to the whole of the Commonwealth. The States have already adopted common standards of weights and measures, and consequently Federal legislation may not be necessary, until the time is ripe for the adoption of a new and general reform, such as the metric system, which in America has been rendered lawful but not obligatory. "I think," says Burgess, "that is an unfortunate beginning. It may introduce great confusion where we now have substantial uniformity. Under existing conditions, it is certainly better either to do nothing at all, or to make some system obligatory as well as lawful." (Burgess, Political Sc. II. p. 141.)

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51. (xvi.) Bills of exchange[187] and promissory notes:

Historical Note.—This sub-section was adopted from the British North America Act (sec. 91, sub-s. 18), and the Federal Council of Australasia Act, 1885. It appeared in the Drafts of 1891 and 1897, and was adopted by both Conventions without debate.

§ 187. "Bills of Exchange."

Bills of exchange and promissory notes are a species of mercantile currency and derived from the customs of trading communities and regulated and protected by law. They are otherwise known as "negotiable instruments" which when drawn according to legal forms, signed by the parties intended to be bound, and duly stamped as required by revenue laws, are regarded as incontestable acknowledgments of debts, fixing a precise time for payment and passing from hand to hand in a manner somewhat similar to bank notes.

Negotiable instruments, such as bills of exchange and promissory notes, come under a branch of the law of contracts. It is worth noticing that, strictly speaking, this is the only branch of the law of contracts (with the possible exception of "insurance," see Note, § 185, *supra*) which is specifically enumerated in the list of powers conferred on the Federal Parliament. It is true that "marriage" is found in sub-sec. 21, but marriage is something more than a contract; it is a legal status involving an aggregation of rights and duties determined by law. This assignment of one or two isolated classes of contracts to Federal jurisdiction may, when read in conjunction with the maxim *expressio unius exclusio alterius*, lead to important consequences in the interpretation of the Constitution, when the question at issue is whether a State law relating to contracts is to prevail in regulating a subject assigned to the Federal Parliament, such as banking, insurance, and corporations. This question was discussed in the Citizens' Insurance Co. *v.* Parsons, 7 App. Cas. 96. In the course of the judgment in that case, sustaining the Ontario law of fire insurance contracts, the Privy Council laid stress on the fact that among the subjects assigned to the Dominion Parliament there was no class including, generally, contracts and the rights arising from them, but that one class of contracts was enumerated, namely, "bills of exchange and promissory

notes," which it would have been unnecessary to specify, if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament. (Note, § 185, *supra.*)

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51. (xvii.) Bankruptcy and insolvency[188]:

Historical Note.—The Constitution of the United States empowers Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." (Art. I. sec. 8, sub-s. 4.) "Bankruptcy and insolvency" are enumerated in the British North America Act, sec. 91, sub-s. 21. This sub-section was included in the draft Commonwealth Bill of 1891, and afterwards in the Adelaide draft of 1897. At Sydney, a suggestion by both Houses of the New South Wales Parliament, to add "and lunacy," was negatived. (Conv. Deb., Syd., pp. 1076-7; and see Historical Note to sub-s. 28.)

§ 188. "Bankruptcy and Insolvency."

"Nothing," says Sir Henry Maine, "strikes the scholar and jurist more than this severity of ancient systems of law towards the debtor, and the extravagant powers which they lodge in the creditor." It brought many early States to the brink of ruin. In early Athens enslavement for debt was a fundamental law. Such was the sanctity of contract in the estimation of Roman law that during the history of the Republic there was no mercy for the insolvent debtor. It was not until the time of Julius Cæsar that a debtor became entitled to his discharge on formally giving up everything to his creditors—*cessio bonorum.* This *cessio bonorum* marks the commencement of the true principle of bankruptcy. (Ancient Law, p. 321; Poste's Gaius, p. 347.)

"The early Teutonic codes exhibit the same Draconian severity as those of Rome and Greece. The insolvent debtor falls under the power of his creditor, and is subject to personal fetters and chastisement; and later on, among the Germans, the witepeow might often be seen working out by his labours a debt that was due to his master. It is not a little remarkable, as Sir Frederick Pollock and Professor Maitland observe, *apropos* of the above (History of English Law), that our common law knew no process whereby a man could pledge his body or liberty for payment of a debt; neither at common law was the body of the debtor liable to execution for debt, except in the case of the king's debtor. It is interesting to observe how imprisonment for debt came about. No right of arrest on a judgment in debt is given by the express words of any Statute, but the law gave in certain cases a right to arrest a delinquent or defaulter for the purpose of securing his appearance at trial, where, for instance, he was flying the realm; and it came to be held, by some strange mediæval logic, that wherever the law gave this right of arrest on mesne process, a *capias ad satisfaciendum* would lie upon the judgment itself (1795, 3 Salk. 286). Thus began the long and dreary annals of bailiffs, sponging-houses, the Marshalsea and the Fleet." (Encyc. Laws of Eng. vol. i. pp. 483-4.)

The historical distinction between bankruptcy and insolvency is, that insolvency laws were intended for the benefit and relief of ordinary private debtors, poor and distressed, but honest; whilst bankruptcy laws were those specially designed and passed for the protection of creditors against insolvent traders and particularly against fraudulent traders. The embryo of English bankruptcy legislation is to be found in the Statute 34 and 35 Henry VIII. c. 4, "against such as do make bankrupt." This Act recited that:

"Divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience."

General Scope.—Bankruptcy and insolvency legislation is a most comprehensive subject. Generally stated, it embraces a large part of the law regulating the relations of debtor and creditor, before and during insolvency; the acts or defaults of a debtor

which render him amenable to what Wharton in his work on Private International Law describes as "National execution against the assets of an insolvent debtor;" the organization of insolvency and bankruptcy courts and proceedings in connection therewith; the investigation of the business dealings and transactions of an insolvent; the pursuit and recovery of assets fraudulently disposed of in order to defeat creditors; the rescission of voluntary conveyances and other transactions amounting to fraudulent preferences; the effect of legal executions at the suit of judgment creditors; what is protected from and what liable to such executions; the seizure of an insolvent's assets for the benefit of his creditors generally; the distribution of his assets among his creditors; the release, partial or conditional or absolute, of an honest but unfortunate debtor; the punishment of a dishonest debtor. Bankruptcy and insolvency law may also include compositions, compromises, arrangements, and assignments for the benefit of creditors, as alternatives to compulsory insolvency. The winding up of corporations unable to pay their debts is an important branch of insolvency jurisdiction. An insolvency law would also include all ancillary provisions necessary to prevent it from being defeated.

A Concurrent State and Federal Power.—The bankruptcy and insolvency jurisdiction is not an exclusive power of the Federal Parliament, like that conferred on the Parliament of Canada; it is a concurrent power. Until the Federal Parliament has passed laws inconsistent with State laws bearing on the question, State laws will remain in full force and effect; and until the Federal Parliament has occupied the whole area capable of being covered by the subject, the States may continue to pass other bankruptcy and insolvency laws, and may enforce them as long as they do not conflict with Federal laws (sec. 107-109). The cases decided under the Constitution of the United States are valuable as illustrating the operation of concurrent laws; those under the Canadian Constitution are only useful as decisions showing what insolvency and bankruptcy legislation is capable of including, and as showing what are merely matters of local and private interests.

American Cases.—Under the Constitution of the United States a State legislature may enact a valid law on the subject of bankruptcy if there is no act of Congress at the time in force establishing a uniform system of bankruptcy with which such law conflicts. (Sturges *v.* Crowninshield, 4 Wheat. 122. Baker, Annot. Const. p. 44.)

This power does not exclude the right of a State to legislate on the same subject, except when the power is actually exercised by the Federal legislature, and the State laws conflict therewith. (Ogden *v.* Saunders, 12 Wheat. 213. *Id.* p. 45.)

An insolvent debtor who has received a certificate of discharge from imprisonment, under a State insolvency law, is not thereby entitled to be discharged under an execution against his person at suit of the federal government. (United States *v.* Wilson, 8 Wheat. 253. *Id.*)

Insolvency laws of one State cannot discharge the contracts of citizens of another State, even where, by the terms of the contract, it is to be performed in the State enacting the insolvency law. (Baldwin *v.* Bank of Newbury, 1 Wall. 234. *Id.*)

A State insolvency law is valid, although enacted while a national bankruptcy law is in force; and takes effect upon the repeal of the latter. (Tua *v.* Carriere, 117 U.S. 201. *Id.*)

State bankruptcy laws have no extra-territorial effect and cannot operate upon non-residents. (Baldwin *v.* Hale, 1 Wall, 223. *Id.*)

A person in custody under a *ca. sa.*, issued by the authority of a court of the United States, cannot legally be released by a State officer acting under a State insolvency law. (Duncan *v.* Darst, 1 How. 301. *Id.*)

A discharge from bankruptcy under a State law is no bar in the courts of the United States or of another State to non-resident creditors. (Gilman *v.* Lockwood, 4 Wall. 409. *Id.*)

The power of Congress to enact bankruptcy laws is not limited to the enactment of such laws as existed in England at and prior to the adoption of the Constitution. (*Re* Klein, 1 How. 277. *Id.*)

Federal laws may relieve against debts contracted prior to the enactment of such laws. (*Re* Klein, 1 How. 277; Carpenter *v.* Pennsylvania, 17 How. 456. *Id.*)

Canadian Cases.—The legislature of Quebec passed an act for the relief of a benefit and benevolent society, named L'Union St. Jacques de Montreal; imposed a forced commutation of their existing rights upon two widows who were annuitants of the society, under its rules, reserving to them the rights so impaired in the future possible event of the improvement in the affairs of the society. In an action which came before the Privy Council, on appeal, this law was attacked on the ground that it dealt with insolvency. The Privy Council held that this was clearly a local and private matter within the competence of the provincial legislature, in the absence of federal legislation dealing with insolvency in a manner applicable to the circumstances. (L'Union St. Jacques de Montreal *v.* Belisle, L.R. 6 P.C. 31.)

"Alluding to the hypothesis of a law having been previously passed by the Dominion Parliament, to the effect that any Association of that particular kind, throughout the Dominion, on certain specified conditions, assumed to be exactly those which appeared upon the face of the statute in question, should thereupon *ipso facto* fall under the legal administration in bankruptcy or insolvency, the Privy Council said they were by no means prepared to say that if any such law as that had been passed by the Dominion legislature it would have been within the competency of the provincial legislature afterwards to take a particular Association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency." (L'Union St. Jacques *v.* Belisle, L.R. 6 P.C. pp. 36-7; Lefroy, Legisl. Power in Can. p. 684.)

In the case of Cushing *v.* Dupuy it was argued that the Canadian Insolvency Act, 1875, interfered with property and civil rights and was therefore *ultra vires*. In answer to the objection the Privy Council (per Sir Montagu E. Smith) said—

"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to these subjects might affect them." (5 App. Cas. 415.)

In the Assignment for Creditors' Act, passed by the Legislature of Ontario (Rev. Stat., 1887, c. 124, sec. 9) it was provided that an assignment for the general benefit of creditors under that Act should take precedence of all judgments and executions not completely executed by payment, subject to any lien of an execution creditor for his costs. The validity of this Act was called into question in the case of the Attorney-General of Ontario *v.* the Attorney-General of Canada, on the ground that it encroached on the Federal power in respect of insolvency. In the judgment of the Privy Council it was said—

"It is not necessary, in their Lordships' opinion, nor would it be expedient, to attempt to define what is covered by the words 'bankruptcy' and 'insolvency' in sec. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors, whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate. In their Lordships' opinion, these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for

this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence." (Per Lord Herschell, 1894, App. Cas. p. 200.)

In conformity with the dicta of the Privy Council in the above case, the Supreme Court of Nova Scotia, in Kinney *v.* Dudman, 2 Russ. and Chess. 19, held that sec. 59 of the Dominion Insolvent Act of 1869, 32 and 33 Vic. c. 16, was within the competence of the Dominion Parliament, though it provided that no lien upon the property of an insolvent should be created for a judgment debt by the issue of an execution, or by levying thereunder, if before the payment over to the plaintiff of the moneys levied the estate of the debtor had been assigned or placed in liquidation; thus overriding existing provincial legislation which gave to a creditor a lien on his debtor's property by the levy of his execution on it.

In McLeod *v.* McGuirk, 15 N. Bruns. (2 Pugs.) 248 (1874), Ritchie, C.J., expressed a doubt whether section 81 of the Federal Insolvent Act of 1869, 32 and 33 Vic. c. 16, restricting landlord's preferential lien for rent to one year, was not *ultra vires*. Mr. Lefroy says that the decision of the Privy Council in Cushing *v.* Dupuy may be considered to have resolved the doubt in favour of the Dominion Parliament; and to have shown that the view of Wetmore, J., in McLeod's case, that if the Act had attempted to take away the landlord's right of distress it would have been *ultra vires*, was erroneous. So the decision of Wetmore, J., in McLeod *v.* Wright, 17 N. Bruns. (1 Pugs. and Burb.) 68 (1877), that sec. 89 of the Insolvent Act of 1869—which declared null and void all sales, transfers, &c., by any person in contemplation of insolvency by way of security to any creditor, whereby the latter obtains an unjust preference—was *ultra vires*, seems to have been equally erroneous. (Lefroy, Leg. Pow. p. 439.)

The Dominion Parliament passed an Act, 42 Vic. c. 48, intituled "An Act to provide for the liquidation of the affairs of building societies in the Province of Quebec." It recited that "whereas a large number of persons of limited means have invested their earnings in building societies in the Province of Quebec, and on account of the long period of depression such persons are exposed to lose their earnings for want of means to continue the payment of their contributions, and it is expedient to come to their relief by providing a speedy and inexpensive mode of liquidating the affairs of such societies in the said Province." It was enacted that liquidation might be resolved upon by a general meeting, after notice; and made other necessary provisions for the liquidation of such societies, whether insolvent or not. In giving judgment, Dorion, C.J., said:—"This Act is not in the nature of an insolvent law, for it is intended to apply to all building societies, whether insolvent or not. It is, therefore, essentially an Act affecting civil rights. . . The case of L'Union St. Jacques de Montreal *v.* Belisle is in point." (McClanaghan *v.* St. Ann's Mutual Building Society [1880] 24 Lower Can. Jur. 162.) It was held by Robertson, J., in *re* Iron Clay Brick Manufacturing Co., 19 Ont. Rep. at pp. 119-20, that the Ontario Joint Stock Companies Winding-up Act, 1887, c. 183, had no application in a case where a winding-up was sought by a creditor on the grounds that the company was insolvent, the provincial legislature having no jurisdiction in matters of insolvency. (Lefroy, Leg. Pow. p. 458.)

In *re* Killam, 14 Can. L.J. (N.S.) 242, Savary, J., in reference to the Nova Scotia Act for the relief of insolvent debtors, which provided for discharge from prison of a debtor on assignment of his property in trust to pay his debts, said:—"So long as the party seeking the benefit of that chapter has not become insolvent under the Dominion statute, all the proceedings under it are valid and effectual, for they only relate to property and civil rights; but as soon as the Dominion statute on insolvency is invoked

that chapter has no more force as to him or his case, and the relief it contemplates can only be obtained under the Dominion statute. He is then in bankruptcy or insolvency, within the meaning of the British North America Act, and the Insolvent Act of Canada, therefore, attaches with exclusive authority upon his person and the property. When and where that chapter conflicts or operates inconsistently with the Dominion Insolvent Act of 1869 or 1875, it is superseded, and must be treated as repealed by the concluding clause of section 154 of the former Act or section 149 of the latter. In any instance where it does not so conflict, and its operation does not become inconsistent with either of those Acts, there is nothing to hinder its provisions being carried out, and *quoad* that case it is an Act *intra vires*, unrepealed, and by the Dominion Parliament unrepealable." (14 Can. L. J., N.S., p. 242. Lefroy, Leg. Power, 531.)

In Quirt *v.* The Queen, 19 S.C.R. (Can.) 517, the Supreme Court of Canada held that an Act of the Dominion, 33 Vic. c. 40, reciting the insolvency of the Bank of Upper Canada, and providing for its winding up, and for a fair and equitable adjustment and settlement of the claims of all creditors, was *intra vires*. Strong, C.J., considered that the Privy Council had, in L'Union St. Jacques de Montreal *v.* Belisle, held "that a special statute, providing for the winding up of an incorporated company, would be bankruptcy or insolvency legislation." Patterson, J.A., said :—"The words, 'bankruptcy and insolvency' in that article, no doubt, point primarily to the enactment of a general bankrupt or insolvent law, as was well explained by Lord Selborne in delivering the judgment of the Judicial Committee in L'Union St. Jacques de Montreal *v.* Belisle, but, as I think is conceded by the same judgment, a special Act for the winding up of some particular company which was insolvent and the distribution of its assets would not be beyond the competency of the Dominion Parliament. . . It is easy to imagine cases arising in connection with bankruptcy proceedings under a general law where special legislation would be required, such, for instance, as the necessity for curing some irregularity so as to validate or remove doubts as to titles taken under the proceedings. There must be power to do this in one legislature or the other, and I take it to be obvious that the power would be in the Dominion Legislature alone. Such legislation would be like that now under consideration, special legislation addressed to an individual case, but it would not on that account be *ultra vires*." (Lefroy, Leg. Pow. p. 569.)

In the Primary Court (17 Ont. Rep. 618), Street, J., said :—"The right to pass a general law of the kind must also involve the power to pass a special law to meet a particular case; the local legislature having no power to deal with insolvency legislation at all are debarred from passing either a general or special Act, and the right must therefore exist in the other legislature." In the Ontario Court of Appeal, Hagarty, C.J., and Osler, J.A., agreed that the Act was *intra vires*. Maclennan, J.A., said that "the power of legislation over bankruptcy or insolvency, which was intended to be conferred on the Dominion Parliament, was the same as had been exercised by the Imperial Parliament and by the provincial legislatures before confederation, namely, the passing of laws more or less general in their application, with proper courts and procedure and machinery for the carrying them into effect, and not Acts declaring a particular person or firm or corporation bankrupt or insolvent, or putting their affairs into a course of liquidation." Legislative power of the latter kind was "intended to be given to the legislatures of the provinces, as matters of property and civil rights, and matters of a merely local and private nature." (17 Ont. App. 452. Lefroy, Leg. Pow. p. 570.)

In his work on the Law of the Canadian Constitution Mr. Clement says :—"The judgment of the Supreme Court in Quirt *v.* The Queen must be taken as conclusive upon all Canadian Courts, that the power of the Dominion Parliament under the various sub-sections of section 91, does extend to private Bill legislation so long as the subject-matter legislated upon can be fairly said to fall within any of those sub-sections" (p. 355). "Whether the Act in question, in Quirt *v.* The Queen, was properly regarded as within the category of bankruptcy and insolvency legislation," Mr. Lefroy says, "seems somewhat doubtful, since the decision of the Privy Council in the Attorney-General of

Ontario *v.* the Attorney-General of Canada (1894), App. Cas. 189. (See per Burton, J.A., S.C., 20 Ont. App. at pp. 496-8.) Perhaps, however, such view may still be upheld on the ground that the Act amounted to a bankruptcy proceeding by Parliament itself *in invitum* against the insolvent institution. (And see per Street, J., in Regina *v.* County of Wellington, 17 Ont. Rep. p. 618.) In the Court of Appeal in that case (17 Ont. App. 428), Hagarty, C.J.O., placed the Act in question rather under the Dominion power over banking and the incorporation of banks, saying:—'It perhaps may be objected that such special legislation may be faulty. I hardly see this, where the special legislation is in reference to settling the affairs of an institution wholly the creation of Parliament, and wholly outside the creative powers of the provinces.'" (Lefroy, Leg. Pow. p. 371. As to Dominion Bankruptcy and Insolvency Acts applying to one or more provinces only see Hagarty, C.J.O., in Clarkson *v.* the Ontario Bank (15 Ont. App. 178. Lefroy, Leg. Pow. p. 573).

In Allen *v.* Hanson, 16 Queb. L.R. 85, the Court of Queen's Bench in Quebec held that the Dominion Act 47 Vic. c. 39, providing that the Dominion Winding-Up Act should apply to incorporated trading companies "doing business in Canada, no matter where incorporated," was *intra vires*, and confirmed an order granted upon the petition of the liquidator, under a liquidation previously instituted under the Imperial Act, 1862, in Scotland, and as ancillary to that principal winding up. Dorion, C.J., delivering the judgment of the majority of the Court, said (p. 84-5):—"It is evident that the Dominion Parliament never intended to regulate, suspend or dissolve, by the Winding-Up Act, any corporation existing under British or foreign authority, but merely to regulate their property and restrain their action in this country, which it undoubtedly had a right to do so. The several legislative bodies in Canada can have no concern in what a foreign corporation might do elsewhere; they are only interested in protecting the rights of the creditors of such corporation upon their own property within this country, and more particularly the right of their own citizens and of resident creditors. . . The provisions of the Winding-Up Act of Canada regulate the proceedings of our Courts to enforce the rights of creditors and of shareholders in the property of such companies. As they only relate to procedure, their operation is confined to property found within the territorial limits of the jurisdiction of the Courts authorized to enforce them. For the same reason, within such limits their operation can neither be regulated nor restrained by any foreign legislation." This decision was confirmed by the Supreme Court of Canada. Ritchie, C.J., said:—"All the Winding-Up Act, as I understand it, seeks to do in the case of foreign corporations is to protect and regulate the property in Canada, and protect the rights of creditors of such corporations upon their property in Canada." (18 S.C.R. [Can.] p. 674. Lefroy, Leg. Pow. p. 629.)

In *re* Clarke and the Union Fire Insurance Company, 14 Ont. Rep. 618, Boyd, C., held that the Dominion Winding-Up Act, 45 Vic. c. 23, was *intra vires* of the Dominion Parliament, as being in the nature of an insolvency law; that it applied to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in that case, though incorporated under a provincial charter, was subject to its provisions; and he observed:—"The case in the Supreme Court of the Merchants' Bank *v.* Gillespie does not touch the status of the present company, which is a domestic corporation within the territorial limits of Canada, whereas the company there in question was, for the purpose of the Act, a foreign one domiciled in England." (Lefroy, Leg. Pow. p. 631.)

In the Merchants' Bank of Halifax *v.* Gillespie, 10 S.C.R. (Can.) 312, the question raised was as to the validity of winding-up proceedings under the Dominion statute, 45 Vic. c. 23, as the sole and principal winding-up of a company incorporated under the English Act of 1862. The Supreme Court held that an order could not be made under that statute for the winding-up of the Steel Company of Canada, which was a joint stock company incorporated in England in 1874, under the Imperial Joint Stock Companies Act, never incorporated in Canada, but having its chief place of business in Nova Scotia,

where it owned mines and works, while it owned no real estate elsewhere, but merely occupied an office in Great Britain. 10 (S.C.R. [Can.] 312. Lefroy, Leg. Pow. p. 629.)

The Merchants' Bank of Halifax *v.* Gillespie was distinguished in *re* Briton Medical Life Association, 12 Ont. Rep. 441, where it was held by Proudfoot, J., that the Dominion Acts, 31 Vic. c. 48 and 34 Vic. c. 9, requiring foreign insurance companies doing business in Canada to make a certain deposit with the Minister of Finance, were *intra vires*, and an order was there made, on petition, for the distribution of the deposit made by the English company in question among the Canadian policy-holders, notwithstanding that proceedings to wind up the company were pending before the English Courts. Proudfoot, J., observed, with reference to the Merchants' Bank of Halifax *v.* Gillespie, that in that case there was no question of a deposit, and what was sought was not the distribution of the deposit, but the general winding-up of the company (12 Ont. 447. Lefroy, Leg. Pow. p. 632.)

Imperial Bankruptcy Laws in the Colonies.—The question, how far English Bankruptcy Statutes extend to the colonies, has been considered in a number of cases. A decision of Lord Mansfield (cited Webb's Imperial Law 64) goes to show that "the statutes of bankrupts do not extend to the colonies." In Ellis *v.* McHenry, L.R. 6 C.P. 228, it was, however, decided that the English Bankruptcy Act of 1861 (24 and 25 Vic. c. 134), was of general application and binding within the colonies. In Callender Sykes and Co. *v.* Colonial Secretary of Lagos (1891), App. Ca. 460, it was held that the English Bankruptcy Act, 1869 (32 and 33 Vic. c. 71), applies to all the Queen's Dominions, and therefore that an adjudication under that Act operates to vest in the trustee in bankruptcy the bankrupt's title to real estate in Lagos, subject to the requirements of the law of Lagos as to the mode of transfer of real estate.

The English Bankruptcy Act of 1883 (46 and 47 Vic. c. 52, s. 118), provides that the English and Colonial Courts having jurisdiction in Bankruptcy and Insolvency shall severally act in aid of and be auxiliary to each other in matters of bankruptcy. In the case of *Re* Mann, 13 V.L.R. 590, Higinbotham, C.J., said: "The section of the English Act on which the application was made to our Court of Insolvency is a new section, and if I may be allowed to say so, I think it is a very wise and excellent section and one which should receive a liberal interpretation and should be cheerfully co-operated with and acted upon by the Courts to which it applies. It is an enabling section as well as an enjoining one, and applies to all British Courts having jurisdiction in bankruptcy or insolvency." A Court which has no bankruptcy jurisdiction cannot act as auxiliary. (Callender Sykes and Co. *v.* Col. Sec. of Lagos, 1891, App. Ca. 460.)

Colonial Bankruptcy Laws.—The inconvenience resulting from the absence of uniform laws relating to insolvency and bankruptcy, operative throughout the Australian communities, was illustrated in the case of the Union Bank *v.* Tuttle (1889), 15 V.L.R. 258. In that case the estate of the defendant had been sequestrated in New South Wales. Before such order of sequestration, creditors of the defendant had seized assets in Victoria under execution on judgments obtained in Victoria. By the law of New South Wales the order for sequestration had relation back to a period antecedent to the seizure by the creditors in Victoria. It was held that the retrospective operation of the order for sequestration in New South Wales did not divest the title of the execution creditors in Victoria. In giving judgment, Mr. Justice A'Beckett said: "The order of sequestration under the law of New South Wales had relation back to a period antecedent to the seizure by the Victorian creditors, and it has been argued that this Court, recognizing the operation of the sequestration in New South Wales, must do so to its full extent, giving it in Victoria the retrospective operation which it would have had in New South Wales, thus divesting the title of the execution creditors in Victoria. No authority has been cited which supports this contention. Story's Conflict of Laws, p. 412, and Geddes *v.* Mowat, 1 Glyn and J. 414, are against it. I hold that the judgment creditors' rights are not displaced by the sequestration of the debtors' estate in New

South Wales subsequently to the seizure, and I bar the claim made on behalf of the estate of Tuttle, the judgment debtor. The property seized is admittedly the property of a bankrupt firm, of which Tuttle is a member, and I have not to decide anything as to how the debtor's interest in this property is to be sold. I merely decide that his official assignee in insolvency cannot stop the sale of his interest in the chattels seized."

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51. (xviii.) Copyrights[189], patents of inventions[190] and designs[191], and trade marks[192]:

Historical Note.—The Constitution of the United States empowers Congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." (Art. I. sec. viii. sub-s. 9.) "Copyrights" are enumerated in sec. 91, sub-s. 23, of the British North America Act. "Patents of Invention and Discovery" and "Copyright" were among the subjects which might be referred to the Federal Council, under the Act of 1885. In the Bill of 1891 the sub-clause was worded "Copyrights and patents of inventions, designs, and trade marks." At Adelaide it was introduced in the same form, and at Melbourne a verbal amendment was made before the first report.

§ 189. "Copyright."

Copyright is the right which an author or artist has to prevent the re-publication of his published literary or artistic productions, including books, designs, drawings, engravings, paintings, photographs, musical compositions, and dramatic pieces. It must be distinguished from the property which an author has in his unpublished works, which is sometimes loosely called "copyright." At common law and independently of statute authors have property in their unpublished literary and artistic works. (Southey *v.* Sherwood, 2 Mer. 435.)

Whether, before the Copyright Acts, authors had at common law any exclusive right in their works after publication, is a question which has been the subject of much legal argument, but as to which authority has been and is still divided. In Millar *v.* Taylor (4 Burr. 2303) it was held by a majority that at common law an author and his assigns had a perpetual copyright in his published works, and that this right was unaffected by the statute 8 Anne, c. 21. In Donaldson *v.* Becket (4 Burr. 2408), Millar *v.* Taylor was overruled by the House of Lords, a majority being of opinion that, though the common law right existed, it had been taken away by the statute. The weight of modern opinion seems to be against the existence of the common law right, but the question is now one of merely historic interest, as copyright in published works is now wholly regulated by statute. (Jefferys *v.* Boosey, 4 H.L. Cas. 815; Read *v.* Conquest, 30 L.J. C.P. 209; Wheaton *v.* Peters, 8 Pet. [U.S.] 591; Copinger on Copyright, 3rd. ed. pp. 27-35.)

The first Act which directly recognized copyright in books after their publication was 8 Anne, c. 21, 1709, by which severe penalties were provided against infringers of copyright, such rights being secured for a period of fourteen years from registration; a term which was afterwards extended to twenty eight years. Copyright in prints and engravings was established in 1735 by the Act of 8 Geo. II. c. 13; since amended by the 15 and 16 Vic. c. 12. Copyrights in designs for manufactures was secured in 1787 by 27 Geo. III. c. 38, which has been amended by subsequent Acts. By the Act 5 and 6 Will. IV. c. 65 the right of printing and publishing lectures belongs to the lecturer, subject to compliance with certain conditions. (Caird *v.* Sime, 1887, 12 App. Cas. 326.)

By the Act 1 and 2 Vic. c. 59, passed in 1838, the copyright of works published in foreign countries is secured against infringement within the British Dominions, provided the law of those countries gives similar protection to the works of British authors. Before the statute the courts would not protect a copyright belonging to a foreigner.

(Delondre *v.* Shaw, 2 Sim. 237.) This Act was repealed and amended by 7 and 8 Vic. c. 12, which was afterwards amended by 15 and 16 Vic. c. 12. The last Imperial Act relating to international copyright was 49 and 50 Vic. c. 33, passed in 1886, after the holding of the international conference at Berne, where the draft of a copyright convention was agreed to.

The Act 5 and 6 Vic. c. 45, passed in 1842, amended and consolidated the law of copyright in books, and is the law which now regulates literary property throughout the Empire to this extent, that a copyright registered in England is valid and may be enforced in the courts of every British possession. This is one of the few Imperial statutes passed during the present reign the operation of which extends to every part of the Queen's Dominions. By this Act copyright in literary works is defined as the sole and exclusive liberty of printing or otherwise multiplying copies of any subject; and it is declared to belong to the author and his assigns, and to endure for the whole term of his life and for seven years after his death, or, if that term of seven years expires before the end of forty-two years from first publication, then for such period of forty-two years. Persons pirating a copyright work are liable to a special action for damages and may be restrained by injunction. The protection of this Act also extends to musical compositions and dramatic pieces. Sec. 15 prohibits her Majesty's colonial subjects, whatever may be their local laws, from printing or publishing in the colonies without the consent of the proprietor any work of which there is a copyright in the United Kingdom. It also prohibits the importation into any British possession of any foreign reprint of works first printed and published in the United Kingdom and entitled to a copyright.

In Routledge *v.* Low (1868), L.R. 3 H.L. 100, it was held that, notwithstanding the fact that Canada had a Legislature entitled to pass laws concerning copyright, Canada was included in the general words of sec. 29 of the Imperial Copyright Act of 1842.

That Act was afterwards amended by 10 and 11 Vic. c. 95 (1847), which provided that in case the legislature of any British possession should pass an Act making due provision for securing or protecting the rights of British authors in such possession, and transmit the same to the Secretary of State, and in case Her Majesty should be of opinion that such Act was sufficient for the purpose of securing to British authors reasonable protection within such possession, it should be lawful for Her Majesty to express Her Royal approval of such Act, and thereupon, by Order in Council, to suspend, so long as the provisions of such Act should continue in force in such colony, the provisions of the 5 and 6 Vic. c. 45, against the importing, selling, or exposing for sale of foreign reprints of British copyright works.

The Royal assent was refused to the Canadian Copyright Bill of 1872 on the ground that it was repugnant to the provisions of the Imperial statute. In a despatch dated 15th June, 1874, addressed by Lord Carnarvon, Secretary of State for the Colonies, to the Governor-General of Canada, his lordship pointed out that the effect of the Canadian Constitution giving the Parliament of the Dominion power to legislate with respect to copyright was to enable it to deal with colonial copyright within the Dominion, and that it was not intended to interfere with the rights secured to authors by the Imperial Act or to override the provisions of that Act. "The Imperial Copyright Act, 5 and 6 Vic. c. 45," wrote his lordship, "is, as you are aware, still in force in its integrity throughout British dominions, in so far as it prohibits the printing in any part of such dominions of a book in which there is a subsisting copyright under that Act without the assent of the owner of the copyright."

Under the power conferred by the Imperial Act, 10 and 11 Vic. c. 95, the Dominion Parliament, in 1875, passed 31 Vic. c. 56 in order to secure to authors the reasonable protection contemplated by the Imperial Act. It provides that any author domiciled in Canada or any part of the British possessions, or being a citizen of a foreign State having an international copyright treaty with Great Britain, should be entitled to copyright in Canada for twenty-eight years, and renewal of it for fourteen years to himself, if he were still alive, and if not to his widow and children, but to no one else, who might be

in possession of the copyright, for any work, literary, scientific, or artistic, printed and published or reprinted or republished in Canada, with the reservation that the exclusive privilege should cease in Canada at the same time that it expired for any work anywhere else.

The conditions precedent to securing the protection of this Canadian Act were (1) that such works should be recorded and copyrighted in Canada; (2) that such works should be printed and published, or reprinted or republished in Canada, or, in the case of works of art, that they should be produced or reproduced in Canada, whether they were so published or produced for the first time or contemporaneously with or subsequently to publication or production elsewhere: provided that in no case should the exclusive privilege in Canada continue after it had expired elsewhere; (3) that no immoral, or licentious, or irreligious, or treasonable, or seditious work should be the subject of such registration or copyright. By Clause 15 of the Act, works of which the copyright had been granted and were subsisting in the United Kingdom, and copyright of which was not secured or subsisting in Canada under any Canadian or Provincial Act, should, upon being printed and published or reprinted or republished in Canada, be entitled to copyright under the Act; but nothing in the Act should be held to prohibit the importation from the United Kingdom of copies of such works legally printed there.

One legal result of this Canadian measure was that, if the proprietor of an English copyright did not register and publish in Canada, foreign reprints could be imported into Canada upon payment of a royalty, to be appropriated for his benefit. The reason for this was that under the protection of the Imperial system, United States authors could secure copyright in Great Britain and her possessions by publishing in England, and thus secure the control of the Canadian market, whilst a Canadian author could not obtain such privileges in the United States.

Her Majesty was empowered to assent to this Bill, by the (Imperial) Canada Copyright Act, 38 and 39 Vic. c. 53, and an Order in Council was then promulgated suspending the provisions of 5 and 6 Vic. c. 45, so far as it prohibited the importation into Canada of foreign reprints of books first published in the United Kingdom and copyrighted there.

The effect of this combination of Canadian and Imperial legislation was considered in the Canadian case of Smiles *v.* Belford (1877), 1 Ont. App. 436, in which an injunction was applied for on behalf of the holder of an English copyright, under the Imperial Act, 5 and 6 Vic. c. 45, to restrain the defendants from publishing a reprint of the plantiff's work in Canada. The point was raised in this case, though afterwards abandoned by counsel before the Court of Appeal, that the Imperial Parliament, by sub-sec. 23 of section 91 of the British North America Act, had divested itself of all power respecting British copyright in Canada, and that the Canadian Copyright Act, 38 Vic. c. 88, had, by virtue of the Imperial Canada Copyright Act, 1875, 38 and 39 Vic. c. 53, superseded the Imperial Copyright Act of 1842, and required all authors desirous of obtaining copyright in Canada to print and publish and register under the new Act, which the plaintiffs had not done. The defendant further contended that the provisions of the Canadian Act must be complied with, in order to give copyright in Canada. Proudfoot, V.C., refused to sustain these views and granted the injunction asked for. He said: "There is nothing indicating any intention of the Imperial Parliament to abdicate its power of legislation on matters of this kind." On appeal to the Ontario Court of Appeal, this decision was affirmed. Burton, J.A., entirely concurred in the view of Proudfoot, V.C. Referring to Routledge *v.* Low, in which it had been unsuccessfully contended that as Canada had a legislature of her own she was not included in the general words of section 29 of the Imperial Act, 5 and 6 Vic. c. 45, whereby that Act was extended to every part of the British dominion, he said: "What the British North America Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the provincial legislatures, in the same way as it has transferred the power

to deal with banking, bankruptcy, and insolvency, and other specified subjects, from the local legislatures, and place them under the exclusive jurisdiction and control of the Dominion. I entirely concur with the learned Vice-Chancellor in the opinion he has expressed, that under that Act no greater powers were conferred upon the Parliament of the Dominion to deal with this subject than had been previously enjoyed by the local Legislatures." (1 Ont. App. 443, Wheeler, Conf. Can. pp. 92-3.)

The Canadian Copyright Act, 1889 (which contained a clause suspending its operation until proclamation by the Governor-General), made regulations operative in Canada which differed from those existing under Imperial legislation, and which were calculated to affect copyrights registered in England. The English law officers advised the Secretary of State for the Colonies that in their opinion "the then existing powers of colonial legislatures to pass local laws on the subject of copyright in books were probably limited to enactments for registration and for the imposition of penalties with a view to the more effectual prevention of piracy, and to enactments within sub-sec. 4 of sec. 8 of the International Copyright Act, 1886, with reference to works first produced in the colony." With respect to the constitutionality of the Canadian Act, the law officers reported that the powers of legislation conferred on the Dominion Parliament by the British North America Act, 1867, did not authorize that Parliament to amend or repeal, so far as it related to Canada, an Imperial Act conferring privileges within Canada, and that, in their opinion, Her Majesty should disallow the Act. On 25th March, 1890, Lord Knutsford sent a despatch to Lord Stanley of Preston, the Governor-General of Canada, in which he expressed his regret that he was unable to authorize the Governor-General to issue a proclamation to bring the Act into force. (Lefroy, p. 231. Todd, Parl. Gov. in Col., 2nd ed. p. 182.)

Copyright in the United States.—In the United States, under the power to secure to authors and inventors the exclusive right to their writings and discoveries, Congress has created the patent and copyright systems of the Union, and regulates and controls them exclusively.

"It can hardly be said that this power is exclusive to the Congress as against the States, in the sense that if the Congress had not occupied the ground the States might not do so. While the States cannot probably amend or supplement the patent and copyright laws of the United States, there is no reason for asserting that, in the absence of any patent and copyright legislation by Congress, the States may not pass laws to protect the inventions and writings of their own citizens, which will hold until displaced by the legislation of Congress upon the subject. Of course such protection would be very inadequate, as it would not reach beyond the boundaries of the particular State." (Burgess, Political Sci. II. p. 144.)

Congress may provide for copyright of photographs as works of art or science, so far as they are representations of original intellectual conceptions of the author. (Burrow-Giles Lithographic Co. *v.* Sarony, 111 U.S. 53.)

§ 190. "Patents of Inventions."

A patent is a legal privilege granted by the Crown to an individual, and conveying to him the sole right to make, use, or dispose of some invention of a new and useful mechanism, appliance, or process in science, art, or industry for a specified period of time. In England modern patent legislation began with the statute of 21 Jas. I. c. 3. This Act declared void all previously enjoyed monopolies, grants, letters-patent, and licences for the sole buying, selling, or making of goods except in certain cases, and provided for the protection for a term of fourteen years of letters-patent and grants of privileges thereafter to be made to the true and first inventor of processes for the working or making of new manufactures within the realm, which others at the time of making such letters-patent and grants should not be using. Thus the elements of novelty and previous non-user by the public became the principal conditions precedent to the acquisition of such rights and privileges. The law was amended by Acts passed in the reigns of Queen Anne and William IV. By the Acts of 5 and 6 Will. IV. c. 83, 2 and 3

Vic. c. 67, 15 and 16 Vic. c 83, amended and re-enacted by the Patent Act, 1883 (46 and 47 Vic. c. 57), the main provisions of the present patent laws were established. These laws defined the procedure to be complied with in order to acquire a patent, such as the formal application, the description and specification of the invention, the provisional protection, the investigation of the merits and originality of the invention, the decision of disputes, the duration of the patent, the protection and privileges of the patentee, and the penalties for the infringement of the right.

A patent granted by the Crown in England extends over the United Kingdom and the Isle of Man, and certain rights are, under the International Convention, obtainable in foreign countries. Under the Patents Act, 1883 (46 and 47 Vic. c. 57), sec. 103, as amended by sec. 6 of the Act of 1885 (48 and 49 Vic. c. 63), the Queen may make arrangements with foreign Governments for the mutual protection of inventions of their respective subjects and citizens. Any person who has applied, within any State with which arrangements have been made thereunder, for protection for any invention, will be entitled to a patent for his invention in the United Kingdom, provided he makes application within seven months after his foreign application. Such an applicant is not prejudiced in his right to a patent by publication within the realm during the seven months period. Sec. 104 makes similar provision for inventors who have first applied for protection in any British possession. A list of countries and colonies with which arrangements have been made is set out in Edmunds on Patents, 2nd ed. at p. 536; the text of the International Convention will be found in the same book. (See Ency. Laws of Eng. ix. p. 522.)

A patent granted by the Government of a British colony does not confer any legal right enforceable in other colonies. An inventor must take out a patent in each colony in which he desires to obtain protection against infringement. As soon, however, as the Parliament of the Commonwealth passes a general law relating to patents, a patent granted by its Government will be operative throughout the Commonwealth. One patent will then secure protection where several were previously required.

English Patent Cases.—The Act 21 Jac. 1, c. 3, did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures. (Caldwell *v.* Van Vlissengen, 21 L.J. Ch. 97. Dig. Eng. Case Law, vol. x. p. 687.)

An invention must be both new and useful, and not confined to the knowledge of the party making it, to be the subject of a patent. (Hill *v.* Thompson, 2 Moore, 424. Dig. Eng. Ca. Law, vol. x. p. 689.)

It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture" in 21 Jac. 1, c. 3, will comprehend not only a production, but the means of producing it. (Ralston *v.* Smith, 20 C.B. [N.S.] 28; 11 H.L. Cas. 223. *Id.*)

The discovery of a more skilful and efficient mode of working a process already known and in use is not the proper subject of a patent. (Patterson *v.* Gaslight Coke Co. 2 Ch. D. 812. *Id.*)

The discoverer of a new principle or new idea as regards any art or manufacture, who shows a mode of carrying it into practice, as by a machine, may patent the combination of principle and mode, although the idea or the machine would not alone be the proper subject of a patent. (Otto *v.* Linford, 46 L.T. 35 C.A. Dig. Eng. Ca. Law, vol. x. p. 690.)

American Patent Cases.—Whether Congress can by Act decide that a particular individual is the author or inventor of a certain writing or invention, so as to preclude judicial inquiry into such fact, *quaere*. (Evans *v.* Eaton, 3 Wheat. 454.) It is for Congress to say when, for what length of time, and under what circumstances a patent shall be granted. It has power to pass an Act which operates retrospectively to give a patent for an invention already in use. (Blanchard *v.* Sprague, 2 Story, 164; Baker, Annot. Const. p. 48.)

Canadian Patent Cases.—In Tennant *v.* Union Bank of Canada, 1894, App. Cas. 31, it was held that laws made by the Dominion Parliament on subjects, such as banking and patents, are paramount, and it would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and

the civil rights of individuals in the provinces. In Smith *v.* Goldie, 9 S.C.R. (Can.) 46, it was held that a patent for a combination of known inventions, the combination being novel and useful, was valid. It was there also held that to be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. In the case of *Re* Bell Telephone Co. (7 Ont. 605) the question was raised whether section 28 of the Dominion Patent Act, 35 Vic. c. 26, was *ultra vires*, as creating a court of justice of civil jurisdiction, infringing sub-secs. 13 and 14, sec. 92, B.N.A. Act. (Wheeler, C.C. pp. 89-91.)

§ 191. "Designs."

In manufacture, design implies the novel and attractive figures, plans, or outlines which the workman copies, either from his own drawings or from artistic sketches supplied, and imprints for the purpose of enrichment into the stuff, silk, and other materials which constitute the manufactured article. The first English Act relating to this subject was 27 Geo. III. c. 38, passed in 1787. This was followed subsequently by the Act 5 and 6 Vic. c 100 (1842), amended by 21 and 22 Vic. c. 70 (1858). By the Act of 1842 all articles of manufacture, and substances on which designs are executed, are divided into thirteen classes; for some of which the copyright of the design was fixed at three years, for others nine months, and for the others twelve months.

The Patents Designs and Trade Marks Act of 1883 (46 and 47 Vic. c. 57), amended and consolidated the English statute law relating to designs. That Act has been slightly altered by the Patents Designs and Trade Marks Act of 1886 (49 and 50 Vic. c. 37), and 1888 (51 and 52 Vic. c. 50), and by the Designs Rules of 1890 and 1891. The Consolidated Act of 1883 defines the term design as any design applicable to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether of printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical or chemical, separate or combined, not being a design for a sculpture or other things within the protection of the Sculpture Copyright Act of the year 1814. According to this definition there are only a few special classes of designs within the protection of the Act, viz.: those applicable to the pattern, shape, or ornamentation of manufactured articles. (Per Lord Herschell in Hecla Foundry Co. *v.* Walker [1889] 14 App. Ca. 550; and per Lindley, L.J, in *re* Clarke's Design [1896] 2 Ch. at p. 43.)

§ 192. "Trade Marks."

A trade mark is some name, symbol, or device, consisting in general of a picture, label, word or words, which is applied or attached to a trader's goods so as to distinguish them from the similar goods of other traders, and to identify them as his goods, in the business in which they are produced or put forward for sale. (Leather Cloth Co. *v.* American Leather Cloth Co., 11 H.L. Cas. 523; Richards *v.* Butcher, 1891, 2 Ch. at pp. 532 and 543, per Kay, J., and Lord Esher, M.R.)

"Any symbol may become a trade mark if it is capable of distinctive user in accordance with the definition, but only symbols which consist of or contain at least one of the essential particulars enumerated in the Acts, 1883, s. 64, as amended by 1888, s. 10, are capable of registration. The essence of a trade mark is that it distinguishes the owner's goods, and the essence of an infringement (where the essential particulars are not bodily appropriated) is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them as being the plaintiff's goods. A trade mark must therefore be a distinctive symbol. A word or device which is common to the trade or is in general use, mere descriptive matter, or the name of the goods themselves, are the principal examples of marks which are not distinctive." (Encyc. of the Laws of Eng., xii. p. 223.)

Prior to trade mark legislation, property in a trade mark could only be acquired by actual user of the mark for such a length of time as to be evidence of appropriation of the badge distinguishing the owner's goods. Under the English Acts, registration can be procured of any trade mark, and registration is evidence of the proprietor's right to its exclusive use. A right to a trade mark can now be obtained by the registration of a new and unused mark, provided that the applicant has a real intention to use the mark upon the description of goods for which it is registered. (Hudson's Trade Marks, 1886, 32 Ch.D. 311.)

By the International Convention of 1883, the signatory Powers agreed to reciprocally admit to registration and protection trade marks registered in their several countries. This has not, so far, been fully carried out by English law. (Californian Fig Syrup Co.'s Trade Mark, 1888, 40 Ch. D. 620; Carter Medicine Co.'s Trade Mark, 1892, 3 Ch. 472.) But foreigners may register their trade marks in England, giving an address within the Kingdom for service on the same terms as English subjects. In the case of a signatory Power, if any of its subjects who has registered a mark at home, which is capable of registration in England, applies for a registration in England within four months of his application to register at home, he is entitled in priority to other applicants, and is not prejudiced by the use of the mark by others during the period. Germany is the only important non-signatory Power. Section 8 of the Act of 1888 is applicable to the principal Colonies. Under the Convention of Madrid, 1891, a trade mark may be registered as the result of a single application in the countries of the signatory Powers. Great Britain has not acceded to this Convention. (Encyc. of the Laws of Eng., xii. p. 234.)

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51. (xix) Naturalization[194] and aliens[193]:

Historical Note.—The Constitution of the United States empowers Congress "to establish a uniform rule of naturalization throughout the United States." (Art. I. sec. viii. sub-sec. 4.) "Naturalization and aliens" is specified in sec. 91, sub-sec. 25, of the British North America Act. "Naturalization of aliens" was a subject which might be referred to the Federal Council under the Act of 1885. The sub-clause was introduced in its present form in 1891, and was adopted in 1897-8 without debate.

§ 193. "Aliens."

In English law an alien may be variously defined as a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject. The rule of the common law is that every person born out of the British Dominions is an alien, and that every person born within British Dominions is a British subject. This is known as the *jus soli* or the territorial test of nationality, which is contrasted with the *jus sanguinis* or the parentage test of nationality. There are several exceptions to the territorial rule; (1) legitimate children born out of the British Dominions, whose fathers, or grandfathers on their fathers' side, were natural-born subjects, not in the service of an enemy at the time of such children's birth, are entitled to the rights of natural-born subjects (Imperial Acts 4 Geo. II. c. 21, secs. 1, 2; 13 Geo. III. c. 21); (2) children born on board British ships on the high seas are natural-born subjects; (3) legitimate children of an alien enemy, born in a part of the British Dominions which at the time of their birth is in hostile occupation, are not British subjects. (See Calvin's case, 7 Coke Rep. 4; Westlake, Priv. Internat. Law, 3rd ed. p. 323. Dicey, Conflict of Laws, p. 176.)

Although aliens resident in a British country owe no local allegiance to the Crown, they are bound equally with British subjects to obey the laws of the country. Mr. Hall considers that an alien, "in return for the protection which he receives, and the opportunities of profit or pleasure which he enjoys, is liable to a certain extent, at any rate, in moments of emergency, to contribute by his personal service to the maintenance of order in the State from which he is deriving advantage, and under some circumstances

it may be even permissible to require him to help in protecting it against external dangers." (Hall's Foreign Jurisdiction, p. 171.) "There is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments." (*Id.* p. 172.)

Under ancient as well as modern jurisprudence, aliens, resident in a country of which they were neither citizens nor subjects, were for a long time regarded with jealousy and under serious disabilities. In ancient Athens foreigners were not allowed to dispose of their property by will; at their death it was confiscated to the State. In early Rome foreigners were similarly disqualified, but under the Empire they were allowed to inherit and devise property by will. By the law of France, until the beginning of this century, the Government appropriated the property of foreigners dying in that country and leaving no heirs who were natives. In England, until enabling legislation during the present reign, aliens were subject to many disqualifications, some of which still remain. An alien could not, and still cannot, own a British ship. An alien could not own real estate within the realm, and hence it was held that a lease or an agreement for a lease of land to an alien artificer was void by 32 Henry VIII. c. 16, sec. 13. (Lapierre *v.* McIntosh, 8 L.J. Q.B. 112.) An alien woman married to an Englishman was not entitled to dower. (Wall's Case, 6 Moore P.C. 216.) A Court of Equity would enforce, for the benefit of the Crown, a trust of real estate created in favour of an alien. (Barrow *v.* Wadkin, 24 Beav. 1.) An alien friend had no legal right enforceable by action to enter British territory, and this disability still remains. (Musgrove *v.* Chung Toy [1891], App. Cas. 272.)

On the other hand, by the terms of the Copyright Act, 5 and 6 Vic. c. 45, an alien friend who, during his temporary residence in a British colony, publishes in the United Kingdom a book of which he is the author, is entitled to the benefit of the English Copyright. (Routledge *v.* Low, L.R. 3 H.L. 100.) So also, by the terms of the English law of Trade Marks, a foreign manufacturer has a remedy by suit in the United Kingdom for an injunction and account of profits against a manufacturer who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked are manufactured by the foreigner. (Collins Co. *v.* Brown, 3 Jur. [N.S.] 929.) An alien can similarly sue to restrain the fraudulent appropriation of his trade mark, although the goods to which such trade mark is affixed are not usually sold by him in the Kingdom. (Collins Co. *v.* Reeves, 4 Jur. [N.S.] 865.) An alien friend, though resident abroad, is entitled to sue in England for a libel published there concerning him. (Pisani *v.* Lawson, 6 Bing. N.C. 90.)

The Act 7 and 8 Vic. c. 66 (1844) first allowed aliens to take and hold every species of personal property—but not real property—as fully and effectually as if they were natural-born subjects, and enacted also that lands or buildings for the purpose of residence, or for the carrying on of any trade, business, or manufacture, might be taken and held by aliens for any term of years not exceeding twenty-one.

The Naturalization Act of 1870 (33 and 34 Vic. c. 14) greatly enlarged the privileges of aliens. Under that Act real and personal property of every description may be acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through an alien, in the same manner as if he were a natural-born British subject. No right is thereby conferred on an alien to hold real property situated out of the United Kingdom. The principal provisions of these Acts have been generally adopted in the colonies by local legislation passed in the exercise of power conferred by the Act 33 and 34 Vic. c. 14, sec. 16.

§ 194. "Naturalization."

Naturalization is the process, defined by law, by which an alien renounces his original allegiance and is converted into a subject or citizen, entitled to all the rights and privileges of natural-born subjects and citizens in the country in which he domiciled. Formerly the only mode of obtaining naturalization was by a special Act of Parliament passed for each individual seeking to be naturalized; but by the Act 7 and 8 Vict. c. 66, the British Parliament provided a general procedure by which approved aliens could acquire the status of natural-born subjects of the Queen. It was enacted that the Home Secretary might, if he thought fit, grant a certificate of naturalization to any alien applying for it, on receiving such evidence (with regard to his intention to remain in the country, his trade, &c.) as might seem necessary. This certificate conveyed to the alien all the rights and privileges of natural-born British subjects, except the right to become a member of Parliament or a Privy Councillor. This Act was amended and enlarged by the Naturalization Act, 1870, (33 and 34 Vic. c. 14), which declared that an alien resident in the United Kingdom for a term of not less than five years, or who has been in the service of the Crown for not less than five years and intends to reside in the Kingdom or to serve the British Crown, may apply to the Home Secretary for a certificate of naturalization, and on giving evidence of particulars may obtain it. Having obtained this certificate, he is, in the United Kingdom, entitled to all the political and other rights, powers and privileges, and subject to all the obligations of a natural-born British subject. When within the limits of the foreign State of which he was formerly a subject, he is not deemed a British subject, unless he has ceased to be a subject of that State. Section 16 of this Act conferred upon colonial legislatures the power of legislation in respect to the naturalization of aliens, and in the exercise of this power the English naturalizatiou laws, with minor variations, have been generally adopted in the colonies. Letters of naturalization granted by the Government of a colony are, however, operative only within that colony.

"No question of naturalization arises in connection with the emigration of British subjects to British colonies. Settling therein makes no more change in this respect than a removal from York, Glasgow, Swansea, or Dublin, to London, and a new arrival has all the privileges of a fellow-subject. This is very important when compared with the position of a person who contemplates emigration from the United Kingdom to the United States. For example:—It is required that everyone from the British Islands who desires to become an American citizen shall take two oaths, one of intention and one of facts, the latter after five years' residence. The effect of these oaths is pointedly and specifically to renounce allegiance to the Queen, to give up one's British birthright, and, in the event of war, to become an enemy to the land of one's birth. In some of the States—the great State of New York, for instance—a British subject cannot hold real estate without taking such oaths, and cannot in any of the States exercise any of the political rights of American citizens without so doing." (Canadian Official Hand-book, p. 7; Wheeler, C.C. p. 770.)

Naturalization in the United States.—"The power to establish a single statute of naturalization for the whole United States is, of course, an exclusive power of the Congress. The States could not do that even though the Congress should not regulate the subject at all. It is, indeed, conceivable that every State might pass exactly the same statute of naturalization, and that the courts of every State might give to the statutes of the respective States exactly the same interpretation, and an uniform rule be attained in this manner. It is not, however, at all likely that they would. Moreover, the State naturalization could not give the full rights and privileges of citizenship. It could only give such as pertain to the individual as a resident of the particular State. The purposes of naturalization, viz., to gain the full rights and privileges of citizenship, could not thus be attained." (Burgess, Political Sci. II. p. 144.)

The American States individually have still a concurrent authority as to naturalization, but they cannot exercise it so as to contravene the rules established by Congress. The true reason for empowering Congress to establish a uniform rule was to guard against a too narrow—not against a too liberal—mode of granting rights of citizenship. A State cannot exclude citizens who have been adopted by the United States; but it can adopt citizens upon easier terms than those imposed by Congress. (Collet *v.* Collet, 2 Dall. 294. Baker, Annot. Const. p. 43.)

"I am not aware of any instance in which the Courts have spoken of the grant of power to the general Government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress and a State law came in conflict with it. In cases of this kind the power of Congress undoubtedly excludes and displaces that of the State, because whenever there is a collision between them the law of Congress is supreme; and it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred." (Per Taney, C.J., License Cases, 5 How. 585.)

No State can make a foreigner a citizen of the United States. It may put a foreigner upon a footing with its own citizens as to all rights and privileges enjoyed by them within its dominion and under its laws. But that will not make him a citizen of the United States nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State. (Dred Scott *v.* Sandford, 19 How. 393. Baker, Annot. Const. p. 43.)

A State cannot make a subject of a foreign government a citizen of the United States. Citizenship and the right to vote are neither identical nor inseparable. (Lanz *v.* Randalls, 4 Dill. 425. *Id.*)

An alien who has been duly naturalized under the federal law becomes thereby a citizen of the United States, and is a citizen of any State of the Union in which he may reside. (Gassies *v.* Ballon, 6 Pet. 761. *Id.*)

Under the power to "prescribe a uniform rule of naturalization," Congress has no power to regulate or prescribe the capacities of a naturalized citizen. A naturalized citizen is on the footing of a native citizen, except so far as the Constitution itself distinguishes him. (Osborn *v.* Bank of United States, 9 Wheat. 827.)

Canadian Cases on Aliens.—"The point decided in Low *v.* Routledge (1865, L.R. 1 Ch. 42), is that a colonial legislature cannot affect an alien's rights beyond the limits of the colony. There, the plaintiff, an alien, temporarily resident in Montreal, claimed to be entitled to copyright under the Imperial Copyright Act, 5-6 Vic. c. 45, in respect to a book she was publishing in England, and it was unsuccessfully contended that she could not be so entitled because by a Canadian statute an alien coming into Canada for the purpose of publishing a work, as the plaintiff had done, and publishing his book there, would not be entitled to copyright in the work so published, and because an alien coming into Canada could acquire only such rights as were given by the law of Canada. Sir G. J. Turner, L.J., however, delivering the judgment of the Court, says:- "This argument on the part of the defendants is, in truth, founded on a confusion between the rights of an alien as a subject of a colony, and his rights as a subject of the Crown. Every alien coming into a British Colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony, he cannot be affected by these laws; for the laws of a colony cannot extend beyond its territorial limits." (Lefroy, Leg. Pow. in Canada, p. 328.)

"This expression, 'subject of the colony,' is significant and important. In an article in 31 Can. L.J. 7, entitled 'Can a Colonial legislature affix a criminal character to acts committed beyond its territorial limits?' the writer says that 'there is no such thing as a Canadian, Australian or Indian subject'; and in an international sense no doubt this is so; but the above dicta, and other authorities . . . show that in connection with the matters under discussion there is a sense in which it is proper to speak of a man as a subject of a particular colony, and that legal distinctions hinge upon his position as such." (See the dictum of Boyd, C., in Regina *v.* Brierly, 14 Ont. Rep. 533; Lefroy, Leg. Pow. in Can., p. 329.)

The Dominion Parliament has exclusive jurisdiction over naturalization and aliens. The Ontario legislature passed an Act, 51 Vic. c. 70, providing that the railway company therein incorporated might become a party to promissory notes and bills of exchange, and how such notes and bills might be made, accepted, or endorsed so as to be binding on the company. Section 12 of the Act provided that aliens as well as British subjects, whether resident in the province or elsewhere, might be shareholders in the company, and that all such shareholders should be entitled to vote on their shares and be eligible as directors. The Canadian Minister of Justice objected to this section as infringing on the exclusive Dominion power to make laws in respect to aliens. In reply, Mr. Mowat, the Provincial Attorney-General, contended that this power was not intended to give and did not give the Dominion Parliament jurisdiction in respect to such matters as that in question, which he submitted related not to naturalization and aliens within the meaning

of the British North America Act, but to property and civil rights. In support of this view he cited Todd's Parliamentary Government in the Colonies (2nd ed., p. 299).

A British Columbia Act of 1890, incorporating a certain company, forbade under severe penalties the employment of Chinese. The Canadian Minister of Justice objected to this provision, which he said "seems open to question on the ground that it is for the Parliament of Canada to legislate respecting aliens and therefore to prescribe their rights and disabilities."

In 1890 the legislature of British Columbia passed the Coal Mines Regulation Act, sec. 4 of which provided that no boy under the age of 12 years, no woman or girl, and no Chinaman, should be employed underground in any mine to which the Act applied. The Union Colliery Company of British Columbia employed Chinamen in its mines in defiance of this prohibition. In 1898, Mr. Bryden, a shareholder, brought a suit against the Company in the Supreme Court of the Province, claiming an injunction restraining the Company from employing Chinamen. The Company pleaded that the Act, so far as it prohibited the employment of Chinamen, was void as being *ultra vires* of the legislature of the Province. Mr. Justice Drake upheld the validity of the Act and granted the injunction. The Full Court of the Province sustained his decision, holding that the Act came within the power of the Province to legislate concerning "property and civil rights." The Company appealed to the Privy Council. In support of the appeal it was argued that the Parliament of Canada had, under the British North America Act, sec. 91 (25), exclusive authority to legislate concerning "naturalization and aliens."

The Privy Council, per Lord Watson, held that the Provincial Act was *ultra vires*, and reversed the decision of the Provincial Courts. Every alien when naturalized in Canada became, *ipso facto*, a Canadian subject of the Queen, and his children were not aliens requiring to be naturalized, but natural-born Canadians. It could hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada, but section 91 (25) might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seemed *prima facie* to include the power of enacting what should be the consequences of naturalization, or, in other words, what should be the rights and privileges pertaining to residents in Canada after they had been naturalized. It seemed clear that the expression "aliens" in that section referred to, and at least included, all aliens who had not yet been naturalized, and the words "no Chinaman" in the Provincial Act certainly included every adult Chinaman who had not been naturalized. The leading feature of the prohibition in the Provincial Act was that it could have no application except to Chinamen who were aliens or naturalized subjects, and that it established no rule or regulation, except that those aliens or naturalized subjects should not work in underground coal mines within the Province. Their Lordships saw no reason to doubt that, by virtue of section 91 (25), the Legislature of the Dominion was invested with exclusive authority in all matters which directly concerned the rights, privileges, and disabilities of the class of Chinamen who were resident in the Provinces of Canada. They were also of opinion that the whole pith and substance of sec. 4 of the Provincial Act, in so far as objected to by appellant company, consisted in establishing a statutory prohibition which affected aliens or naturalized subjects, and therefore trenched upon the exclusive authority of the Parliament of Canada. (Per Lord Watson, in The Union Colliery Company of British Columbia, Ltd., *v.* Bryden [1899], App. Ca. 580.)

Under the Constitution of the Commonwealth, sec. 51—xix., the Federal Parliament will be able to prohibit Chinamen, whether naturalized or not, from working in mines, or to permit them to work in mines. In the absence of Federal legislation State laws relating to such subjects would, under sec. 108, prevail.

Aliens Naturalized by Colonial Laws.—"The continued inconveniences and disabilities to which German emigrants to Canada are exposed by reason of the partial benefits afforded to them by naturalization under the colonial law, which leaves them

still liable to be claimed as German subjects when travelling abroad or on a return to their native country, induced the Canadian Privy Council to request the Governor-General to write to the Secretary of State for the Colonies and represent this grievance. . . Accordingly, on April 21, 1873, the Canadian House of Commons passed an address to the Queen, praying that, pursuant to the provisions of the Imperial Naturalization Act of 1870, Her Majesty would be pleased to negotiate naturalization treaties with the German and other foreign States, under which legally naturalized foreigners in Canada may no longer be subject to the disabilities of a divided allegiance, but, on formally renouncing their native allegiance, may become entitled to all the privileges of native-born British subjects. A despatch, in reply to this address, dated September 3, 1873, was transmitted by the Governor-General to the House of Commons, on May 6, 1874. It inclosed a memorandum from Her Majesty's Secretary of State for Foreign Affairs, which stated that the Imperial government were prepared to place aliens naturalized in any British colony, out of Europe, on the same footing, so far as passports and protection in foreign countries are concerned, as aliens naturalized in England under the Act of 1870. But it suggested that a compliance with the request for the negotiation of naturalization treaties would prove less advantageous to aliens naturalized in the colonies than the existing practice—inasmuch as no treaties could be negotiated, except upon the basis of a five years' residence in the colony of the alien who desired to be allowed to change his allegiance. The only way in which the objections urged could be satisfactorily overcome would be by an extension of Imperial naturalization to the colonies, the expediency of which is under the consideration of Her Majesty's government. . . And in March, 1881, the Canadian Commons were informed that negotiations had been entered into between the Imperial and the German governments, with a view, by treaty, to enable German settlers in Canada to obtain complete naturalization." (Todd's Parl. Gov. in Col. 2nd ed. pp. 296-9.)

"Legislation with regard to aliens is entrusted to the Dominion Parliament. The Manitoba Assembly passed an Act dealing with the holding of land; and declared that the existing disqualifications against aliens debarred them from serving as jurors. The Minister of Justice, 21 February, 1874, following the ruling of the Chief Justice, under the English laws in force in Manitoba, recommended that the Act be sanctioned. (Prov. Leg. 1887.) If the Provinces attempt to effect the naturalization of a person who is a citizen of a foreign State, this would be objected to, as this is one of the subjects left exclusively to the Dominion Parliament, and Acts have been passed accordingly." (Wheeler, C.C., p. 101.)

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51. (xx.) Foreign corporations[195], and trading[196] or financial corporations[197] formed[198] within the limits of the Commonwealth[199]:

Historical Note.—"Status of corporations and joint stock companies in other colonies than that in which they have been constituted" was a subject which might be referred to the Federal Council under the Act of 1885.

In the Bill of 1891 the sub-clause was worded, "The status in the Commonwealth of foreign corporations, and of corporations formed in any State or part of the Commonwealth." In Committee Mr. Munro and Mr. Bray suggested that there should be power to prescribe a uniform law for the incorporation of all trading corporations; but Sir Samuel Griffith thought it unnecessary. (Conv. Deb. Syd., 1891, pp. 685-6.)

At Adelaide the sub-clause was drawn as follows:—"Foreign corporations and trading corporations formed in any State or part of the Commonwealth." In Committee the words "or financial" were added. (Conv. Deb., Adel., pp 793-4.) At Melbourne, after the fourth report, the words "within the limits of the Commonwealth" were substituted for the words "in any State or part of the Commonwealth."

§ 195. "Foreign Corporations."

A corporation has been already defined; Note, § 182, *supra*, "Incorporation of Banks." A corporation, according to the law of England, cannot be created except by royal charter, letters-patent, or Act of Parliament. Once duly constituted it is an artificial person, having the incidents of unity and perpetuity, capable of suing and being sued, holding property, performing acts, and having a domicile. Its domicile is

its principal place of business, where the administrative work of the corporation is carried on. (Dicey, Conflict of Laws, 154.)

Foreign corporations, chartered for lawful purposes, have the right to carry on business within the British Dominions, subject to the conditions and requirements of local laws; this has been recognized by the comity of nations, as well as by conventions concluded between Great Britain and other countries. By the Anglo-French and Anglo-Belgian treaties of 1862, and by the Anglo-Spanish treaty of 1883, companies formed in one of the joint contracting countries, in accordance with laws in force therein, are entitled to exercise "all their rights" in the dominions of the other. Similar conventions have been entered into by Great Britain with Germany, Italy, Greece, and other nations, mutually securing to commercial and industrial companies the exercise of their rights throughout the possessions of the high contracting parties.

"The right of foreign and colonial corporations to carry on business in England, without any authority to that effect from Parliament or Government, has now passed unquestioned for so long that it may be considered to be established; and it is a very exceptional instance of liberality." (Westlake, Priv. Internat. Law, p. 337.)

The term "foreign," in the phrase now under discussion, is wide enough to cover not only corporations established by the laws of independent foreign States, but also corporations established by the law of Great Britain and by the law of every self-governing community within the British Empire. In short, "foreign" includes every corporation established beyond the limits of the Commonwealth.

A foreign company carrying on business in any part of the British Dominions, through a branch office situated there, is liable to be sued locally in the same manner as a local corporation. Thus, an American company, incorporated by American law in the United States, had a place of business in England, where it, *de facto*, carried on business, although its manufactory, and also its principal place of business, where the meetings of its directors and shareholders were held, were in America. The plaintiff claimed a sum of money as being due from the corporation to him as the balance of commission on the sale of goods. He commenced an action against the corporation and its agent in England, including both in the writ, and served two copies upon the agent, one for himself and the other for the corporation. It was held that the court would not, upon the ground that a foreign corporation cannot be sued in England, prevent the plaintiff from proceeding in the action; and also that, as the corporation had a place of business in England and traded there, it must be treated as resident there, and that the service upon its agent was sufficient. (Newby *v.* Van Oppen, L.R. 7 Q.B. 293; and it was similarly held in Haggin *v.* Comptoir d'Escompte de Paris, 23 Q.B.D. 519.)

The right of British and colonial courts to order the winding-up of companies not domiciled within their respective jurisdictions has been considered in a number of cases which have arisen in the United Kingdom, India, Australia, and New Zealand. In a New Zealand case it was held that the Court of Chancery in England has jurisdiction under s. 199 of the Companies' Act, 1862 (25 and 26 Vic. c. 89), to wind up an unregistered joint-stock company, formed, and having its principal place of business in New Zealand, but having a branch office, agent, assets, and liabilities in England. The pendency of a foreign liquidation does not affect the jurisdiction of the court to make a winding-up order in respect of the company under such liquidation, although the court will, as a matter of international comity, have regard to the order of the foreign court. It being alleged that proceedings to wind up the company were pending in New Zealand, the Court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu* with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company, that the English assets should remain in *statu quo* until the further order of the Court. (*Re* Commercial Bank of India, L.R. 6 Eq. 517; followed in *Re* Matheson Bros. Limited, 27 Ch. D. 225; Digest of English Case Law, 111, 1674.)

A banking company carrying on business in South Australia had a branch London, but was not registered in England. The company had English creditors and assets in England. Two petitions were presented in England to wind up the company, which had stopped payment, and on the hearing of the petitions an order was made appointing a provisional liquidator, and the further hearing was ordered to stand over for a time. The powers of the provisional liquidator were limited to the taking possession of, collecting and protecting the assets of the company in England. When the petitions came on again to be heard it appeared that a petition to wind up the company had been meanwhile presented in Australia, and a provisional liquidator had been appointed there, but it was not proved that a winding-up order had been made. It was held that there was jurisdiction, at the time when the petitions were presented, to make an order to wind up the company, and that the jurisdiction could not be affected by subsequent proceedings in Australia. A winding-up order was accordingly made, the order appointing the provisional liquidator being continued, with the same restrictions on the powers, the judge expressing an opinion that the winding-up in that court would be ancillary to a winding-up in Australia, and that if the circumstances remained the same, the powers of the official liquidator, when appointed, ought to be restricted in the same way. (*Re* Commercial Bank of South Australia, 33 Ch. D. 174.)

In the case of the Merchants' Bank of Halifax *v.* Gillespie, 10 S.C.R. (Can.) 312, the question was as to the validity of proceedings under the Dominion statute for the sole and principal winding-up of a joint stock company incorporated in England in 1874, under the Imperial Joint Stock Companies' Act, and never incorporated in Canada, but with its chief place of business in Nova Scotia, where it owned and operated extensive iron mines and works, constituting almost its whole assets, while it owned no real estate, but occupied an office in Great Britain. (Lefroy, Leg. Pow. in Canada, p. 629.) The Supreme Court held that an order could not be made under the Dominion law for the winding-up of the Company. In the same case, Henry, J., said:—"If the provisions of a Dominion statute, as in this case, contravene an English statute regulating an English incorporated company, such provisions would be *ultra vires*. . . It is possible that a company chartered in the United States or other foreign country doing business here might be wound up under the Dominion Act, if such could be done without interfering with the terms of the constituting articles, but I see serious difficulties in the way, even in such a case."

The extent to which federal control may be exercised over foreign corporations, including those formed under Imperial law, may be thus summarized from the English and Canadian cases. They will be liable to federal taxation; they may be required to give security for the performance of their contracts; their property and assets within the Commonwealth may be protected and regulated, so as to secure the rights of creditors, and particularly the rights of citizens and residents of the Commonwealth; they will not and cannot be wound up or dissolved under Federal law. But should they not be able to pay their debts, their assets may be seized and placed in the hands of a Federal liquidator, charged with the duty to carry on a local liquidation ancillary to any principal winding-up that may be instituted in the country of their domicile. (The Merchants' Bank of Halifax *v.* Gillespie, 10 S.C.R. [Can.] 312; Allen *v.* Hanson, 16 Quebec L.R. 79; *Re* Briton Medical Life Association, 12 Ont. Rep. 441.)

§ 196. "Trading . . Corporations."

A trading corporation is one formed for the purpose of carrying on trade. To trade, as we have seen (Note, § 162, *supra*), means to buy and sell; to be engaged in the exchange, barter, traffic, bargain, or sale of goods, wares, and merchandize, or to carry on commerce as a business. The Federal Parliament may legislate concerning trading corporations formed within the limits of the Commonwealth. Such corporations may be both created and wound up under the provisions of Federal law; whilst foreign corporations cannot be either created or wound up by Federal law, though their business operations and property can be regulated and affected.

§ 197. "Financial Corporations."

Sub-section 13 enables the Parliament to make laws with respect to "Banking and the incorporation of Banks." This sub-section is intended to give the Parliament power to legislate concerning all "financial institutions" formed within the limits of the Commonwealth. There are financial institutions which are not banks. Among these may be mentioned companies which receive deposits of money for investment and make advances on the security of land, such as land-mortgage companies and building societies. (Con. Deb., Adel., 1897, p. 793.)

§ 198. "Formed."

In the expression "trading or financial corporations formed within the limits of the Commonwealth," the words "formed within," &c., apparently include corporations formed under the authority of State laws, whether before or after the establishment of the Commonwealth. "Formed" is certainly capable of meaning "formed under State laws." It would have been unnecessary to declare that the Parliament should have power to make laws controlling corporations "formed" by its own authority. There is no express power vested in the Parliament to incorporate trading or financial companies (sec. 51—xiii.). Whether such companies could be created under the trade and commerce section is not clear. It would therefore seem that this provision refers to companies created under State laws. Such bodies, once launched, will come within the control of Federal legislation. Under this power it would probably be competent for Parliament to convert a corporation created by State authority into a Federal corporation; to enlarge the scope of its operations and business; to confer on a local corporation certain powers which would be beyond the jurisdiction of the States Governments to grant. (Todd's Parl. Gov. in Col., 2nd ed. 437.)

"In June, 1881, the Quebec Court of Queen's Bench, on an appeal from the decision of an inferior court, declared that the Dominion Parliament had exceeded its powers in the incorporation, by Act 43 Vic. c. 67, of the Bell Telephone Company. This company had been authorized to establish telephone lines in any part of Canada, to cross rivers, boundary lines, &c. But the company, in commencing a local business in Quebec, did so for purely local traffic, having no pretension to service of a dominion character. Their undertaking did not involve the connection of service with two or more Provinces, or the need even to cross navigable rivers; neither had Parliament declared the company to be 'for the general advantage of Canada, or of two or more Provinces.' In fact, the powers claimed to have been conferred were beyond the jurisdiction of the Dominion Parliament to grant, and should have been obtained in the particular instance from the Quebec legislature. The company were therefore adjudged to have been guilty of a nuisance, in erecting their poles in the city of Quebec without lawful authority. But in the same month (June, 1881), upon application to the Quebec legislature, then in session, an Act was passed 'to confer certain powers on the Bell Telephone Company of Canada,' which recognized this company, and gave it the necessary corporate powers for provincial work, saving only actions pending in the courts. Similar Acts were passed by the New Brunswick, the Nova Scotia, and the Ontario legislatures, in 1882. And in the same year, the Dominion Parliament amended their Act of incorporation, and furthermore declared the works in question to be 'for the general advantage of Canada.'" (Todd's Parl. Gov. in Col. 2nd ed. p. 534.)

§ 199. "Within the Limits of the Commonwealth."

This is a notable expression, affirmative of the territoriality of the Commonwealth, and recognizing the principle that, as a general rule, the laws of a sovereign State or of a semi-sovereign community are intended to be operative and enforceable only within its territorial limits. The words, "formed within the limits of the Commonwealth," are, apparently, words of description rather than words of limitation, seeing that even without any express restriction the laws of the Commonwealth could only operate within and throughout the Commonwealth. Only express words would justify any interpretation giving an extra-territorial effect. One instance of such express words is found in Clause V.,

which enacts that the laws of the Commonwealth shall be "in force an all British ships" whose first port of clearance and whose port of destination are within the Commonwealth. Another instance is found in section 51—x., "Fisheries in Australian waters beyond territorial limits."

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51. (xxi.) Marriage[200]:

Historical Note.—"Marriage and divorce" is specified in the British North America Act, sec. 91, sub-sec. 26. "Recognition in other colonies of any marriage or divorce duly solemnized or decreed in any colony" was a subject which might be referred to the Federal Council under the Act of 1885. In the Bill of 1891, and also in the Adelaide draft of 1897, "Marriage and divorce" was one of the legislative powers.

At the Sydney session, a suggestion by the House of Assembly of Tasmania was submitted, to omit the sub-clause and substitute "The status, in other States of the Commonwealth, of persons married or divorced in any State." Mr. Glynn said that there were strong objections in South Australia to the prospect of the grounds of divorce in that colony being extended as they had been in New South Wales and Victoria. The sense of the desirability of uniform laws of marriage and divorce prevailed, however, and the sub-clause was agreed to. (Conv. Deb., Syd., 1897, pp. 1077-82.) At the Melbourne session, before the first report, "Marriage" was placed in a separate sub-clause.

§ 200. "Marriage."

Marriage is a relationship originating in contract, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others. (Bethell *v.* Hildyard, 38 Ch. D. 220.)

Laws relating to this subject will therefore embrace (1) the establishment of the relation, including preliminary conditions, contractual capacity, banns, license, consent of parents or guardians, solemnization, evidence, and rules in restraint, (2) the consequences of the relation, including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights. *Quaere* whether this power will enable the Parliament to legislate with respect to breach of promise of marriage; immoral agreements concerning marriage; and the separate property of married women. It could be argued that the first two matters belong to the general law of contracts, and the last one to the general law relating to civil rights; both of which classes of laws are reserved to the States. It might be said, however, that they impinge on the principal grant of power, "marriage," and are conveyed by it.

In considering the validity of a marriage the requirements of two kinds of laws, not always coinciding in the same political community, have to be regarded; one is the law of the domicile—that is, the law of the country which the contracting parties look upon as their permanent home; the other is the law of the place in which the contract is made, or where the ceremony is performed. As regards the essential qualification and capacity to enter into the marriage relation, both the *lex loci contractus* and the *lex domicilii* must apparently be satisfied; the formal requisites, the mode of solemnization and the like, depend upon the *lex loci contractus* alone. (Westlake, Priv. Internat. Law, pp. 52-5.)

The policy of the Imperial Government, to secure uniformity of marriage laws among the Christian races of the Empire, is shown in the manner in which several

colonial Acts to legalize marriage with deceased wife's sister have been discountenanced and disallowed. Such amending laws have been, however, at length sanctioned by the Crown in Ceylon, South Australia, Victoria, Tasmania, New South Wales, Queensland, Western Australia, New Zealand, Canada, and Barbadoes. In the countries in which the parties are domiciled the children of these marriages are legitimate by statute law, but in the United Kingdom, these marriages being still regarded as illegal, the offspring are liable to serious disabilities. By the law of England, "with regard to personal property the children of these marriages are regarded as legitimate; but with respect to realty, the status of legitimacy, which the law of the domicile gives them, is not recognized, on the ground that the established rule of law in deciding the title of real estate, *lex loci rei sitæ*, excludes such children." (Hammick's Marriage Law of Eng. and Cols. p. 253.)

"In regard to such legislation the difficulty still remains, that the Imperial Parliament has not yet (1892) agreed to this alteration in the law of marriage. Consequently, such marriages continue to be illegal in England, and those who avail themselves of the liberty afforded by colonial enactments to contract these marriages expose their offspring to disastrous consequences, as regards both inheritance and legitimacy, in the mother country. Hitherto, the Imperial Government and Parliament have shown no disposition to alter the law in this respect, for the behoof of the colonies in question." (Todd's Parl. Gov. in Col. 2nd ed. 198.)

The personal capacity of parties to enter into the contract of marriage depends upon their domicile; and where both parties had a foreign domicile, and, by the law of their domicile, their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to English law, was held invalid. (Sottomayor *v.* De Barros, 3 P.D. 1. Digest of English Case Law, vol. vii. p. 626.)

A foreign marriage, valid according to the law of the country where it is celebrated, is good everywhere; but this applies only to the form, and not to the essentials of the contract, which depend on the *lex domicilii*. Therefore, if a marriage abroad of English domiciled subjects is polygamous or incestuous, the law of England will not recognize it, and will follow in that respect its own rules as to incest and policy. (Brook *v.* Brook, 9 H.L. Cas. 193. *Id.*)

When an English woman marries a domiciled foreigner, the marriage is constituted according to the *lex loci contractus*; but she takes his domicile, and is subject to his law. (Harvey *v.* Farnie, 8 App. Cas. 43. Digest of English Case Law, vol. viii. p. 215.)

The rule, that the *lex loci contractus* of a marriage establishes its validity, requires this qualification—that where the law of a country forbids marriage under any particular circumstances, the prohibition follows the subjects of that country wherever they may go. Each nation has a right to define and prohibit incest. If a marriage, though good according to the law of the domicile, were nevertheless contrary to the religious or moral notions of other States, it would be impossible to contend that it ought to be adopted by them. If the comity of nations were always to prevail, a foreign marriage between uncle and niece, under papal dispensation, must be held valid, and the issue might claim to take a Scotch estate and Scotch honours, although, had the marriage been contracted in Scotland, the parties might have been capitally punished. (Fenton *v.* Livingstone, 3 Macq. H.L. 497. *Id.* 216.)

British subjects resident in a British settlement abroad are governed by the laws of England, and consequently, with respect to marriage, by the law of which existed there before the Marriage Act, viz., the canon law. (Lautour *v.* Teesdale, 2 Marsh, 243. *Id.* p. 217.)

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51. (xxii.) Divorce[201] and matrimonial causes[202]; and in relation thereto, parental rights[203], and the custody and guardianship of infants[204]:

Historical Note.—For the history of the sub-section "marriage and divorce," see Historical Note, sub-sec. xxi. At the Adelaide session, in 1897, a new sub-clause "Parental rights, and the custody and guardianship of infants" was added. It was thought, however, that, except incidentally to matrimonial suits, the control of children was not a federal matter, and accordingly at the Sydney session the sub-clause was

attached to the preceding one, so as to read "Marriage and divorce, and in relation thereto, parental rights, and the custody and guardianship of infants." (Conv. Deb., Syd., 1897, pp. 1082-5.) At the Melbourne session, before the first report, "Marriage" was placed in a separate sub-clause, and the words "and matrimonial causes" were added.

§ 201. "Divorce."

Divorce is the termination and dissolution of the marriage relation, by process of law, for causes assigned. Among these causes are generally recognized such acts or omissions as are inconsistent and incompatible with, and in violation of, the marriage state, such as adultery, cruelty, and desertion; causes less generally recognized are the perpetration of crimes leading to imprisonment for a lengthened period; and persistence in habits that disqualify for the marriage state, such as habitual drunkenness and the neglect of matrimonial obligations. The object of this sub-section is to enable the Federal Parliament to abolish the varied and conflicting divorce laws which prevail in the States, and to establish uniformity in the causes for which divorce may be granted throughout the Commonwealth. This is considered advisable in order to avoid the great mistake made by the framers of the Constitution of the United States of America, who left the question to the States to deal with as they respectively thought proper. It has been well said, that if there is one defect in that Constitution more conspicuous than another it is its inability to provide a number of contiguous and autonomous communities with uniformity of legislation on subjects of such vital and national importance as marriage and divorce. At present persons who, according to the law of the State in which they reside, would have no right to a divorce, may become domiciled in another State by living there a certain time, and then, according to the laws of that State, may obtain a divorce for reasons which, in their own State, would have been insufficient. In some cases they may be divorced without a domicile. All these circumstances point to the conclusion that, unless we wish to repeat, in these communities, the condition of things which has obtained in America, it is necessary to provide for uniformity in the law of divorce. (Mr. R. E. O'Connor and Mr. I. A. Isaacs, Conv. Deb., Syd., p. 1080.)

By the old instructions to colonial Governors, still in use in the Australian colonies at the establishment of the Commonwealth, a Governor was required not to assent to any bill for the divorce of persons joined together in holy matrimony unless such bill contained a clause suspending its operation until the royal pleasure thereon was signified; otherwise they must be reserved. The royal assent to such reserved bills has been frequently refused. Thus a bill passed by the Parliament of New South Wales to enable a wife to obtain divorce on the sole ground of her husband's adultery, and one by Victoria authorizing a divorce for desertion for four years without reasonable cause, failed in the first instance to receive the royal assent, on the ground that they would occasion confusion throughout the Empire as to the status of persons so divorced, and of their offspring. Subsequently these bills received the royal assent and became law. (Todd's Parl. Gov. in Col. 2nd ed. 197-8.) The present instructions to the Governor-General of Canada do not contain the paragraph embodied in the old instructions above referred to, and in all probability it will not appear in the instructions to the Governor-General of the Commonwealth.

"I would ask hon. members to recollect the view we have taken about the condition of the English law with respect to marriage with a deceased wife's sister. I think every colony has petitioned the English Parliament on that subject. I know that when we were at home in 1887, we all agreed in making a particular request to the Imperial Government to bring in an Act to prevent the unpleasant and anomalous condition of the laws by which people, married in the colonies, when they reached England were not married. We only have to remember the attitude we took when we were unanimous amongst ourselves against the mother country, which has a different line of legislation, to understand that we ought to do that amongst ourselves which we wanted England to do towards us. What subject is more fitted for general legislation? In what subject

do we want a universal law more than that dealing with the most sacred relations, that concern not merely the individuals who are parties to the contract, or whatever you please to call it, but also those who are to come afterwards? Anyone who seriously considers the social feelings of pain and grief, and worry and trouble, caused by a differentiation of the laws of the colonies, as between themselves, on this most vital subject, must agree that something ought to be done to prevent the anomaly." (Sir John Downer, Conv. Deb., Syd., 1897, p. 1081.)

"A foreign tribunal has no authority, so far as consequences in England are concerned, to pronounce a decree of divorce *à vinculo* in the case of an English marriage between English subjects, unless such subjects are, at the time of such decree pronounced, *bona fide* domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion. (Shaw *v.* Gould, 37 L.J. Ch. 433. Dig. of Eng. Case Law, viii. p. 226.)

A wife's domicile is that of her husband, and her remedy for matrimonial wrongs must, as a general rule, be sought in the courts of that domicile; and, therefore, the wife of a man not domiciled in England cannot maintain a suit for restitution of conjugal rights if her husband has left the jurisdiction before the commencement of the proceedings. (Firebrace *v.* Firebrace, 47 L.J. Prob. 41. *Id.* p. 225.)

The word domicile has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicil for many purposes, and yet may be domiciled in England, so as to give jurisdiction to the court for divorce; but if he has never resided in England except temporarily, and is not there at the time of the commencement of the suit, he is not subject to its jurisdiction. (Yelverton *v.* Yelverton, 1 Sw. and Tr 574. *Id.* p. 223.)

Great caution ought to be observed in allowing a petition for divorce to proceed in the English Divorce Court where there is ground for supposing that the parties are domiciled out of the jurisdiction. (Sinclair's Divorce Bill, 1897, App. Ca. 469. Dig. of Eng. Case Law, vol. vii. p. 730.)

When the domicile of the parties is English, the jurisdiction of the court is founded, though the marriage and adultery may have taken place abroad. (Ratcliff *v.* Ratcliff, 29 L.J. Mat. 171. *Id.*)

For the purposes of the jurisdiction of the Divorce Court, the British colonies, as well as Scotland and Ireland, are deemed to be foreign countries. (Firebrace *v.* Firebrace, 47 L.J. Prob. 41. *Id.* p. 733.)

§ 202. "Matrimonial Causes."

The matters contemplated and covered by this grant of power are those subsidiary and consequential to marriage and divorce. They will naturally include judicial separation, restitution of conjugal rights, nullity of marriage, jactitation, damages against an adulterer, and probably maintenance of wives and children and marriage settlements.

§ 203. "Parental Rights."

The Parliament has power to legislate respecting the rights of parents to their children, but only in relation to divorce and matrimonial causes. Outside and independent of the area covered by divorce and matrimonial causes, the power of the States to deal with parental rights remains unaltered. The power to determine the parental rights of divorced or separated persons with respect to children of the marriage, is a necessary corollary of the power to dissolve the union by divorce, or to suspend it by judicial separation; one is an essential incident and should be the sequence of the other. Without this conjunction of power the Parliament, whilst able to pass a uniform law of divorce and judicial separation, would be unable to pass a uniform law of parental rights to be enforced in such suits. It would be anomalous for a Federal law to dissolve or suspend a marriage, and for a State law to decide the destiny of the children of the marriage.

At common law a father is entitled to the custody of the child at its mother's breast, and the court, in making an order as to the custody, *pendente lite*, will not, unless some good cause is shown, take away this right. (Cartledge *v.* Cartledge, 31 L.J. Mat. 85. Dig. of Eng. Case Law, vol. vii. p. 789.)

In making an *interim* order as to the custody of the children, the court will adhere to, or depart from, the common law rule, according to its discretion. (Spratt *v.* Spratt, 1 Sw. and Tr. 215. *Id.*)

A divorce and matrimonial court has jurisdiction by its order to regulate the custody of children until they attain the age of sixteen. (Mallinson *v.* Mallinson, 35 L.J. Mat. 84.) But the court has no jurisdiction to make any order as to the custody of children upwards of sixteen years of age. (Ryder *v.* Ryder, 30 L.J. Mat. 44. *Id.* p. 788.)

In exercising its discretion in the matter of access to children by their parents, pending suit, the court is mainly influenced by consideration for the interests of the children. (Philip *v.* Philip, 41 L.J. Prob. 89.)

§ 204. "Custody and Guardianship of Infants."

The power of the Parliament to legislate concerning the custody and guardianship of infants is not a general one; it is limited to divorce and matrimonial causes. Apart from that jurisdiction the States retain their former authority in respect to these matters. (Conv. Deb., Adel., 1897, p. 1085.)

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51. (xxiii.) Invalid and old-age pensions[205]:

Historical Note.—This sub-section was first proposed by Mr. Howe, at the end of the Sydney session in 1897, but was not then dealt with. (Conv. Deb., Syd., 1082, 1085-8.) At the Melbourne session, Mr. Howe proposed it again, when after a short debate it was carried by 26 votes to 4. (Conv. Deb., Melb., pp. 1991-6.)

§ 205. "Invalid and Old-age Pensions."

In considering Mr. J. H. Howe's proposal to place this sub-section in the Constitution, the question debated was not the policy or practicability of giving governmental pensions to poor and aged persons, but whether such a power ought to be left to the States or added to the functions of a Federal Parliament. Those who doubted the wisdom of the proposal argued that it was a matter which stood in the same category as State Banking and State Insurance; that it was a branch of the charitable systems which existed in the States; that it could be best dealt with by each State apart from the Federal authority; that it might involve embarrassing financial issues; that it would tend to load the Constitution with a social problem of complexity and magnitude, which had better be reserved for the States. In reply to these arguments it was said that the Federal authority would occupy a superior vantage-ground which would enable it to deal effectively and comprehensively with the subject, which could not be done by the disunited efforts of the States. Such a law should be uniform so as to reach and regulate the rights and obligations of those who were migratory in their habits. "The people who would benefit most by this provision," said Mr. Howe, "are a moving population. They are engaged in seeking work all over Australia, and are constantly going to those places which, for the time being, are more prosperous than other places. Our labouring classes will be a nomadic race for a considerable time to come. If the State took this matter in hand, and made payments compulsory, it could not follow a contributor to the fund from one State to another. The duty is one which can only be performed by the Federal authority. (Conv. Deb., Syd., 1897, p. 1086.)

"In these Colonies," said the same hon. gentleman, "men are born in one State, spend their manhood and best days in another, and then return, broken down and unfortunate, to the land of their birth, which owes them nothing. Is it to be contended that under such circumstances the State of the unfortunate man's birth should be compelled to support him? Surely the support of the aged poor could be better accomplished by a Federated Australia. Wherever a man may roam within the boundaries of Federated

Australia, he should know that in his old age he need never fear the pauper's lot. I would compel every able-bodied man, in the heyday of youth, when he has the means, to make a compulsory contribution towards a fund, out of which provision would be made for his old age. That is another reason why the Federal authority should take it instead of the State, because within the bounds of Federated Australia a law can be enacted compelling that individual, who is to receive the benefit, to contribute to the fund in which he is to participate in old age." (Conv. Deb., Melb., 1898, p. 1992.)

If a precedent were required it could be found in the German Empire, which has adopted the system of providing invalid and old age pensions. "In Germany it is compulsory for those in fixed employment, and for employers, to contribute to a fund which is subsidized by the Government. Then when a man comes on the fund he does not come upon it as with us a man comes upon the charitable institutions of the country. He can hold up his head among his fellow men. This law prevents a man who has fulfilled all the obligations of citizen, husband, and father, from becoming a pauper in his declining days. . . . At the present time there are no fewer than 12,000,000 of people in Germany subject to this law, and Germany takes the pride of place in having been the first nation in Europe to adopt the system. . . . In Australia we have a country far removed by a vast expanse of water from every other part of the world. Our labourers will be Australian labourers. Labourers from other lands will not intermingle with them. We should try to prevent these men from becoming destitute in their declining years through no fault of their own. Every member of the Convention knows of cases where men, who, perhaps, once held high positions, have through force of circumstances had to become inmates of charitable institutions. The poor have to be kept by the State in any case, and I want the Commonwealth to say to those of its citizens who have attained a certain age, or who have been maimed for life by some accident, that they shall not want, and need not be a burden upon friends, who, perhaps, are not able to keep them, but that the Commonwealth shall provide the means from this fund to which they have contributed whereby they can live. I hope the Convention will agree to these words being inserted. I am sure that if they do so, the Federal Parliament will be able to formulate a scheme whereby my object can be achieved, and thereby crown itself with glory." (Hon. J. H. Howe. Conv. Deb., Syd., 1897, p. 1086.)

The Convention after several unsuccessful appeals at last yielded to Mr. Howe's advocacy of the cause and granted the power to Parliament, making it a concurrent authority, which could be exercised by the States until it was acted upon by the Parliament. "And," said Mr. Kingston, "there is no fear whatever that one would desire to exercise that power to the prejudice of the other. No doubt also the Federated authority will be armed with greater power for giving effect to anything it may desire, for the reasons which my hon. friend and colleague has pointed out." (Conv. Deb., Syd., p. 1087.)

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51. (xxiv.) The service[206] and execution[207] throughout the Commonwealth of the civil and criminal process[208] and the judgments of the courts of the States:

Federal Council of Australasia Act, 1885.—Saving Her Majesty's prerogative, and subject to the provisions herein contained with respect to the operation of this Act, the Council shall have legislative authority in respect to the several matters following:—

(*d*) The service of civil process of the courts of any colony within Her Majesty's possessions in Australasia out of the jurisdiction of the colony in which it is issued:

(*e*) The enforcement of judgments of courts of law of any colony beyond the limits of the colony:

(*f*) The enforcement of criminal process beyond the limits of the colony in which it is issued, and the extradition of offenders (including deserters of wives and children, and deserters from the Imperial or Colonial naval or military forces).—Fed. Council of Aust. Act, 1885, sec. 15.

Historical Note.—No provision corresponding to this sub-section is to be found in the Constitution of the United States of America, or in that of Canada. It first appeared in the Federal Council of Australasia Act, 1885, section 15, *supra*. In the Commonwealth Bill of 1891 the provision appeared in exactly the same form as that in which it now stands in this sub-section. (Conv. Deb., Syd., 1891, pp. 686-8.) At the Adelaide session it was inserted in its present form. At the Melbourne session a suggestion by the Legislative Council of New South Wales, to omit "throughout the Commonwealth," was negatived. (Conv. Deb., Melb., p. 29.)

§ 206. "Service."

The object of this sub-section is to provide a uniform law for the service of civil and criminal process, for the execution of civil and criminal process, and for the execution of the judgments of the courts of the States, throughout the Commonwealth. With reference to the service, beyond the limits of a colony, of civil process issued within a colony, the constitutionality of laws passed by Colonial legislatures authorizing this to be done has often been questioned. Service, of course, is generally recognized as the foundation of jurisdiction in civil cases. No man can be legally bound by a judgment given behind his back and without his having had an opportunity of being heard. (Per Erle, C.J., in *re* Brook, 33 L.J. C.P. 246.) Now, the Colonial Constitutions gave authority to the Colonial legislatures to make laws for the peace, order, and good government of their respective colonies. Those legislatures were not sovereign, like the British Parliament; their powers were strictly circumscribed and defined by their respective Constitutions, and it was contended that whilst they could legislate concerning the service of process within their territorial limits, they could not, in the absence of an express grant of power from the Imperial Parliament, give their courts jurisdiction over persons and property situated outside those limits. In several cases the Colonial courts have been asked not to shrink from the responsibility of declaring void Colonial legislative enactments which purported to apply to acts done by persons residing, and property located, outside the territorial limits. In most of these cases the courts have refused to disregard the mandates of the legislative departments.

In connection with Acts which authorize the initiation of civil proceedings against defendants absent from the law-making country, two questions have to be kept steadily in view and distinguished. (1) Are these statutes valid and binding on the courts within the territory of the lawmakers? (2) Will foreign courts recognize judgments obtained in civil proceedings so initiated? Several cases have been decided, from which it appears that the first question ought to be answered in the affirmative. (Lefroy, Leg. Pow. in Can. p. 330.)

In Banks *v.* Orrell (1878, 4 V.L.R. [L.] 219), the question was raised as to the validity of the service in New South Wales of a writ of the Supreme Court of Victoria. By the Common Law Procedure Act, 1865 (Vic.), sec. 90, it was declared that a writ of summons in any action might be served in any part of Victoria or within fifty miles of the frontier or border thereof. Counsel in support of the service (Mr. Geo. Higinbotham, afterwards Chief Justice), admitted *arguendo* that the legislature had usurped jurisdiction *pro tanto* outside its territory, but he contended that as the power was given, the court was bound to carry it out. The Supreme Court held that every Act of the legislature must be obeyed, whatever its meaning. In Regina *v.* Call *ex parte* Murphy (1881, 7 V.L.R. [L.] 113), Chief Justice Stawell said:—"It has always appeared to me to be the duty of the court to assume that Parliament will not lightly attempt to exceed its territory."

By the Judicature Act, 1883 (Vic.), sec. 90 of the Common Law Procedure Act was repealed, and provision, founded on sec. 18 of the (Imperial) Common Law Procedure Act, 1852, (15 and 16 Vic. c. 76), was made for the issue of a writ of summons "on any defendant being a British subject residing out of the jurisdiction of the Court in any

place;" and on proof that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction or the breach within the jurisdiction of a contract wherever made, or in respect of property within the jurisdiction, and that the writ has been personally served on the defendant, or that reasonable efforts were made to effect service, and that it came to his knowledge, the judge may allow the plaintiff to proceed in the action. There is a similar law in New South Wales (Common Law Procedure Act, 1899. sec. 18).

It has been held that this procedure applies to individuals and not to corporations. (Connell *v.* Neill and Co., 7 W.N. [N.S.W.] 6; Lempriere *v.* New Pinnacle Group S.M. Co. No Liab., 21 A.L.T. 182 [Vic.].)

Another provision for the extra-territorial service of civil process, applicable to minor courts, has been made by several Australian Legislatures. By the Victorian Intercolonial Debts Act, 1887, re-enacted in the County Court Act, 1890, secs. 142-4, authority is given to serve County Court Summonses on defendants out of the jurisdiction, in Australian colonies, in which there are laws in force by which effect may be given, by the local courts of such colonies, to the judgments of the County Court of Victoria. On recovering judgment against an absent defendant, within any of the reciprocating provinces or colonies, the plaintiff is enabled to procure a certificate of judgment; this certificate is sent on to the clerk of the local court of the other colony in which the absent defendant is resident, and in which execution is then issued. Similar and reciprocal Acts were passed in South Australia (Intercolonial Debts Act, 1887), and in New South Wales (Intercolonial Debts Act, 1889).

The ineffectiveness of this kind of legislation, and the necessity of a federal law regulating service of process and execution of judgment, has been recently illustrated in a striking manner in the case of Elkan *v.* De La Juvenay, decided by the Full Court of Victoria on the 10th August, 1900.

In March of that year, Madame De la Juvenay, of Camberwell, near Melbourne, was served at her residence with a summons issued from the local court of South Australia, claiming £9 as the amount of two promissory notes. She was domiciled and resident in Victoria, and endorsed the promissory notes there, but they were payable in Adelaide. She did not appear to answer the summons, and judgment was entered up in Adelaide by default. It was transferred to the Victorian County Court, and on 8th May Madame De la Juvenay was served with a notice of the judgment. This was followed up next morning by a writ of execution. Under protest, she paid the money, and afterwards applied to have the judgment set aside. Mr. Justice A'Beckett, however, held that the Intercolonial Debts Act of 1887, now represented by sections 138 to 145 of the County Court Act of 1890, established a system of reciprocity between Victoria and any colony as to which a proclamation had been issued. An appeal was made on the ground that as the defendant was domiciled in Victoria, and had not submitted in any way to the South Australian jurisdiction, the judgment was not enforceable against her in Victoria, and was null by international law. The Full Court allowed the appeal. The Chief Justice (Sir John Madden) pointed out that it was a well understood proposition of international law that a subject of one State was not bound to obey the judgments of another State unless he chose to submit himself to its jurisdiction. The colonies were, for a purpose of this kind, as much apart as if they were foreign States. It was now contended, practically, that whenever a cause of action arose in South Australia against a Victorian, although the Victorian had never been in the other colony at all, the South Australian court had as much jurisdiction against him as if he had lived all his life there. This would be a striking change in the ordinary principles of law, and what had happened was wrong. The Act only applied to cases in which a resident of one colony had gone to another colony; not to cases in which the defendant had never submitted to the jurisdiction of the colony in which the plaintiff sued. In the view the court took, Madame De la Juvenay was a person not liable to be sued effectually in the circumstances. The judgment was set aside, and the money paid

upon the unlawful execution was ordered to be handed back. (*The Age*, 11 August, 1900 ; 22 A.L.T. p. 34.)

The New Zealand Parliament passed an Act (New Zealand Code, 46 Vic. No. 29, Rule 53) authorizing the courts of that colony, in any action founded on a contract made or to be performed within the colony, to decide whether they will allow a plaintiff to issue a writ and proceed against an absent defendant without service of the writ. In Ashbury *v.* Ellis (1893), App. Cas. 339, the Privy Council held that this was a valid law, and that it was competent for the legislature of New Zealand, under the Constitution of that colony, to subject to its tribunals persons who were neither by themselves nor their agents present in the colony, in actions founded on any contract made or entered into or wholly or in part to be performed within the colony. Referring to the argument that a judgment so obtained could not be enforced beyond the limits of New Zealand, their lordships said that "when a judgment of any tribunal comes to be enforced in another country, its effect will be judged by the courts of that country with regard to all the circumstances of the case. For trying the validity of New Zealand laws, it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own courts in New Zealand."

In reference to the second of the above questions the answer may be gleaned from numerous cases decided in England. In Simpson *v.* Fogo, 32 L.J. Ch. 249, it was held that the same rules are applicable in the enforcement of colonial judgments as in the enforcement of foreign judgments. In Buchanan *v.* Rucker, 9 East 192, the facts were that a law of the island of Tobago, a British colony, enacted that if a defendant were absent from the island he might be summoned by nailing up a copy of the declaration at the Court-house door, and this should be deemed good service. Lord Ellenborough, C.J., held that on a fair construction of the Act this must be intended to apply to one who had been present and subject to the jurisdiction ; and that if it had been meant to reach strangers to the jurisdiction, it would not have bound them. The principle affirmed was that an action is not maintainable on a colonial judgment, unless it appears that the defendant was regularly served with process, and had an opportunity of defending the suit, even although it appears to be the practice of that court not to give personal notice. The rule to be deduced from the cases is, that where the defendant against whom a judgment has been obtained in a colonial court, under such local Acts as we have been considering, authorizing service of process *in absentem*, is, or even has been, subject to the jurisdiction of the colony, such judgment will be recognized in the courts in England where otherwise it would not be. (Lefroy, Leg. Pow. in Can. p. 332.)

Under this sub-section of the Constitution a most important power is conferred on the Federal Parliament. It will enable that Parliament to provide procedure for the service, throughout the Commonwealth, of the civil process of the courts of the States, such as writs, summonses, notices of legal applications issued in and by the courts of the States. This includes the service of the civil process of the inferior as well as the superior courts of the States ; so that it will be as competent to provide for the service in one State of a summons issued by a local court or a court of petty sessions in another State. as for the service of Supreme Court writs. Such a law would appropriately specify the mode of service, whether personal or substituted, to be observed. It could also define the persons, whether private individuals or public officers, who are qualified to effect service. Another essential would be proof of service, sufficient to satisfy the adjudicating tribunal and give it jurisdiction. (Bank of Australasia *v.* Nias, 16 Q.B. 717.)

§ 207. "Execution."

Legal process includes not only the writ and summons to appear, but all the steps taken by the court in execution of its judgment ; hence seizure, sale, and sequestration are, in the natural meaning of the words, comprehended in the term process. (Per Lynch, J., in *re* Delahoyd, 11 Ir. Ch. R. 407.) The power to legislate concerning

"the execution throughout the Commonwealth of the civil process and judgments of the Courts of the States" clearly extends to all these matters.

This sub-section does something more than provide for the inter-state recognition of judgments; it means the inter-state execution of judgments. Under this power a law could be passed authorizing the enforcement, within one State, of a judgment recovered in a civil action in another State; so that a writ of execution issued by the Supreme Court of one State, or a warrant of distress issued by a court of petty sessions therein, could be enforced by seizure and sale, in another State, of the assets of a person against whom a judgment or order has been recorded. It might go so far as to authorize the sheriff and constables of each State to execute writs and warrants issued by the courts of the other States. (Conv. Deb., Adel., p. 1006.)

Without this sub-section a judgment recovered in one State would not carry with it into another State the efficacy of a judgment, affecting property or persons, which could be enforced by direct execution; to give it such force in another State it would have to be made a judgment there under local laws; which could only be executed in that State as its laws permitted. (Baker, Annot. Const. p. 152.)

§ 208. "Criminal Process."

Process includes the doing of something in a criminal court or proceeding, as well as in a civil court or proceeding. A summons from a judicial officer to appear and answer a criminal charge is a process. A warrant issued by a judicial officer, directing the arrest of a person on a criminal charge, is a process.

The power conferred by this part of the sub-section will enable the Federal Parliament to deal with a class of cases which, it has been held, is not within the competence of the Colonial legislatures to regulate; viz., the transfer of persons charged with crime from one colony to another. This disability is founded on the territorial limitations to which the Colonial legislatures are restricted.

In 1855 the law officers of the Crown in England, on being asked to give their opinion with reference to a case arising in British Guiana, said—"We conceive that the Colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or, at most, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons." (Forsyth, Constitutional Cases, p 24.)

In 1861 a Canadian Act was passed and assented to by the Governor which purported to give jurisdiction to Canadian magistrates, in respect of certain offences committed in New Brunswick by persons afterwards escaping to Canada. By order of the Queen in Council, 7th January, 1862, this Act was disallowed, as being in excess of the jurisdiction belonging to the Canadian Parliament, and only to be properly effected by Imperial legislation; or by an arrangement in the nature of an agreement of extradition between the two provinces, to be carried into effect by Acts of the two provincial legislatures. (Todd's Parl. Gov. in the Col. 2nd ed. p. 177.)

In Ray *v.* MacMackin (1875), 1 V.L.R. (L.) 274, it was decided that the power of extradition, from one part of the British dominions to another, was not inherent in the legislature of any colony, but required the sanction of the Imperial Parliament; that a Colonial legislature may authorize the exclusion from its territory of a person charged with having committed an offence in another colony, and it may order his punishment unless he leaves, but it cannot authorize the sending him in custody out of its territory into another colony. This was the case of a man arrested in New South Wales on a warrant issued by a magistrate in Victoria. The warrant was endorsed in New South Wales by a justice of that colony, who directed a constable to remove the accused in custody to Melbourne. The endorsement was made by the Sydney justice on the authority of a New South Wales Act (14 Vic. No. 43, s. 4). This section was passed before the separation of Victoria from that colony, and applied the provisions of Jarvis'

Act (11 and 12 Vic. c. 42) as to backing warrants. It was intended to authorize the backing of intercolonial warrants, making them operate in the same manner as was the case between England and Ireland. In an action afterwards brought in Victoria by the arrested man against the arresting constable, for false imprisonment in placing him in a vessel and in conveying him over the high seas from Sydney to Melbourne, it was held by the Supreme Court of Victoria that the Act was *ultra vires* and was no defence to the action. "It was distinctly enunciated that the superior Courts in England will regard Acts of Colonial Legislatures in the same way as they regard Acts of foreign countries legislating with respect to their inhabitants within the limits of their authority. Any attempt to exercise jurisdiction beyond the boundaries of their own territory, domestic or distant, by either one or the other, is treated as being beyond the powers of their legislatures. Whatever power or authority the Legislature of New South Wales has to frame laws to cause persons charged with the commission of misdemeanours in other countries, to be apprehended within that colony, and to be detained in prison there, it is a totally different thing to say that it can give a magistrate power to expel such persons from the colony, and send them across the seas to another part of the world." (Per Barry, J., 1 V.L.R. (L) p. 280.)

In 1863 the New Zealand Legislature passed the Foreign Offenders Apprehension Act, which authorized the deportation of persons charged with indictable misdemeanours committed in other Australian colonies, and their surrender to the authorities of the colony where the offence was committed. Doubts were at the time entertained as to its validity, but it was not disallowed. In 1879 one Gleich, an absconding bankrupt from South Australia, was arrested in New Zealand, and it was proposed to deport him back to South Australia. He was brought before the Supreme Court of New Zealand, which decided that a colonial legislature had no power to authorize the conveyance on the high sea to another colony, and the detention outside its jurisdiction, of any person whatever; that such power could be only exercised either directly by the authority of an Imperial Act, or in the exercise of power expressly conferred on a colonial legislature, by an Imperial Act. (Todd, Parl. Gov. in Col. 2nd ed. p. 303.)

In the case of Regina *v.* Call, *ex parte* Murphy (1881), 7 V.L.R. (L.) 113, the Supreme Court of Victoria decided that the power given by section 63 of the Justices of the Peace Statute, 1865 (Vic.), to a justice in Victoria, to endorse a warrant for the apprehension of an offender, "whether such warrant has been issued in Victoria or elsewhere," was not *ultra vires*, as it did not direct any act to be done beyond the territorial limits of Victoria. It was, further, the opinion of the court that on the production of a warrant issued in New South Wales, and proof of the handwriting of the justices issuing it, and that the person bringing it is one of the persons to whom it was originally addressed, it is the duty of the justices to whom it is produced to endorse it; but the last few lines of the form in the 13th schedule referred to in the margin of sec. 63 are not warranted by that section, and are incongruous. Such endorsement will then authorize the person holding the warrant to take the offender to the border of the colony, where the warrant itself will authorize him to complete the execution of it. Per Higinbotham, J.: "The endorsement would authorize the taking of the offender into New South Wales to the justice who issued the warrant." (7 V.L.R. [L.] 113.)

Owing to the difficulties arising from the territorial limitations of the power of Colonial legislatures, it has been the practice of late years for fugitive offenders, escaping from one colony into another, to be arrested and returned under the provisions of Imperial Acts relating to the extradition of criminals.

Imperial Fugitive Offenders Act.—By the Fugitive Offenders Act, 1843 (6 and 7 Vic. c. 34), provision was made for the apprehension in the United Kingdom, or in the Colonies, of persons charged with felony committed in a colony. By the Foreign Jurisdiction Act, 1878 (41 and 42 Vic. c. 67), this Act was extended to places to which the Foreign Jurisdiction Act, 1843, applied. After the decision of the Supreme Court of

New Zealand in Gleich's case, holding that the New Zealand Foreign Offenders Apprehension Act, 1863, was *ultra vires*, the Governor of the colony in reporting the case to the Secretary of State for the Colonies expressed a hope that the Imperial Parliament would remedy the defect in the law, disclosed by that decision, by extending the procedure provided by the Fugitive Offenders Act, 1843. Shortly afterwards the Imperial Parliament passed the Fugitive Offenders Act, 1881 (44 and 45 Vic. c. 69), which formulated a uniform plan, facilitating the apprehension and trial of persons committing crimes in one part of the British dominions and escaping to another. This Act provides that a person, accused of having committed an offence in one part of the Empire, may, if found in another part, be apprehended and returned to the part from which he is a fugitive. A warrant issued in the part of the Empire from which the accused is a fugitive, and endorsed by the proper authority in the part of the Empire in which the accused is found, is sufficient authority for his arrest. A person found in one part of the British dominion and suspected of having committed an offence in another part, may also be arrested on a provisional warrant, signed by a magistrate in that part of the dominion in which he happens to be found. Upon his apprehension the accused must be brought before a magistrate, by whom he may be remanded pending the arrival of an endorsed warrant. After the expiration of fifteen days the Governor of the possession in which the arrest is made, or if the arrest is made in the United Kingdom, the Secretary of State, is authorized to issue a warrant ordering the fugitive to be returned to that part of the dominions from which he has escaped. The above provisions of the Act apply to all offences punishable, in the place where committed, by imprisonment with hard labour for a term of twelve months or more. By part II. of the Act a procedure of a simpler character is formulated and made applicable to groups of contiguous colonies, in which it may by Order in Council be declared in force. Under this part, the inter-colonial backing of warrants by magistrates, and the return of fugitives without the formality of a warrant signed by the Governor of a colony in which the fugitive is found, was legalized. This law was declared applicable to the Australian colonies by Order in Council, dated 23rd August, 1883.

The sub-section now under review will facilitate Federal legislation to enforce the service and execution throughout the Commonwealth of the criminal process issued by the courts of a State for the arrest of offenders within any State. It will enable the Parliament to formulate a simple procedure for effecting what now can only be done under the authority of the Imperial Fugitive Offenders Act, and to authorize the execution of magistrates' warrants for the apprehension of offenders in every part of the Commonwealth. This power is clearly restricted to inter-state extradition, or its equivalent. Inter-British and inter-national extradition will still be governed by Imperial legislation, although auxiliary laws may be passed by the Federal Parliament under 51—xix., "External Affairs," facilitating the enforcement of the Imperial legislation. (See Notes, § 214, *infra*.)

Inter-state Extradition in America.—The part of this sub-section relating to inter-state arrest on criminal process provides a summary method of accomplishing inter-state extradition. The same object was aimed at by Art. IV. sec. ii. sub-sec. 2 of the Constitution of the United States of America, which enacts that "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." The difference between the two procedures is, that under the Constitution of the Commonwealth, inter-state fugitives may be arrested and returned from one State to another without the intervention of the Executive Government of any State; the whole process may be a judicial one, superintended by the courts, and uncontrolled by the Executive in either State. In America the return of a fugitive offender from one State of the Union to another depends upon the will of the Executive Government of the State in which the offender is found.

Some cases decided by the Supreme Court of the United States of America, under the above section, may be cited in illustration of its working and as showing what cases may be covered by the phrase "criminal process." In Kentucky *v.* Dennison (24 How. 66), it was ruled that "the words of this article embrace every act forbidden and made punishable by a law of the State, whether treason, felony, or misdemeanour, and give the right to the State where any such crime is committed to demand the fugitive from the Executive of the State to which he has fled." If a person is arrested in one State on an inter-state warrant, charged with having committed a crime in another State, it would appear that the State courts have power by writ of *habeas corpus* to inquire into the legality of the arrest. (Robb *v.* Connolly, 111 U.S. 624.) A person arrested upon a requisition warrant may have the legality of his arrest tested by the courts, and to this end the State courts have jurisdiction in *habeas corpus*. (Roberts *v.* Reilly, 116 U.S. 80.) It must appear that the crime with which the fugitive stands charged was committed within the State making the demand. This provision, by the obvious import of its terms, has no relation whatsoever to foreign nations, but is confined in its operation to the States of the Union. (Per Mr. Justice Barbour, in Holmes *v.* Jennison, 14 Pet. 587.)

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51. (xxv.) The recognition[209] throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

Historical Note.—This sub-section was introduced verbatim in the Bill of 1891 and was adopted by the Convention of 1897-8 without debate. (See Historical Note, p. 118.)

§ 209. "Recognition."

As service and execution are the dominant features of the preceding sub-section, so "recognition" is the ruling principle of this one. It is founded on Art. IV. sec. 1 of the Constitution of the U.S. of America, which is as follows:—"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." This sub-section is partly reproduced in a declaratory form in section 118 of the Constitution of the Commonwealth which reads:—"Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public acts and records, and the judicial proceedings, of every State."

Under this power the Parliament may legislate in order to give effect to sec. 118. The Supreme Court of the United States of America, in a series of decisions under a section of that Constitution corresponding to sec. 118 of ours, has decided that a judgment rendered in one State does not carry with it into another State the efficacy of a judgment affecting property or persons to be enforced by direct and immediate execution. In order to give it such force in another State it must be made a judgment there, and it can only be executed there as the laws of the States permit. The record of a judgment in one State, rendered after due notice, is conclusive evidence in the courts of another State, as well as in the courts of the United States, of the matter adjudged. A judgment so recorded differs from judgments recorded in a foreign country, in these respects (1) it is not re-examinable on its merits; (2) it is not impeachable for fraud in obtaining it, if rendered by a court having jurisdiction of the cause and the parties. This provision was not intended to confer any new powers upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments, to all intents and purposes, but only gave a general validity, faith and credit to their

evidence. The above principles are deduced from cases cited in Baker, A.C., 152. "So I take it," said Mr. Barton, "that the effect of this clause will be to cause the courts of the Commonwealth to take judicial notice of the laws, acts, and records of the States, without the necessity of requiring them to be proved by cumbrous evidence." (Conv. Deb., Adel., p. 1005.)

This sub-section appeared in the Draft Bill of 1891. On the consideration of the sub-section by the Convention of 1891, Mr. (now Sir Richard) Baker asked whether it would include the recognition, in one State, of probate of a will issued in another. "There was," he said, "a great deal of unnecessary expense and trouble in the registration of probates and letters of administration issued by one colony in another colony." "I think," said Sir Samuel Griffith, in reply, "that probate of a will must be regarded as coming under the heading of a judicial proceeding." . . "This is a clause to enable the Federal Parliament to make a law recognizing a judicial proceeding —that is, probate. But it recognizes the probate for what it purports to be; that is, the proof of the will and the committal of the administration of the property in that State to some person. The committal of the administration of the property in any State is a matter for that State. Another State will recognize the probate; but they do not necessarily commit the administration to the same person. They will recognize the will as far as the judicial proof of it extends and no further." (Conv. Deb., Syd., 1891, p. 686-7.)

At the Adelaide session of the Convention of 1897, when the sub-section was discussed, Mr. Henry Dobson enquired "whether, under it, the courts of the other colonies would take cognizance of the appointment of a Receiver or Trustee of Lunacy or Curator of Intestate Estates; so that upon the registration of the document making the appointment, assets and lands in different colonies can be administered. I want to know whether under this section we can have some such machinery as that under the Probate Acts, where probate granted in one colony is sealed in another colony, whereby the will is practically proved in another colony, so that estates of an intestate or lunatic may be administered under the one authority. If a man dies intestate in one colony, would the administrator or curator be able to register his appointment in another colony and deal with the assets there?" In reply to these enquiries the American cases decided under the corresponding clause were cited by Mr. Barton. It was suggested that this sub-section alone merely meant to refer to the evidence necessary to secure the credit and recognition of laws, public acts, records, and judicial proceedings of the courts of the States, but that, read in conjunction with the preceding sub-section xxiv., referring to "service" and "execution," it might mean something more than mere credit and recognition. It is submitted that under this sub-section provision might be made for the inter-state cognizance of such appointments as those of executor, administrator, curator of intestate estates, and trustee in lunacy, as these appointments are generally made by the courts, and hence come within the category of public acts, records, and judicial proceedings. If such legal representatives obtain a judgment or order in a court of competent jurisdiction, within the State to which the deceased person or the lunatic belonged, they could, aided by appropriate legislation under sub-sec. xxiv., issue process and enforce the same by sale of lands and chattels in another State. (Conv. Deb., Adel., 1897, p. 1005.)

51. (xxvi.) The people of any race[210], other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

Historical Note.—In the Bill of 1891 the following sub-clause was comprised among the exclusive powers of the Federal Parliament:—"The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorize legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand." (Conv. Deb., Syd., 1891, pp. 701-4.) At the Adelaide session the sub-clause was introduced and passed in substantially the same words. (Conv. Deb., Adel., pp. 830-1.)

At the Melbourne session, a debate occurred on the question whether this power ought to be exclusive, so that the State Parliament, in the absence of Federation, would be unable to make special laws in respect of alien races within their territory. Eventually the sub-clause was omitted, on the understanding that it would be placed among the concurrent powers of the Parliament. (Conv. Deb., Melb., pp. 227-56.) Accordingly before the first report the sub-clause was inserted in its present form.

§ 210. "The People of any Race."

This sub-section does not refer to immigration; that is covered by sub-sec. xxvii. It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.

In the Draft Bill of 1891, this sub-section appeared as the first of a group of three subjects, with reference to which the Parliament was assigned exclusive legislative power. It is now placed in the list of powers generally described as concurrent; that is to say, the States may occupy the ground until the Federal authority interferes and displaces them. The sub-section can only exclude the action of State legislation respecting "the people of any race," when the Federal Parliament declares, by legislation, that such race is a race "for whom it is deemed necessary to make special laws." Before such legislation the State Parliaments will be free to pass laws concerning any part of their resident population, including the people of any particular race, coloured or otherwise, but as soon as the Federal Parliament by legislative intervention has shown that it has dealt with, or contemplates dealing with, the people of a particular race by special laws, the power to discriminate in respect of that race will thenceforth be exclusively vested in it and the State legislatures will be deprived of jurisdiction.

Under the fourteenth amendment of the Constitution of the United States it is enacted that:—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

An ordinance or by-law of the City and County of San Francisco vested in the supervisors the power to grant to or withhold from certain persons within certain limits licenses to conduct laundries. This power was exercised discriminatingly; laundry licenses were granted to Europeans and denied to Chinamen. In the case of Yick Wo *v.* Hopkins (118 U.S. 356), it was decided that these laws were unconstitutional and void. It was held that the fourteenth amendment is not confined to the protection of citizens. It is applicable alike to all "persons" within the territory, without regard to differences of race, colour, or nationality; and the "equal protection of the laws" is a pledge of

the protection of equal laws. Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. (Yick Wo *v.* Hopkins, 118 U.S. 356, citing Henderson *v.* Mayor of N.Y., 92 U.S. 259; Chy Lung *v.* Freeman, 92 U.S. 275; *ex parte* Virginia, 100 U.S. 339; Neal *v.* Delaware, 103 U.S. 370; Soon Hing *v.* Crowley, 113 U.S. 703. Baker, Annot. Const. 220.)

The decision in Yick Wo's case turned, of course, on the special inhibitions of the fourteenth amendment. There is no section in the Constitution of the Commonwealth containing similar inhibitions. On the contrary it would seem that by sub-sec. xxvi. the Federal Parliament will have power to pass special and discriminating laws relating to "the people of any race," and that such laws could not be challenged on the ground of unconstitutionality, as was done in Yick Wo *v.* Hopkins.

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51. (xxvii.) Immigration[211] and emigration[212]:

Historical Note.—This sub-section was in the Bill of 1891. (Conv. Deb., Syd., 1891, p. 689.) It was adopted verbatim and without debate by the Convention of 1897-8.

§ 211. "Immigration."

International Aspect.—It is a recognised canon of international law and intercourse that every sovereign State has a paramount right to exclude from its borders all elements of foreign population which, for any reason, might retard its prosperity or be detrimental to the moral and physical health of its people. (Per Mr. Grover Cleveland, President of the United States of America; message to Congress *re* Chinese Exclusion Bill, 1st Oct., 1888.)

Political Aspect.—Referring to the same subject from an ethnical and political point of view, Dr. Burgess says:—

"Let us suppose the case of a great colonial empire. Its life will depend, of course, upon the intensest nationality in that part of its territory which is the nucleus of the entire organization. It cannot suffer national conflicts to make this their battle ground. The reigning nationality is in perfect right, and pursues, from a scientific point of view, an unassailable policy, when it insists, with unflinching determination, upon ethnical homogeneity here. It should realize this, of course, through the peaceable means of influence and education, if possible. When, however, these shall have been exhausted in vain, then force is justifiable. A State is not only following a sound public policy, but one which is ethnically obligatory upon it, when it protects its nationality against the deleterious influences of foreign immigration. Every State has, of course, a duty to the world. It must contribute its just share to the civilization of the world. In order to discharge this duty, it must open itself, as freely as is consistent with the maintenance of its own existence and just interests, to commerce and intercourse, ingress and egress; but it is under no obligation to the world to go beyond these limits. It cannot be demanded of a State that it sacrifice itself to some higher good. It cannot fulfil its mission in that way. It represents itself the highest good. It is the highest entity. The world has as yet no organization into which a State may merge its existence. The world is as yet only an idea. It can give no passports which a State is bound to accept. The duty of a State to the world is a duty of which the State itself is the highest interpreter. The highest duty of a State is to preserve its own existence, its own healthful growth and development. So long as foreign immigration contributes to these, it is sound policy not only to permit, but to cultivate it. On the other hand, when the national language, customs, and institutions begin to be endangered by immigration, then the time has come for the State to close the gateways partly or wholly, as the case may require, and give itself time to educate the incomers into ethnical harmony with the fundamental principles of its own individual life. It is a most dangerous and reprehensible piece of demagogism to demand that a State shall suffer injury to its own national existence through an unlimited right of ingress; and it is an unendurable piece of deception, conscious or unconscious, when the claim is made from the standpoint of a superior humanity." (Political Sci. I. pp. 42-3.)

Legal Point of View.—The legal aspect of the subject of political control over immigration was dealt with by the Privy Council in the celebrated case of Chun Teong Toy *v.* Musgrove (1891), App. Cas., 272, on appeal from the Supreme Court of Victoria, in which it was held that an alien has no legal right, enforceable by action, to enter British territory.

"Their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action. Their Lordships, therefore, do not think it would be right on the present appeal to express any opinion upon the question which was elaborately discussed in the very learned judgments delivered in the Court below—viz., what rights the executive government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may never become of practical importance." (1891, App. Cas. 282.)

For further discussion of the right of the Crown to exclude aliens, see an article on "Alien Legislation and the Prerogative of the Crown," by T. C. Haycraft, Law Quarterly Review, 1894, p. 165; and an article in the Weekly Notes (N.S.W.), 26 Sept., 1891.

Restrictive Immigration Laws.—In 1855 the Legislative Council of the newly erected colony of Victoria led the way in the passage of a number of laws intended to restrict Chinese immigration, which commenced in 1854, when the fame of the gold diggings of Victoria began to attract thousands of Chinamen to that colony. The Victorian Council passed a bill, which was assented to by the Governor, "to make provision for certain immigrants." The substance of the law was that no ship should bring to a Victorian port more passengers, being Chinese immigrants, than in the proportion of one person to every ten tons of the tonnage of such ship, under a penalty of £10 for each passenger in excess of such proportion. On the arrival of a ship in any port of Victoria, with Chinese immigrants on board, the master was required to pay to the Collector of Customs a tax of £10 for every such immigrant. The money so collected was to be invested by the Government to form a fund for the relief, support, and maintenance of such immigrants. Provision was made for the registration of such immigrants, on their arrival in any district or place to which they proceeded. This and other immigration laws were consolidated in 1865.

Similar legislation was adopted in New South Wales in 1861. Her Majesty was not advised to disallow any of these Acts, although the Colonial Secretary remonstrated, and declared "that exceptional legislation, intended to exclude from any part of Her Majesty's dominions the subjects of a State at peace with Her Majesty, is highly objectionable in principle." (Lord Carnarvon's Despatch to Governor Cairns, 27th March, 1877.) Those Acts were subsequently repealed, to the satisfaction, it is said, of

Her Majesty's Government; but they were eventually succeeded by legislation of a more drastic character adopted in all the Australian Colonies, in order to repel the Chinese invasion.

In 1876 the Queensland Parliament passed a bill to amend the Gold Fields Act of 1874, so far as it related to Asiatic and African aliens, and to demand an increased license fee from such aliens, with a view to discouraging excessive immigration. Governor Cairns considered that this bill was one of an extraordinary nature, which might possibly involve a breach of national comity by restraining Chinese immigration into Queensland, and that as such it was contrary to the treaty of Tien-Tsin and the Convention of Pekin of 24th October, 1860. Accordingly he reserved the bill for the signification of Her Majesty's pleasure. The Queensland Ministry protested against the reservation, and in a minute to the Governor expressed the opinion that it was of the utmost importance that the authority of the Colonial legislatures to pass laws upon all subjects whatever which they might think necessary for the good government of the colony should be recognized and upheld, and that no other limit to that power should be admitted, than that which was imposed by the royal instructions to the Governor. They thought that to go beyond those instructions, or to allow the unusual character of proposed legislation, not forbidden by them, as a sufficient ground for not giving immediate effect to the wish of the legislature, would be of serious consequence to the independence and freedom of Parliament. (Todd's Parl. Gov. in Col. 2nd ed. p. 188)

In a despatch, dated 26th March, 1877, Earl Carnarvon expressed his approval of the Governor's conduct, and of the reasons which had actuated him. For these and other reasons, although he was most unwilling even to appear to infringe upon the privileges of self-government enjoyed by the inhabitants of Queensland—he had been unable to advise the Queen that this bill should receive the royal assent in its present shape.

During the session of 1877 the Queensland Legislature passed another Act to regulate the immigration of Chinese and to prevent them from becoming a charge on the colony. A poll tax of £10 was imposed on every Chinese immigrant, to be refunded to him if he left the colony within three years without having committed any criminal offence, and without having received charitable relief from any public institution. This Act was not disallowed. The Act of 1877, amended by another Act passed in 1878, was found insufficient to restrict the objectionable immigration. In 1884 the Act of 1877 was amended by reducing the number of Chinese passengers that might be brought into Queensland waters to one for every fifty tons of registered tonnage, by increasing the sum payable on arrival to £30, and by repealing the provision for the repayment of the poll-tax on departure within three years. "The effect of the law of 1884 has been that the number of Chinese arriving in Queensland by sea has been in each year somewhat less than the number of those departing. The easy means of transit by land between the various Australian colonies, however, renders it impossible to exercise any effective control over their migration across the borders of the colonies." (Todd's Parl. Gov. in Col. 2nd ed. p. 191.)

In 1879 an Anti-Chinese Influx Bill, containing prohibitions and restrictions similar to those of the Queensland law then in force, was passed by the Legislative Assembly of New South Wales, but rejected by the Legislative Council. In 1881 a similar bill was re-introduced and passed by both Houses. In the same year the Parliament of Victoria again resorted to legislation in order to arrest the influx of Chinese. Vessels were not allowed to introduce into any Victorian port more than one Chinaman per 100 tons of tonnage, and a poll-tax of £10 was imposed on each immigrant on his landing. In April, 1888, a Chinaman, Chun Teeong Toy, arrived in the port of Melbourne on board the British ship *Afghan*. The Collector of Customs considered that the *Afghan* had brought a larger number of Chinese than was allowed by law; he refused to allow any of them to land, or to accept the poll-tax of £10 each. Chun Teeong Toy brought an action against the Collector in the Supreme Court of Victoria, which decided that the action of the

Government in preventing the landing of Chinese prepared to pay the prescribed poll-tax was illegal. The Victorian Government appealed from this decision to the Privy Council, which reversed the judgment of the Victorian Court, and held (1) that the Collector of Customs was under no legal obligation to accept payment, whether tendered by the master on behalf of any such immigrants, or tendered by or for any individual immigrant; (2) that, apart from the Act, an alien has not a legal right, enforceable by action, to enter British territory. (Chun Teeong Toy *v.* Musgrove [1891], App. Cas. 272.)

An intercolonial Conference was held in June, 1888, at which the Governments of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia were represented. The Chinese immigration question was considered, and the following resolutions were adopted as embodying the views of the majority of the colonies:—

(1.) That in the opinion of this Conference the further restriction of Chinese immigration is essential to the welfare of the people of Australasia.

(2.) That this Conference is of opinion that the desired restriction can best be secured through diplomatic action of the Imperial Government and by uniform Australasian legislation.

(3.) That this Conference resolves to consider a joint representation to the Imperial Government for the purpose of obtaining the desired diplomatic action.

(4.) That this Conference is of opinion that the desired Australasian legislation should contain the following provisions:—

(*a*) That it shall apply to all Chinese, with specified exceptions.

(*b*) That the restriction should be by limitation of the number of Chinese which any vessel may bring into any Australasian port, to one passenger to every 500 tons of the ship's burthen.

(*c*) That the passage of the Chinese from one colony to another, without the consent of the colony which they enter, be made a misdemeanour.

Some of the colonies at once adopted legislation in accordance with the resolutions arrived at. In Victoria an Act was passed providing that no vessel should enter any Victorian port having on board more than one Chinaman for every 500 tons of the tonnage of such vessel. Any Chinese who should enter Victoria by land, without first obtaining a permit in writing from some person to be appointed by the Governor in Council, was declared guilty of an offence against the Act, and made liable on conviction to a penalty of not less than £5 nor more than £20, and also, upon the warrant of the Commissioner of Trade and Customs, to be removed or deported to the colony from whence he came. (Chinese Immigration Restriction Act, 1888, sec. 9.)

In about 1895 danger began to be apprehended from the increasing immigration of Indians, Afghans, and other Asiatics, many of whom were British subjects. At an intercolonial Conference held at Sydney in March, 1896, at which all the Australian colonies except Western Australia were represented, it was unanimously resolved that the provisions of the Chinese Immigration Restriction Acts should be extended to all coloured races. During 1896, accordingly, Coloured Races Restriction Bills were passed in New South Wales, South Australia, and Tasmania, and an Asiatic Restriction Bill in New Zealand. These Bills were reserved for the signification of the Queen's pleasure, but did not receive Her Majesty's assent. The presence of the Australian Premiers at the Jubilee celebrations in London in 1897 afforded Mr. Chamberlain an opportunity of explaining the views of the Imperial Government as to this kind of legislation. He expressed entire sympathy with the determination of the Australian colonies to prevent the influx of people who were alien in civilization, in religion, and in customs, and who interfered with the legitimate rights of the existing labouring population. Such an

influx must be prevented at all hazards; but he asked the Premiers to remember the traditions of the Empire, which make no distinctions of race or colour, and pointed out that the exclusion of all Her Majesty's Indian subjects, or even of all Asiatics, would be so offensive to those people that it would be most painful to Her Majesty to sanction it. He therefore urged them to base their prohibitive legislation, not upon race or colour, but upon the really objectionable characteristics of the immigrants legislated against; and he instanced, as a type of legislation which the Imperial Government would think satisfactory, the Immigration Restriction Act of 1897 recently passed in Natal—a measure which was being found adequate in that colony to meet the same evil.

The Natal Act defined six classes of "prohibited immigrants." The first and most important class consisted of persons who, when asked to do so by an authorized officer, should fail to "write out and sign, in the characters of any language of Europe" an exemption application in the prescribed form. The other classes of "prohibited immigrants" were:—(2) Paupers, or persons likely to become a public charge; (3) idiots or insane persons; (4) persons suffering from a loathsome or contagious disease; (5) persons convicted within two years of a crime involving moral turpitude, and not being merely a political offence; (6) prostitutes, and persons living on the prostitution of others. Subject to certain exemptions and exceptions, the immigration of a "prohibited immigrant" was forbidden; any immigrant contravening the Act was made liable to removal from the colony, and upon conviction to be sentenced to six months' imprisonment; which imprisonment should cease for the deportation of the offender, or if he should find sureties for his departure within one month. Masters and owners of vessels illegally landing immigrants were made liable to heavy penalties.

Accordingly a Bill, almost identical with the Natal Act, was introduced in the Legislative Assembly of New South Wales. It was amended in the Council by the omission of all the classes of "prohibited immigrants" except the first—which was relied on as the real safeguard against the immigration of Asiatic and other coloured races. In this form it became law, as the Immigration Restriction Act, 1897. In Victoria a similar Bill was introduced, but failed to pass owing to disagreement between the two Houses. In Western Australia in 1897, in Tasmania in 1898, and in New Zealand in 1899, Immigration Restriction Acts, almost identical with the Natal Act, were passed.

Immigration in Canada.—In Canada, the Dominion and the Provinces have concurrent power to legislate concerning immigration, but any law of a Province with respect to that subject is void if it be repugnant to Dominion Legislation. In 1878 the Provincial legislatures of British Columbia passed an Act "to provide for the better collection of Provincial taxes from Chinese." It required every Chinaman, above the age of 12 years, to take out a quarterly license, for which he had to pay ten dollars in advance. This license fee was to be in lieu of the ordinary taxation payable by the people generally for public purposes. Any Chinaman failing to take out the license was liable to a severe penalty. Nominally a tax Act, it was in reality, like the first anti-Chinese Act passed in Queensland, intended to restrict Chinese immigration. An action was commenced in the Supreme Court of British Columbia to test its validity. The judgment of the Court was delivered by Mr. Justice Gray, who held that the Act was beyond the power of the Provincial legislature; that it was at variance with the treaty obligations of Great Britain and China; that it related to a matter affecting trade and commerce, which belonged to the Dominion Parliament; and that therefore it was unconstitutional and void. This Act was afterwards disallowed by the Governor-General in Council, who considered it inadvisable to permit an Act which had been pronounced *ultra vires* to remain on the statute book. (Todd's Parl. Gov. in Col. 2nd ed. pp. 194 and 557.)

Undiscouraged by the failure of its first attempt to grapple with the Chinese problem, the legislature of British Columbia, in 1884, passed another Act regulating the Chinese

population of the Province. In 1885 Wing Chong, a Chinaman, was convicted and fined before a magistrate for not having a license under the Act of 1884. He obtained a writ of *certiorari* for the removal of the case to the Supreme Court of British Columbia; and Crease, J., one of the Judges of that Court, quashed the conviction on the ground, *inter alia*, that the Act was *ultra vires* the legislature of the Province It appears that there could be no appeal from this decision to the full Court; but on the ground of the great public importance of the question, special leave to appeal to the Privy Council was asked for and granted. The appeal, however, was not prosecuted. (Reg. *v.* Wing Chong, 1 Brit. Columb. Rep., Part ii., p. 150; Wheeler, C.C. 122.)

Yielding to the representations of the Provincial Government as to the necessity of central legislation, the Dominion Government at length appointed a royal commission to enquire and report on the question in all its bearings. As the result of this report the Parliament of the Dominion in 1885 passed an Act to restrict and regulate Chinese immigration into Canada, the principal features of which were:—(1) A poll tax of $50 on each Chinaman landing; (2) No vessel to carry more than one Chinaman to every 50 tons of its tonnage; (3) Every Chinaman wishing to leave Canada with the intention of returning, on giving notice of such intention at the port of departure and surrendering his certificate of entry or of residence, to receive, on payment of a fee of one dollar, a certificate of leave to depart and return. In 1891, there were about 109,127 Chinamen in Canada, of whom 8900 were located in British Columbia. (Todd. *Id.* p. 195.)

Immigration in the United States of America.—Congress has not been assigned express power to deal with immigration; nevertheless it has been held that the Government of the United States, through the action of its legislative department, can exclude aliens from its territory.

Jurisdiction over its own territory, to that extent, is an incident of every independent nation. It is a part of its independence, and one method whereby it is enabled to maintain its independence from control of another power. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." (Chief Justice Marshall in The Exchange *v.* McFaddon, 7 Cranch, 136, cited and approved in the Chinese Exclusion Case, 130 U.S. 604. Baker, Annot Const. p. 17.)

In the United States of America similar difficulties have been experienced in dealing with undesirable immigrants, such as Chinese, and there have been several conflicts between State laws and Federal laws with respect to that subject. In Ling Sing *v.* Washburn, 20 Calif. Rep 534, and in The People *v.* Raymond, 34 Calif. Rep. 492, legislation directed by the State of California against the Chinese was pronounced unconstitutional by the Supreme Court of that State. In the case of Baker *v.* The City of Portland (U.S.) L T. 18 Oct., 1879, p. 403, the question arose as to the validity of an Act of the State legislature in prohibiting the employment of Chinese labourers on public works. The circuit court of the United States, in the Oregon district, pronounced the law unconstitutional on the ground that a treaty between the Federal Government and a foreign power was the supreme law of the land, which the courts were bound to enforce, and that an individual State could not so legislate as to interfere with the operation of a treaty or to limit the privileges guaranteed thereby. (Todd's Parl. Gov. in Col., 2nd ed. p. 196.)

In 1879 Congress passed an Act to discourage Chinese immigration, by restricting the number of Chinese which might be brought from China to the United States in a single voyage, to fifteen persons. The president, Mr. Rutherford B. Hayes, vetoed the bill, on the ground that it was repugnant to the terms of a treaty between the United States and China, and that the power of modifying treaties was not vested in Congress,

but belonged to the Executive. In 1880 a new treaty was negotiated between the United States and China. By this treaty it was agreed that the United States Government should be allowed to regulate the admission of Chinese labourers at its discretion, but not to forbid it altogether. In March, 1888, a fourth treaty was entered into between the United States and China, which provided that thereafter no Chinese labourer should be entitled to enter the States. This, like other treaties, was subject to the ratification of the Senate. The Senate amended it by adding a proviso that Chinese labourers formerly resident in the United States should not be allowed to return thither whether they held certificates of former residence or not. The Chinese Government refused to accept this amended treaty. A bill was then brought into the House of Representatives containing a prohibition similar to that added to the treaty by the Senate. It was passed without a division, agreed to by the Senate, and ultimately assented to by the President on 1st October, 1888.

Assisted Immigration.—The Parliament will have power, not only to exclude undesirable aliens, but also to facilitate the introduction of industrious and respectable immigrants, likely to become workers, producers, and consumers within the Commonwealth. Assisted immigration, which at one time was the policy of most of the Australian colonies, has within the last few years been very sparingly resorted to.

§ 212. "Emigration."

Emigration contemplated by this sub-section would probably mean the inspection, supervision, and registration of departures from the Commonwealth. It might also authorize legislative arrangements to be made for the return of foreign labourers to their respective countries, after the expiration of their respective terms of service.

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51. (xxviii.) The influx of criminals[213]:

Historical Note.—At the "Convention" which met in Sydney in 1883, Sir Samuel Griffith's original resolution for the establishment of a Federal Council proposed to give that body power to make laws with respect to the "prevention of the influx of criminals." (See p. 111, *supra*.) That power was accordingly given by the Federal Council of Australasia Act, 1885.

In the Bill of 1891 the sub-clause was passed in its present form; and it was adopted without debate by the Convention of 1897.

§ 213. "Influx of Criminals."

Exclusion of Criminals.—This sub-section is intended to embrace the class of cases covered by 18 Vic. No. 3, an Act to prevent the "Influx of Criminals" into Victoria passed by the Legislative Council and assented to by the Lieutenant-Governor on 16th November, 1854. That Act came into force at the beginning of the rush to the goldfields, when swarms of convicts and ticket-of-leave-men from other settlements invaded the colony and became a nuisance and menace to its peace and welfare. Any person who had been found guilty of any capital or transportable felony, in the United Kingdom or in any British possession, and who came to Victoria after the passing of the Act, was made liable to be apprehended and taken before two justices. Such justices were authorized, on proof that such person came to Victoria contrary to the Act, to convict him for the offence of so doing, and at their discretion they could either take bail that he would leave the colony within seven days, or cause him to be conveyed in custody to the country from whence he came, or sentence him to hard labour on the roads or other public works of the colony for a period not exceeding three years. Persons harbouring or concealing such convicts, and masters of vessels bringing them to Victoria, were liable to punishment. This law was re-enacted by the Parliament of Victoria

under the new Constitution in 22 Vic. No. 68. It now appears in the Victorian Crimes Act, 1890, ss. 370-385.

The scope and validity of this Act were considered by the Supreme Court of Victoria in the case of Ryall *v.* Kenealy (1869), 6 W.W. and A'B. (L) 193. John Kencaly had, in 1865, been convicted in Cork of treason felony, for which he was transported to Western Australia for ten years. In 1869 he received a free pardon from the Crown; he was discharged from custody, left Western Australia and proceeded to Victoria, arriving in the port of Melbourne 6th July, 1869. Immediately on his arrival he was arrested under the Influx of Criminals Act, convicted, and ordered to enter into recognizances to leave the colony within seven days. A case was stated for the opinion of the full court. Against the conviction it was argued (1) that the Act did not create an offence, (2) that the defendant was not prohibited from coming to Victoria, (3) that the Act only applied to convicts whose term of imprisonment had expired, (4) that the free pardon of the Crown exempted the defendant from the prohibition, and restored him to the position of a new man without disability, (5) that the Act could not control or prejudice the Queen's prerogative, and did not affect any pardon granted by virtue of the prerogative. During the argument no attention seems to have been drawn to the words of the Act enabling the justices, as an alternative, "to cause the said person to be conveyed in custody to the country or possession from whence he came." The constitutionality of that part of the Act was not in issue, as the defendant had not been ordered to be so conveyed out of the colony. Had that been done the conviction would, according to the principle established in Gleich's case and in Ray *v.* MacMackin, have been bad.

"We now come to the last objection, that relating to the prerogative. It is said that the Act interferes with the Royal prerogative. To that several answers have been given during the argument. One is, that the Act is descriptive merely as regards the persons who are to be affected by it. It only describes a fact, just as if it referred to persons born in a particular country, or marked in a particular manner. It simply says that persons found guilty of a felony cannot come here. The pardon cannot obliterate that fact, although it may remove the effects of the conviction. So it may be libellous to say that a person is a thief who has been tried and found guilty of a larceny, and pardoned; but it would not be libellous to say that he had been found guilty of it. A pardon relates to past offences, not to future; and the offence in this instance was subsequent to the pardon. Giving, however, the fullest force to the effect of the pardon, in this instance the prerogative of the Crown is subject to the enactment of the Legislature. The Crown, as one of the three branches of the Legislature necessary to pass this Act, has assented to its being passed. . . . We are, therefore, bound to assume that by assenting to the Act the Royal prerogative was to be exercised, subject to the provisions of the Act so assented to. The authority in 5 Espinasse, Dover *v.* Maestaer, is conclusive on the point. It may be that the prerogative can only be taken away by express words; yet it can be affected by the fair and necessary intendment from an Act. The Crown is at liberty to refuse its assent to a measure that may interfere, not merely to one that must interfere, with the prerogative; and as this Act applies not merely to expirees, but to conditionally and to absolutely pardoned men, it might so interfere, and the Crown might have refused its assent. But it did assent; and the sound conclusion is, that in assenting to it the Crown expressed an intention that the Royal prerogative should be exercised subject to it. It is said that this construction would put a pardoned man in a worse position than an expiree. Perhaps so. But we cannot entertain such an objection. A person who takes a pardon takes it subject to all consequences and limitations" (Per Stawell, C.J., in Ryall *v.* Kencaly, 6 W., W., and A'B. pp. 206-7.

"This Act, 18 Vic. No. 3, is the third enactment on the subject of the influx of criminals. The first was passed in 16 Vic., and the matter was referred home. The nature of the legislation was so different from anything affecting the other portions of Her Majesty's dominions that for some reasons it did not become law. It was re-enacted in nearly similar words, and again sent home. The law officers who advised the Colonial Office were vigilant, if not jealous, for the Royal prerogative, and were disinclined to its becoming law; but they were disinclined to reject it, and it was therefore allowed to pass. No objection was taken to the inability of the Legislature to pass such a law, and if such a disability existed there is reason to believe it would have been pointed out. Since then the Act has been passed again and again. It is therefore part of the law of the British Empire—different from what exists in other parts of the empire—and subject to this law the Royal pardons must be issued. If a person disregarded the legislative

prohibition which the Queen has assented to, and labours under the disability referred to in this Act, he comes here bearing a pardon giving him emancipation in any other part of the globe but this country. He takes the pardon subject to the contract between the Queen and the Parliament and to his inability to come here." (Per Barry, J., *id.* p. 208.)

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51. (xxix.) External affairs[214]:

Historical Note.—In the Bill of 1891 the sub-clause extended to "External affairs and treaties;" and at the Adelaide session of the Convention, 1897, the same words were adopted. At the Melbourne session a suggestion of the Legislative Council of New South Wales, to omit the words "and treaties," was agreed to. (Conv. Deb., Melb., p 30, and see Historical Note, Clause V. of Constitution Act.)

§ 214. "External Affairs."

Significance.—Considerable speculation has been already indulged in by constitutional writers as to the meaning and possible consequences of this grant of power over external affairs. It may hereafter prove to be a great constitutional battle-ground. Mr. A. H. F. Lefroy, the well-known Canadian authority, says "it looks as though the Imperial Parliament intended, so long as the Commonwealth Bill should remain unrepealed, to divest itself of its authority over external affairs of Australia and commit them to the Commonwealth Parliament." (Law Quarterly Review, July, 1899, p. 291.) Professor W. Jethro Brown (University of Tasmania) describes the power to legislate upon external affairs as a new departure of doubtful significance. (Law Quarterly Review, January, 1900, p. 26.) Professor W. Harrison Moore (University of Melbourne) is of opinion that this power is a somewhat dark one, and suggests the view that it may be used "to establish the doctrine that, in the Courts of the Commonwealth, Commonwealth laws, like Acts of the Imperial Parliament, cannot be impugned on the ground that they reach beyond local affairs; in other words, the rule against laws 'intended to operate exterritorially' will within the Commonwealth be a rule of construction only, and not a rule in restraint of power." (Law Quarterly Review, January, 1900, p. 39.)

It must be conceded that the expression "external affairs" is singularly vague, but it is submitted that it cannot be construed in the wide and far-reaching manner suggested by the learned gentleman whose views are quoted. There is nothing in it indicative of an intention of the Imperial Parliament to divest itself absolutely of all authority over the external affairs of Australia and to commit them exclusively to the Parliament of the Commonwealth, any more than it divests itself absolutely of any other of its supreme sovereign powers. The same section which grants legislative power to the Federal Parliament over "external affairs" grants legislative power over naval and military defence, copyright, coinage, influx of criminals, naturalization, and other matters. If there is any final abandonment of Imperial authority over one of these matters there must be a similar abandonment with respect to all. Yet in view of the application of the Colonial Laws Validity Act to the interpretation of the Constitution it could not be successfully contended that any such divestment is intended. The other view, as we understand it, is that this grant of power may be used to give extra-Commonwealth operation to laws of the Federal Parliament founded on other grants; in other words, that a Federal law relating, say, to immigration or naturalization, and giving an extra-Commonwealth effect to some of its provisions, cannot be impugned, since the Federal Parliament has jurisdiction over "external affairs." That view also, it is submitted, is not tenable. Sub-section 29 contains a distinct and independent grant of power. It is not intended and it cannot be used to enlarge, or qualify, other distinct and independent grants.

The expression "External Affairs" is apparently a very comprehensive one, but it has obvious limitations. As already pointed out, it can hardly be intended to confer

extra-territorial jurisdiction ; where that is meant, as in other sub-sections, it is distinctly expressed. It must be restricted to matters in which political influence may be exercised, or negotiation and intercourse conducted, between the Government of the Commonwealth and the Governments of countries outside the limits of the Commonwealth This power may therefore be fairly interpreted as applicable to (1) the external representation of the Commonwealth by accredited agents where required ; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries, and (3) the extradition of fugitive offenders from outside countries.

External Representation —From the earliest period of colonial history, British colonies and settlements have been represented in England by Agents residing in London, whose duties were to convey to the home Government the views of the colonists on local questions ; to give information and make suggestions concerning the defences of the colonies against foreign aggression ; to encourage emigration from the mother country into the colonies ; and to advance the trading and commercial interests of the communities on whose behalf they were employed. The designation " Agent-General " is said to have been first applied to the representatives of the New England colonies, prior to the declaration of American Independence. In modern times the duties of the office have been considerably enlarged, and its value, dignity, and usefulness have been correspondingly enhanced. Agents-General have had to superintend the conduct of important financial operations ; to negotiate the flotation of public loans, and to make all the incidental arrangements. They have had to launch gigantic contracts, involving millions of money. In controversies that have arisen between the colonies and the Imperial Government on constitutional, commercial, postal, telegraphic, naval, military, and diplomatic questions, they have had to act as trusted and responsible envoys on behalf of their respective colonies.

Indeed the Agent-General's Department for each colony is now so much used, and is found so effective as a medium of official inter-communication, that a considerable amount of important work, which was formerly required to be done through the Governor, is now performed through the less formal but prompter agency. This expansion and differentiation of functions has developed without any material alteration in constitutional law, and without any desire or intention to supplant the Governor as the organic connecting link between the mother country and her colonies. The Governor still discharges those duties imposed upon him by his commission and by the Royal instructions. The Agent-General's office is used merely as a subsidiary means of communication and representation, and especially is it entrusted with matters springing out of the wider relations and increasing business responsibilities of the colonies. As such, it is unhampered by formality, and is extremely valuable by reason of the frank, confidential and friendly relations which are now established between the Agent-General for each colony and the Secretary of State for the colonies.

Another important feature in connection with the growth of the colonial Agency-General is this—that of late years there has been an organized co-operation among the officers representing the different colonies, in every matter of common concern and common interest, and that spirit of co-operation has so welded them together that they now practically constitute a united deputation, present a solid and unbroken front, and speak with one voice to the Secretary of State for the colonies on all questions which they are authorized by their principals to discuss.

Some years ago a discussion took place in official circles as to the expediency of changing the title and improving the status of the Agent-General. In an official communication to the Government of New Zealand dated 12th February, 1879, Sir Julius Vogel, the Agent-General for that colony, suggested that Agents-General should be called Resident Ministers in England for their respective colonies. An Agent-General's rank, he thought, should be equal to that of an ordinary Minister of the Crown, but, like an Ambassador, without the necessity of retirement with a government ; he should be in the position of an Ambassador, making due allowance for the fact that he

represented a colony forming an integral part of the Empire, and not an independent State. Sir Archibald Mickie, at one time Agent-General for Victoria, was of opinion that the designation "Agent-General" was a mistake, as it led to misapprehension of the true nature of his position. On several occasions he was mortified to find that some people in England were under the impression that an Agent-General was the head of a general commercial agency of a most enlarged description. On one occasion, it is said, he ordered the words "Agent-General" to be inscribed in gold letters on his office blinds. The painter substituted the words "General Agent," believing that that was the correct and intended phrase. (Todd's Parl. Gov. in Col. 2nd ed. 236.)

In November, 1879, the Government of Canada appointed Sir Alexander Galt to represent the Dominion in England. With the consent of the Imperial Government his appointment carried with it a more definite position, larger powers, and the title of "High Commissioner and Resident Representative Agent of the Dominion of Canada in the United Kingdom." The principal duties annexed to the office were attention to finance, immigration, trade and commerce, naval and military affairs, territorial questions, and diplomacy. (Todd's Parl. Gov. in Col. 2nd ed. p. 235.)

The subjoined statement shows the expenditure in connection with the offices of Agent-General for the various Australian colonies :—

AGENCY-GENERAL DEPARTMENTS.

PRESENT ANNUAL COST.

—	New South Wales.	Victoria.	South Australia.	Western Australia.	Queensland.	Tasmania.
Ordinary Maintenance	£5,664	£3,500	£4,987	£4,008	£2,758	£1,095

The Federal Parliament will not have power to abolish the separate Agencies-General of each colony, but it will be able to create a new department similar to that of the High Commissioner for Canada, and to authorize the appointment of a High Commissioner for Australia, who would, in time, necessarily absorb and perform all the important work relating to public finance, trade and commerce, post and cable, naval and military defence, diplomatic representation and inter-communication, now done by the several Agents-General. The latter would be denuded of their prestige and most of their duties, and there would be no necessity or justification for the continuance of the old system. The Agent-General's office for each State, if not quite abolished, could be converted into that of a "General Agent"— a term so repugnant to the sensibilities of some of its past occupants.

Commercial Treaties.—It is a recognized principle of international law that sovereign States only can enter into commercial treaties and conventions one with another ; that one sovereign State will not enter into such a compact with a colony or dependency of another, except with the sanction or through the intervention of the sovereign State to which the colony and dependency belongs ; that the privileges and advantages of such a compact do not extend to the colonial dependencies of the contracting powers, unless they are expressly named or provided for in the agreement. (Todd's Parl. Gov. in Col. 2nd ed. p. 265.)

It has been the practice of the Imperial Government, in entering into these treaties, to make them applicable to the British colonies, possessions and dependencies enjoying responsible government, only with the consent of the colonial legislatures.

"In 1877 the Italian and French governments, having notified the British Government of their intention to terminate the existing commercial treaties between themselves and Great Britain, and propositions being entertained for the negotiation of fresh treaties, Her Majesty's Secretary of State for Foreign Affairs communicated with

the Colonial Secretary in reference to the inclusion of the colonies therein. In reply, Lord Carnarvon intimated the propriety of consulting the governors of colonies possessing responsible government in reference to the terms of the proposed treaties before deciding upon the same. He accordingly addressed a circular despatch to the principal colonial governments, transmitting a copy of a draft article, for insertion in future treaties of commerce, applying the same to the British colonies, but with the understanding that no treaty with a foreign power shall include or extend to any British colony which may desire to be exempted from the operation of the same. This article is as follows :—'The stipulations of the present treaty shall be applicable to the colonies and foreign possessions of the two high contracting parties named in this article.' (Here insert the names of the colonies, &c., to be included in the treaty.) They 'shall also be applicable to any colony or foreign possession, &c., not included in this article upon the conclusion by the two high contracting parties of a supplementary convention to that effect,' within a specified time after the ratification of such treaty." (Todd, Parl. Gov. in Col. 2nd ed. p. 266.)

"In a new Anglo-French treaty, agreed upon in 1882, the British colonies were not included. This led to grave remonstrances on behalf of certain of the principal colonies. In reply the Earl of Kimberley (Colonial Secretary) intimated that the French government were unwilling that the colonies should participate in the advantages of the new tariff arrangements, because of the high duties placed on the importation therein of French goods, and because of 'the customs autonomy of some of the colonies, and the inability of Her Majesty's government to bind them.' In 1880 and 1881 correspondence passed between Sir A. T. Galt, on behalf of Canada, and the colonial and foreign offices, which resulted in the Imperial Government consenting that the Government of Canada should hereafter be relieved from the obligation of any new treaties with foreign powers to which objection was taken; that Canada should have the option of acceptance or refusal." (*Id* pp. 267-8.)

Negotiation of Commercial Treaties.—From time to time the Governments of British colonies have endeavoured to induce the Imperial Government to modify the rule according to which the negotiation of treaties with foreign powers should be conducted by ambassadors accredited by the Crown and responsible to the British Parliament, and to concede to the colonies the right to actively participate in the conduct of such negotiations, so far as they relate to commercial matters in which they are specially interested. In the years 1871-3 a correspondence took place between the Australian Governments and the Imperial Government with reference to a proposal that the colonies should be allowed to make reciprocal arrangements with foreign States. The Imperial Government refused to waive the prerogatives and obligations of the Crown in its international relations, but, as a concession, it agreed to secure the passage of an Act through the Imperial Parliament allowing the Australian colonies to establish intercolonial commercial reciprocity. The Australian Colonies Duties Act, 1873, gave full power to each of the colonies concerned to make laws imposing or remitting duties, whether differential or preferential or otherwise, for or against one another. But it retained the prohibition against the imposition of differential duties on goods imported into the colonies from foreign countries, or from Great Britain. It also forbade the levying of duties upon articles imported into Australia for the use of the Imperial army or navy, and the levying or remitting of any duty contrary to or at variance with any existing treaty between Her Majesty and any foreign nation.

The Government of Canada, however, continued to press its claim to direct participation in the conduct of negotiations for commercial treaties, and gradually the right was acknowledged and conceded. In 1871 Sir John A. Macdonald, the Premier of Canada, was appointed one of the plenipotentiaries to watch and represent the interests of Canada in negotiations with the United States in reference to trade, commerce, and fisheries.

In 1874 the Imperial Government agreed to allow Senator George Brown, of Canada, to be associated with the British Minister at Washington, in his negotiations with the Government of the United States for a treaty to promote reciprocal trade relations between Canada and the United States. It was, however, subject to the understanding that the Canadian Representative should not act independently, but that propositions made by the Government of Canada should be previously submitted to the Secretary of

State for the Colonies. A draft treaty was agreed to by the British, Canadian, and American Commissioners, and was recommended for ratification. It was approved by the British Government, but failed to secure the sanction of the American Senate.

In 1879 the Imperial authorities permitted Sir A. Galt, as representing the Canadian Government, to share in the conduct of negotiations for improved commercial intercourse between Canada, France, and Spain. (Todd's Parl. Gov. in Col. 2nd ed. 272.) In 1883, and again in 1888, Sir Charles Tupper, as High Commissioner, was allowed to act as co-plenipotentiary in association with the British Ambassador in conducting commercial negotiations with Spain. In 1888 he was allowed to act in a similar capacity in negotiating with the United States. Sir Charles Tupper was similarly privileged in 1892-3 in assisting to discuss proposals respecting a reciprocal customs tariff arrangement between France and Canada. (Todd's Parl. Gov. in Col. 2nd ed. 268.)

In 1890 permission was given to the Governments of the West Indian colonies to send delegates to advise the British Minister at Washington on commercial questions and proposed reciprocal trade between those Islands and the United States. (Todd's Parl. Gov. in Col. 2nd ed. p. 273.)

These precedents serve to illustrate the way in which the power given to the Parliament of the Commonwealth to deal with "external affairs" may be exercised. It may pass laws authorizing the negotiation of commercial treaties—of course through the direct agency of the Imperial Government, assisted and advised by the representatives of the Commonwealth; and it may afterwards, like the Senate of the United States, either ratify or refuse to confirm them.

International Extradition.—Extradition is the surrender or delivery of fugitives from justice by one sovereign State to another. It is justified by the principle that all civilized communities have a common interest in the administration of the criminal law and in the punishment of wrongdoers. As, however, it involves an invasion of the right of sanctuary and asylum generally extended, in past ages, by humane and benevolent governments to refugees and exiles from countries ruled by despots, extradition, where agreed to, is surrounded with safeguards and discriminating exceptions. Extradition is a sovereign act. It can only be done at the will of the sovereign government. A colony or dependency of an empire, such as ours, could not of its own accord agree to surrender criminals to a foreign State. The right to do so is not included in the ordinary police power of a colony or dependency; the police power relates only to internal concerns. Extradition involves intercourse with a foreign State, and it can only be carried into execution by the treaty-making authority. (Holmes *v.* Jennison, 14 Pet. 540, 569-574. Baker, Annot Const. p. 162.)

Extradition, where it is practised, is therefore generally founded on treaty between two sovereign States; such treaty being, in the British Empire, ratified and enforced by an Act of the Imperial Parliament, whilst in the United States a treaty made by the President and ratified by a majority of three-fourths of the Senate has the force of law. All recent extradition treaties between the British Government and foreign States are made applicable to the colonies and foreign possessions of the two high contracting parties.

The Imperial Extradition Act (1870), 33 and 34 Vic. c. 52, consolidated the law then in force relating to the apprehension and surrender to foreign States of fugitive offenders. It provides that where an arrangement has been made by Her Majesty with any foreign State, respecting the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that the procedure and machinery of the Act should apply in the case of such foreign State: that Her Majesty may limit the operation of the Order to fugitive criminals in specified parts of Her dominions, and render it subject to such conditions, reservations, and exceptions as may be deemed expedient. The schedule to the Act contains a list of the crimes for which a suspected offender may be surrendered, subject to the restrictions that no fugitive shall be

surrendered to a foreign State (1) for an offence of a political nature, or (2) unless provision is made by the law of that State that he shall not, when surrendered, be detained or tried in that State for any other offence committed prior to his surrender. The Act, when applied by Order in Council, is made to extend to every British possession, in the same manner as if, throughout the Act, the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications : —

(1.) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the Governor of that British possession by any person recognized by that Governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the Governor of such colony or dependency :

(2.) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorized or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the Governor of the British possession alone.

(3.) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

"It is under the Imperial Act of 1870 that French escapees from the French settlement of New Caledonia are dealt with. . . Upon receipt of a requisition from the consul of France requiring the extradition of a person supposed to be in the colony, accompanied by proof of the conviction of the person to be dealt with of an extradition crime, and upon production of an affidavit stating that it is believed he is at large in the colony, the governor, acting according to the powers given in England, issues his warrant for the apprehension of the accused. Upon the arrest being made, the prisoner is brought before the governor, who takes evidence upon oath as to the conviction of the accused of a crime for which he may be extradited, and of his sentence not having expired, and if satisfied upon these matters commits the prisoner to Darlinghurst gaol, &c. ; the further proceedings being as prescribed by the Act of 1870." (Legal Year-Book of Australasia, Article by W. J. Williams, Crown Solicitor for New South Wales.)

It is provided by the Extradition Act of 1870, s. 18, that where by any law or ordinance, made by the legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in, or suspected of being in, such British possession, Her Majesty may, by the Order in Council applying the Extradition Acts in the case of any foreign State, or by any subsequent Order, either (1) suspend the operation of the Act or any part thereof, within any such British possession, so far as it relates to such foreign State, and so long as such law or ordinance continues in force there ; or (2) direct that such law or ordinance, or any part thereof, shall have effect in such British possession with or without modifications and alterations. Partly by virtue of this power and partly by the British North Am. Act, 1867, sec. 132, the Imperial Extradition Acts are suspended in Canada during the continuance of the Canada Extradition Act, 1877, and Acts amending the same. With respect to extradition procedure generally and the preliminary judicial investigation as to the criminality and identification of the fugitive, necessary in order to give effect to extradition treaties, recourse is had, in Canada, to the Canadian Act of 1877 as amended by subsequent legislation. (Todd's Par. Gov. Col. 2nd ed. p. 290.) Similarly, the Commonwealth being a British possession within the meaning of the Imperial Extradition Act, the Government of the Commonwealth will, no doubt, hereafter contend that all negotiations and proceedings for the enforcement of extradition treaties entered into by Great Britain with foreign powers shall be conducted under uniform federal legislation, passed partly pursuant to the power vested in the Federal Parliament by this sub-section and partly pursuant to power conferred by section 20 of the Imperial Act. Indeed, it would appear from the definition of the term "legislature" of a British possession, contained in section 26 of the Imperial Act,

that the Federal Parliament will have exclusive jurisdiction to exercise the power conferred by section 20, since where there are local legislatures, as well as a central legislature, "legislature" means the central legislature only. When such legislation is adopted, requisitions for the surrender of fugitive criminals, within the limits of the Commonwealth, will probably have to be made through the Governor-General of the Commonwealth instead of through the Governor of the State in which they may be found.

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51. (xxx.) The relations of the Commonwealth with the islands[215] of the Pacific:

Historical Note.—This sub-section dates back to the "Convention" of 1883, when the Federal Council Bill was drafted. Mr. Samuel Griffith's resolution in favour of a Federal Council proposed that its legislative power should comprise "Matters affecting the relations of Australasia with the islands of the Pacific," and this power was accordingly given by the Federal Council of Australasia Act, 1885 (see p. 111, *supra*). The Council, however, never attempted to exercise this power. The sub-clause was afterwards included in the Bill of 1891, and in the Adelaide draft of 1897. At the Melbourne session there was a short discussion whether the sub-clause might be incorporated with the preceding one, "External affairs." (Conv. Deb., Melb., pp. 30-1.)

§ 215. "Relations . . . with the Islands."

Relations.—The term "relations" is of an abstract character; a relation is defined as a connection which is perceived or imagined between two or more things. It is obvious that the power to legislate concerning "the relations of the Commonwealth with the islands of the Pacific" does not confer extra-territorial jurisdiction on the Federal Parliament. It may mean that the Commonwealth is to enjoy a sphere of commercial and political influence in those islands, so far as is not inconsistent with Imperial legislation or contrary to international law. It may give the Federal Government a statutory right to recommend to the Imperial Government legislation and administration, which may promote the views and interests of the Commonwealth, in reference to the islands of the Pacific. It may give the Federal Government the special right to remonstrate against the adoption of an Imperial policy or the toleration of an international policy, which may clash with the interests of the Commonwealth in those islands The Commonwealth may be entitled to claim facilities for carrying on trade and commerce with the races inhabiting the islands, and to enter into treaties with them, which would not be subject to the same strict Imperial scrutiny as those with continental nations.

The Pacific Islands.—By the Pacific Islands Protection Acts of 1872 and 1875 (35 and 36 Vic. c. 19, 38 and 39 Vic. c. 51) provision was made by the Imperial Parliament for the establishment of a British Protectorate over certain islands in the Western Pacific. On 13th August, 1877, by order in Council pursuant to the statutes, a Protectorate was established over the Southern Solomon Islands, the New Hebrides, the Tongan or Friendly Islands, the Samoan or Navigators Islands, the Groups of Melanesia, and the eastern coast of New Guinea, such islands not being, at the time, within Her Majesty's Dominions or within the jurisdiction of any civilized power. A High Commissioner was appointed to exercise certain powers within the Protectorate, and the Governor of Fiji was appointed the first High Commissioner. With the High Commissioner was associated a court of Deputy and Judicial Commissioners, with civil and criminal jurisdiction over British subjects in the islands.

In November, 1880, the Governor of New Zealand was appointed High Commissioner. The abuse of the coloured labour traffic, and the prevalence of outrages, led to an Australian agitation for closer supervision over the islands. On 2nd February, 1883,

the Agent-General of Queensland was instructed to urge on the Imperial Government the expediency of annexing to that colony the eastern part of New Guinea, not claimed by Holland, on the understanding that Queensland would bear the expenses of government. The reasons urged in favour of this step were :—

"That the trade on the coast of New Guinea and the islands adjacent—in which Queensland colonists were chiefly engaged—consisted of gold-mining, pearl-diving, and beche-de-mer fishing, and employed a large and increasing number of colonists, over which the authorities appointed by the Queensland Government found it difficult to exercise control, especially as the jurisdiction of its government only extended within sixty miles of the coast of the colony. That owing to the extended nature of the jurisdiction of the High Commissioner of the Western Pacific, it was not possible for him to exercise an adequate supervision over the settlers rapidly peopling the islands and coast of New Guinea, who were practically beyond the pale of restraint in their dealings with the natives and with each other. That Queensland had already suffered inconvenience and loss from the escape of political convicts and malefactors from the French penal settlement of New Caledonia; and apprehension was felt in the colony lest some foreign government might institute a similar establishment almost within sight of her territory. 'That in addition to this contingent danger . . . there is an actual and present danger to Queensland interests in the fact of a coastline so near to the scene of several of her industries, and dominating one side of the direct channel of communication between Queensland and Europe, being in the hands of a savage race.' Therefore the colonists of Queensland felt that in their interests it would be most desirable to prevent the possibility of such a misfortune by the annexation of the territory in the immediate proximity to their shores." (Todd, 2nd ed. pp. 248-9.)

The Imperial Government not having readily acquiesced in the proposed annexation, the Queensland Government, on 20th March, 1883, sent Mr. H. M. Chester, a Police Magistrate from Thursday Island, to formally annex to Queensland, in Her Majesty's name, that portion of New Guinea and the adjacent islands not occupied by the Dutch. Mr. Chester accordingly, on 4th April, hoisted the British flag at Port Moresby. The Imperial Government repudiated this act, considering that there was no necessity for annexation, inasmuch as the powers of the High Commissioner for the Western Pacific extended to New Guinea; but if the colony of Queensland was prepared, with or without assistance from the other colonies, to provide a reasonable annual sum to meet the cost of placing one or more deputies of the High Commissioner on the coast, Her Majesty's Government expressed their willingness to take steps for strengthening the naval force on the Australian station, so as to enable Her Majesty's ships to be more constantly present than hitherto in that part of the Pacific. At the intercolonial conference held in Sydney in November, 1883, at which all the Australian Governments were represented, and at which the Federal Council Act was drafted, resolutions were adopted formulating the views of the colonies with reference to the islands of the Pacific as follows:—

"That further acquisition of dominion in the Pacific, south of the equator, by any foreign power, would be highly detrimental to the safety and well-being of the British possessions in Australasia, and injurious to the interests of the empire. That, having regard to the geographical position of the island of New Guinea, the rapid extension of British trade and enterprise in Torres Straits, the certainty that the island will shortly be the resort of many adventurous subjects of Great Britain and other nations, and the absence or inadequacy of any existing laws for regulating their relations with the native tribes, this convention, while fully recognizing that the responsibility of extending the boundaries of the empire belongs to the Imperial Government, is emphatically of opinion that such steps should be immediately taken as will most conveniently and effectively secure the incorporation with the British Empire of so much of New Guinea and the small islands adjacent thereto as is not claimed by the Government of the Netherlands."

These resolutions were communicated to the Imperial Government. In May, 1884, a circular despatch was addressed by the Secretary of State for the Colonies to the Australian Governors, intimating that Her Majesty's Government were disposed to think that there should be a High or Deputy Commissioner, with large powers of independent action, stationed in New Guinea; and that the cost of this system of protectorate should be secured by one or more of the colonies to the Imperial Government. On 6th November, 1884, the British Government proclaimed a protectorate over the southern coast of New Guinea, to the eastward of the 141st meridian of east longitude, Germany

having claimed the northern portion of the east coast of the island. Further correspondence ensued, and in 1886 modified proposals for the annexation and government of New Guinea were made by the Australian colonies interested.

At the Colonial Conference held in London in April, 1887, the Secretary of State for the Colonies intimated that Her Majesty's Government had decided to accept the modified proposals of the Governments of New South Wales, Victoria, and Queensland, in regard to the administration of New Guinea. In order to give effect to the scheme, the Queensland Government introduced into the Parliament of that colony a Bill providing that as soon as Her Majesty should have assumed the sovereignty over the eastern portion of New Guinea, the Queensland Government would guarantee to pay to Her Majesty, towards the expenses of government, the sum of £15,000 per annum for a period of fifteen years. The British New Guinea Act, 1887, was passed by the Parliament of Queensland, and was assented to by the Queen on 4th November, 1887. Though the full amount of the indemnity required by the Imperial Government was guaranteed by Queensland, each of the colonies of New South Wales and Victoria agreed to pay one-third of the entire sum. It was agreed that contributions from the other colonies, and revenue derived from New Guinea, should be applied in reduction of the £15,000 subsidy. The contributing colonies have a voice in the administration of the country. Thus by one of the earliest and most important of intercolonial agreements, the obligation to perform a duty of an Australian character was equally divided among and equally borne by the colonies most interested. On 8th June, 1888, Her Majesty caused letters patent to be issued providing for the erection of certain territory in South-Eastern New Guinea and in the adjacent islands into a separate British possession, to be known as British New Guinea, and also enacting a plan for its government.

Sovereignty.—The Islands of the Pacific, South of the Equator, now belonging to Great Britain or under her protection at the passing of the Commonwealth Act are :—South-eastern New Guinea, Southern Solomon Islands, Gilbert Islands, Ellice Islands, Phœnix Islands, Tokelau Islands, New Hebrides (dual control with France), Fiji Islands, Tonga Islands, Savage Islands, and Cook Islands. Germany owns :—Part of New Guinea, the Bismarck Archipelago, one of the largest of the Solomons, two principal Islands of Samoa, and (north of the Equator) Caroline Islands and Marshall Islands. France has New Caledonia, Loyalty Islands, and Tahiti (eastward of the Cook Group). The United States own one of the Islands of Samoa, and Hawaii, which lies half way between Samoa and California.

Greater New Zealand.—Since the passing of the Commonwealth Act the Government of New Zealand, under the forward leadership of Mr. Seddon, has launched proposals of a far-reaching character, having for their ultimate object the establishment of a Federation which shall include New Zealand, Fiji, Tonga, and the Savage and Cook Islands. This is not a recent idea. At one time it was the dream of far-seeing New Zealand statesmen to establish an Island Federation which would embrace even Samoa ; but such an extended scheme has been rendered unattainable by the partition of Samoa between Germany and the United States.

On 28th September Mr. Seddon submitted the following resolution to the New Zealand House of Representatives :—

"That whereas it is desirable, in the best interests of the colony and the inhabitants of certain islands in the Pacific hereinafter mentioned, that those islands should be annexed to this colony, this house therefore approves of the alteration of the boundaries of this colony, and consents to the extension of the said boundaries, so as to include the Cook Group, including the islands of Raratonga, Mangaia, Atin, Aitutaki, Mitiari, Mauke, Hervey (Manuai) ; also the following islands :—Palmerston (Avarau), Savage (Niue), Pukapuka (Danger), Rakaanga (Manahaki), and Penrhyn (Tongareva)."

This resolution was carried by 37 votes to 4, and was also passed by the Legislative Council. Of the islands mentioned, Aitutaki, Penrhyn, and Palmerston Islands were already British territory, whilst the others were merely under British protection. Lord Ranfurly, the Governor of New Zealand, was authorized by the Imperial Govern-

ment to proceed to Cook's Islands in H.M.S. *Mildura*, and proclaim the annexation of the group as part of the Queen's Dominions. The annexations having been made, it is next expected that the Queen will issue letters-patent, under the Colonial Boundaries Act, 1895, for the extension of the boundaries of New Zealand to include the islands mentioned.

Mr. Seddon has since submitted a further resolution to the New Zealand House of Representatives, proposing that Fiji should be relieved from the position of a Crown colony and should be federated with New Zealand. Sir William Lyne thereupon cabled to the Secretary of State for the colonies, protesting against any alteration in the political status of Fiji pending the establishment of the Commonwealth; and Mr. Chamberlain replied that no such change would be made until the Federal Government had been consulted.

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51. (xxxi.) The acquisition of property[216] on just terms[217] from any State or person for any purpose in respect[218] of which the Parliament has power to make laws:

Historical Note.—At the Adelaide session Mr. Wise called attention to the necessity of providing for the acquisition of public works within a State. (Conv. Deb., Adel., p. 1199.) At the Melbourne session Mr. Barton proposed to insert a new sub-clause: "The acquisition of property on just terms from any State or person for the purposes of the Commonwealth." He expressed doubts whether the power to make laws on matters incidental to the exercise of powers would be enough to carry a right of eminent domain for federal purposes. Dr. Quick and Mr. Glynn supported the sub-clause; but Sir Geo. Turner thought that time ought to be given for its consideration, as such a power might involve enormous expenditure. Mr. Isaacs also suggested further consideration, in order to examine the effect of the clause upon the territorial rights of the States. Accordingly the sub-clause was withdrawn for the present. (Conv. Deb., Melb., pp. 151-4.) On the first recommittal Mr. O'Connor proposed the sub-clause as it now stands, and it was agreed to. (*Id.* p. 1874.)

§ 216. "The Acquisition of Property."

This sub-section expressly confers on the Commonwealth, through the Federal Parliament, the right—technically called the right of "eminent domain"—to compulsorily take property, both private and provincial, for Federal purposes. In the Constitution of the United States there is no section exactly similar to this; there is one (Art. 1 sec. 8, subs. 18) giving Congress power to make all laws which may be necessary and proper "for carrying into execution the foregoing powers." Under this it has been held that the right of eminent domain is vested in the Federal Government, and that it may be exercised within the States, when necessary, for the enjoyment and exercise of the powers conferred upon the Government by the Constitution. Hence in the case of Kohl *v.* United States, 91 U.S. 367, it was decided by the Supreme Court that the United States could, under the Acts of Congress of 2nd March and 10th June, 1872, acquire land in Cincinnati upon which to build a Customs House, and that the right could not be prejudiced either by the unwillingness of property-holders to sell, or by the action of a State in prohibiting sale to the Federal Government. In the case of the United States *v.* Jones, 109 U.S. 513, the opinion was further expressed that the right of eminent domain was an incident of sovereignty, which required no special constitutional provision to call it into existence.

It may be pointed out that a grant of "ways and means" power, similar to that of Art. 1 sec. 8 subs. 18 of the Constitution of the United States, is to be found in sec. 51—xxxix. of this Constitution. However, it was not considered advisable to allow the

right of eminent domain in the Commonwealth to be dependent upon any implied or incidental power. Although the American Courts have given the above decisions it must be remembered that they were given under the Constitution of a sovereign State. The Commonwealth is not a sovereign State, but a federated community possessing many political powers approaching, and elements resembling, sovereignty, but falling short of it. Its Parliament can only exercise delegated powers carved out for it, and assigned to it, by the sovereign Parliament of Great Britain and Ireland. No implied power will be founded on any conception of latent unexpressed sovereignty, as in the case of the Government of the United States. Hence all possible doubt as to the right of the Commonwealth to acquire property for federal purposes has been removed by this sub-section, which renders it unnecessary to resort to the "ways and means" sub-sec. xxxix.

A railroad, although constructed and owned by a private corporation, is for public use, and the power of eminent domain may be exercised to condemn its right of way. (Olcott *v.* Supervisors, 16 Wall. 678. Baker, Annot. Const. 182.)

The United States may exercise the right of eminent domain in the territories, as well as in the States, for purposes necessary to the execution of the powers of the government. All lands held by private persons, within the limits of the United States, are subject to this authority. A railway, being primarily a public highway, may exercise this power, when so authorized by proper legislative sanction. (Cherokee Nation *v.* Southern Kansas R. Co., 135 U.S 641. *Id.*)

When in the judgment of Congress the public good requires a bridge over the navigable waters of the nation to be removed or altered, the United States is not bound to make compensation for damages incurred, although the bridge was constructed so as to comply substantially with the provisions of law relating thereto. (Newport, &c. Bridge Co. *v.* United States, 105 U.S. 470. *Id.*)

§ 217. "On Just Terms."

By the fifth amendment of the Constitution of the United States it was declared that private property should not be taken for public use without just compensation. This is regarded not as a grant but a restriction on the implied power. So the power of the Federal Parliament to take property, private or provincial, is limited by the condition that it must be exercised "on just terms." This condition is consistent with the common law of England and the general law of European nations. It is intended to recognize the principle of the immunity of private and provincial property from interference by the Federal authority, except on fair and equitable terms, and this principle is thus constitutionally established and placed beyond legislative control. (Pumpelly *v.* Green Bay Co., 13 Wall. 166.)

Any law relating to this subject, passed by the Federal Parliament, would be examinable by the High Court, and if on its face it appeared to be unjust it would be liable to be declared unconstitutional and void. The Parliament would be able to pass a general law providing the machinery and procedure, according to which the right of eminent domain could in all cases be exercised. Until such a general law were passed, proceedings to acquire property and to ascertain compensation could be made to conform to the laws of the State in which such property is situated. In each State, at the present time, such machinery and procedure already exist for provincial purposes, in the shape of Acts known as Lands Clauses Compensation Acts, or Lands for Public Purposes Acquisition Acts. (United States *v.* Jones, 109 U.S. 513)

In the United States it has been held that, under the provision for "just compensation," a Federal law is valid which directs that where part of a property is taken for a highway, any direct benefits to the owner from the establishment of the highway shall be taken into consideration in assessing the compensation. (Bauman *v.* Ross, 167 U.S. 548.) Compensation must not only be just to the owner whose property is taken, but just to the public who have to pay. (Searl *v.* Lake County School District, 133 U.S. 553.)

Whenever any business, franchise, or privilege becomes obnoxious to the public health, manners or morals, it may be regulated by the police power of the State even to

suppression ; individual rights being compelled to give way for the benefit of the whole body politic. But when, in the exercise of this police power, private property or private vested rights must be taken for public use, in order to carry out improvements or regulations, or to carry on business or public works, looking to the benefit of the public health, manners or morals, compensation must be made for the property taken. (New Orleans Water-works Co. *v.* Tammany Water-works Co., 14 Fed. Rep. 194. Baker, Annot. Const. 183.)

When the Federal Government appropriates private property, it is under an implied obligation to make just compensation therefor ; and, upon failure to do so, the owner may sue upon such obligation, although there may have been no formal act looking towards such compensation. (United States *v.* Great Falls Manufacturing Co., 112 U.S. 645. *Id.* 184.)

It is not necessary that the property should be absolutely taken to entitle the owner to compensation. If there is such serious interruption with the common and necessary use as to practically destroy its value, it would be a taking within the meaning of the fifth amendment. (Pumpelly *v.* Green Bay Co., 13 Wall. 166. *Id.*)

Where private property is taken by the government in time of war or public danger and converted to public use, the government is bound to pay for the same. (United States *v.* Russell, 13 Wall. 623. *Id.*)

Private property may be taken by a military commander to prevent its falling into the hands of the enemy ; or, where necessary, it may be taken for the use of the public. In such case the government is bound to make full compensation ; but the officer is not a trespasser, provided the danger is imminent or the necessity urgent, and such as will not admit of delay. (Mitchell *v.* Harmony, 13 How. 115. *Id.*)

§ 218. "Purpose in Respect of Which."

The second limit to the power of the Commonwealth to acquire private or provincial property is, that it must only take it for purposes in respect of which the Parliament has power to make laws. Thus lands and buildings could only be taken for postal, telegraphic, telephonic, naval and military purposes ; for arsenals and fortifications ; light-houses ; quarantine stations ; customs houses ; federal offices and federal law courts ; and other purposes similarly authorized by the Constitution.

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51 (xxxii.) The control of railways with respect to transport for the naval and military purposes[219] of the Commonwealth :

Historical Note.—In the Bill of 1891 sub-clause 29 extended to "the control of railways with respect to transport for the purposes of the Commonwealth." Mr. Gordon and Mr. Clark proposed to add provisions with regard to preferences and discriminations (see Historical Note to sec. 102). Mr. Baker moved to add "The altering of the gauge of any line of railway, and the establishing a uniform gauge in any State or States ;" but this was negatived. (Conv. Deb., Syd., 1891, pp. 692-8.)

At the Adelaide session in 1897 the sub-clause was confined to "the military purposes of the Commonwealth." At the Melbourne session a suggestion by the Legislative Council of New South Wales, to insert "but only" after "transport," was negatived as unnecessary, and on Mr. Barton's motion the words "naval and" were inserted before "military." (Conv. Deb., Melb., p. 154.)

§ 219. "Transport for the Naval and Military Purposes."

The railways at present belong to the States and are worked by the States. This sub-section confers on the Federal Parliament the power to exercise a modified control over the railways, so far as may be necessary to regulate the transport of forces and material for naval and military purposes. This control will cover the time and manner of using the railways for defence purposes, as well as the indemnity which will, as a

matter of justice, have to be paid to the State authorities for such compulsory user. No doubt the Federal Government will be able to make arrangements with the State Governments, determining the manner and conditions under which the railways may be so used. It is not likely that the Federal Government would dictate its own terms, so long as a reasonable spirit was displayed by the State Governments.

Such a power is necessarily a concomitant and auxiliary of "the naval and military defence of the Commonwealth," which by sub.-sec. vi. is vested in the Federal Parliament. Probably, even without sub-sec. xxxii., the Parliament would, in an actual state of war, or in making necessary arrangements for the defence of the country antecedent to war, be able to authorize the use of the State railways It would be a defensive power, necessarily embraced in sub-sec. vi. It has not, however, been allowed to rest on that sub-section, but has been placed beyond the region of controversy.

By the Constitution of the German Empire (Art. 41) it is provided that railways considered necessary for the defence of Germany, or in the interest of general commerce, may by Imperial law be constructed at the cost of the Empire, even in opposition to the will of those members of the Union through whose territory the railroads run, without prejudice, however, to the sovereign rights of that country; or private persons may be charged with their construction, and receive rights of expropriation. Every existing railway company is bound to permit new railroad lines to be connected with such national lines, at the expense of the latter. All laws granting existing railway companies the right of injunction against the building of parallel or competitive lines are abolished throughout the Empire, without detriment to rights already acquired. Such rights of injunction cannot be granted in future concessions. Managers of all railways are required to obey requisitions made by the Imperial authorities for the use of their roads for the defence of Germany. In particular, troops and all material of war must be forwarded at uniform reduced rates. (Art. 47.) These articles do not apply to Bavaria, but by Art. 46, ss. 2-3, the Imperial Government has power, with regard to Bavaria, to prescribe by means of legislation uniform rules for the construction and equipment of such railways as may be of importance for the defence of the country.

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51 (xxxiii.) The acquisition, with the consent of a State, of any railways[220] of the State on terms arranged between the Commonwealth and the State:

Historical Note.—At the Adelaide session Mr. McMillan moved a new sub-clause: "The taking over by the Commonwealth, with the consent of the State, of the whole or any part of the railways of any State or States upon such terms as may be arranged between the Commonwealth and the State." This was agreed to. (Conv. Deb., Adel., p. 1199.)

At the Melbourne session Mr. Glynn moved the omission of the words "with the consent of the State," in order to enable the Commonwealth to take over the railways. After debate, this was negatived by 31 votes to 14. (Conv. Deb., Melb., pp. 154-63.) The sub-clause was verbally amended before the first report, and after the fourth report.

§ 220. "Acquisition . . . of any Railways."

The railway question was one of the first practical problems which received the attention of the Federal Convention at Adelaide. It was generally admitted that the railways, being the arterial channels of communication between the colonies, were intimately connected with trade and commerce, and that it would be useless for the Constitution to declare that trade and commerce between the States should be absolutely free if the States were allowed to continue to impose preferential or differential railway

rates, which would materially interfere with the freedom and equality of trade. It was also perceived that the railways were valuable assets, associated with and forming the main tangible security for the public debts of the colonies ; and that the transfer of the railways from the States to the Commonwealth might have to be accompanied by the transfer of the public debts.

Two propositions were formulated in the course of debate ; the first was that the Commonwealth should, within a specified time, and regardless of the wishes of the States, take over and federalize the public debts and the railways ; the second was that the railways should remain the property of the States, and should be managed by them, but that they should be subject to limited federal control, so as to prevent any derogation from freedom and equality of trade, and so as to guard against preferences and discriminations in traffic rates and traffic arrangements, which might indirectly prejudice that freedom and equality. The Convention accepted the solution of the problem suggested by the policy of limited federal control, which is expressed in secs. 98, 99, 101, 102, 103 and 104, of this Constitution.

A distinct proposal was submitted by Mr. J. T. Walker, that "the Parliament shall take over the whole of the railways of the several States, excepting Tasmania and Western Australia if they desire to be excepted, and each State shall be charged with any deficiency or credited with any net profits on the working of such railways." The resolution found so little support that it was withdrawn. (Conv. Deb., Adel., p. 1176.)

At the same time it was considered prudent to authorize the Federal Parliament at any time to acquire the railways of a State, with the consent of the State, on fair and reasonable terms, and also to allow the Parliament to construct or extend railways within a State with the consent of the State. This idea, first suggested by Mr. R. E. O'Connor (Conv. Deb., Adel., p. 60), was afterwards presented by Mr. W. McMillan, in the form of the sub-section which is now under consideration. (Conv. Deb., Adel., p. 1199.)

The subjoined return, prepared by Mr. J. J. Fenton, Assistant Government Statist of Victoria, shows the mileage and cost of railways in the various colonies up to the year ending 30th June, 1899 :—

——	Miles.	Capital.	Revenue.	Cost of Working.	Interest.
		£	£	£	£
New South Wales...	2,707	37,992,276	3,145,273	1,690,442	1,377,950
Victoria	3,143	38,974,410	2,873,729	1,716,441	1,472,090
South Australia ...	1,870	14,042,007	1,073,155	634,755	503,705
Queensland ...	2,746	18,670,208	1,373,475	784,811	768,333
Western Australia..	1,355	6,427,370	663,220	712,329	207,257
Tasmania	438	3,585,040	178,180	141,179	140,881
Total	12,259	119,691,311	9,307,032	5,679,957	4,470,216

By virtue of this sub-section the Federal Parliament may, at any time, take over the whole or part of the railways of a State subject to the conditions (1) that the State through its legislature consents, and (2) that the terms of the acquisition and transfer are arranged to the joint satisfaction of the Government of the Commonwealth and the Government of the State concerned. In this manner the whole of the State railways could, eventually, be transferred by the States to the Commonwealth.

51. (xxxiv.) Railway construction[221] and extension in any State with the consent of that State:

Historical Note.—The report of the Committee of the Privy Council in 1849 proposed that the General Assembly should have power to make laws as to "The formation of roads, canals, and railways traversing any two or more of the Colonies." (See p. 85, *supra*.) The report of Wentworth's Committee in 1853 contained a similar provision (See p. 91, *supra*.) Wentworth's Memorial in 1857 proposed that the Federal Assembly should have power with respect to the gauges of connecting railways. (See p. 94, *supra*.)

At the Adelaide session in 1897 Mr. McMillan proposed a new sub-clause: "Railway construction and extension with the consent of any State or States concerned." This was agreed to. (Conv. Deb., Adel., p. 1199.)

At the Melbourne session, a suggestion by the Legislative Council of New South Wales, to insert "but only" after "extension," was negatived. Mr. Deakin called attention to the vagueness of the word "concerned," and the sub-clause was amended to its present shape. Mr. Reid objected to the whole sub-clause, unless restricted to defence purposes, as a dangerous temptation to the Commonwealth, but after debate withdrew his opposition for the time being. (Conv. Deb., Melb., p. 163-80.)

§ 221. "Railway Construction."

As the preceding sub-section provides an opening for the gradual transfer of established railways from the States to the Commonwealth, so this sub-section affords scope for the initiation of a federal policy of railway construction and extension. It will, no doubt, be first used to authorize the construction of trans-continental lines, such as those already projected to connect the railway system of South Australia, at Port Augusta, with that of Western Australia, and to extend the South Australian railway at Oodnadatta northward, to join the Northern territory railways, running southward from Port Darwin. So it could be used to authorize the connection of such a trans-continental line, when constructed, with the railways of Queensland and New South Wales. The only condition precedent to the exercise of the power is the consent of the State, or States, through which the proposed Federal railways are to run.

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51. (xxxv.) Conciliation and arbitration[222] for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

Historical Note.—In the Sydney Convention of 1891, Mr. Kingston proposed a new sub-clause: "The establishment of courts of conciliation and arbitration, having jurisdiction throughout the Commonwealth, for the settlement of industrial disputes." Sir Samuel Griffith expressed the opinion that the amendment ought to be moved in the chapter dealing with the Federal Judiciary, and Mr. Kingston accordingly withdrew it. (Conv. Deb., Syd., 1891, pp. 688-9.) Subsequently he proposed to insert, in sec. 1 of Chap. III., the words "including courts of conciliation and arbitration for the settlement of industrial disputes." This was criticized as an interference with the functions of the States, and was negatived by 25 votes to 12. (*Id.* pp. 780-5.)

At the Adelaide session in 1897 Mr. Higgins proposed the sub-clause as it now stands; but after debate it was negatived by 22 votes to 12. (Conv. Deb., Adel., pp. 782-93.)

At the Melbourne session Mr. Higgins moved the sub-clause again, and after considerable debate it was agreed to by 22 votes to 19. (Conv. Deb., Melb., pp. 180-215.)

§ 222. "Conciliation and Arbitration."

In the Convention of 1891, when Mr. C. C. Kingston proposed that the Federal Parliament should have the power to establish Courts of Conciliation and Arbitration, having jurisdiction throughout the Commonwealth for the settlement of industrial disputes, he pointed out that the object was to deal with labour conflicts, the ramifications of which might extend beyond the limits of a State. It was proposed to create a Federal tribunal, which would be able to settle such matters more effectually than could be done by State tribunals, under State legislation; but there was no intention to deprive the States of the powers which they possessed to legislate concerning conciliation and arbitration for the settlement of industrial disputes within their respective boundaries The principal objection urged against the proposal was that it would involve an interference with private property and civil rights, and that it would be expedient to leave such questions within the control of the States.

In the Convention of 1898 Mr. Kingston's pioneer proposals with reference to this subject were found of great service. By that time political thought had developed and public sentiment had ripened in the direction indicated by him in 1891. At Adelaide Mr. H. B. Higgins submitted a sub-clause "Industrial disputes extending beyond the limits of a State."

"I want simply to give the Federal Parliament a power to establish these courts if it thinks fit. Therefore there will have to be an incidental alteration in the judicature part of the Bill, so as to enable the Federal Parliament to create a court for the purpose. It may be said, 'Leave the industrial disputes to the States;' but it is well known that these disputes are not confined, in their evils, to any one State. If there is a shipping dispute in Sydney it is sure to be felt in Melbourne; if there is a coal dispute in Newcastle it is sure to be felt at Korumburra. Any one State is unable to cope with the difficulty." (Mr. H. B. Higgins, Conv. Deb., Adel., p. 782.)

"When first I attempted to deal with it I thought that for the purpose of making any effectual provision on the subject federal legislation was necessary on account of the extent of the disputes which occurred in industrial matters, and upon which local legislation, confined to provincial limits, is not competent to deal. The opinion I affirmed is here borne out by a variety of cases. If you had federal legislation dealing with this matter, you could establish courts which would exercise a wider jurisdiction and command greater respect and confidence than can be hoped for under any system of provincial legislation" (Mr. C. C. Kingston, Conv. Deb., Adel., p. 782.)

The arguments presented in opposition to the proposal were that to interfere with a State, in the settlement of trade disputes, would be an undue and unnecessary intrusion on the local industrial life of a State; that every dispute was complete in itself in each State; that each State would have ample power to settle a dispute arising within it; that it was impossible to conceive a dispute in a State which, in itself, could extend beyond the limits of a State, in such a manner as to establish a formula determining Federal jurisdiction. In reply to this it was said that a dispute beginning in Adelaide might overflow into Western Australia or Victoria, in which case the State law, if any, relating to it would cease, and the Federal law, if any, would begin.

"Yes; but it will be difficult to determine the moment of overflow even if you can determine the point of overflow. We can scarcely say if there is to be a law in each State that the federal law must not differ from some, if not from all, of these. Consequently it will be a curious problem in relation to penalties and observances for those concerned to know the moment when they have passed from under the dominion of the State law to the dominion of the federal law. That is the great difficulty to settle." (Mr. A. Deakin, Conv. Deb., Adel., p. 784.)

"In one sense it is hard to say that any industrial dispute is a dispute outside the limits of the colony. . . . It is impossible to say when any dispute extends outside the limits of a colony, because a dispute is always in one colony although it may be going on in every colony. In another sense every dispute extends outside the limits of a colony." (Mr. B. R Wise, Conv. Deb., Adel., p. 785.)

The proposed new sub-clause was amended in form, but on a division it was rejected by 22 votes to 10.

At the Melbourne session, the sub-clause was again proposed by Mr. Higgins, and led to a prolonged debate. Mr. W. McMillan was strongly of opinion that this matter ought to be left absolutely to the States. Sir John Downer contended that it was not a federal question at all. Mr. J. H. Symon thought it unnecessary and mischievous to insert such a power in the Constitution. Mr. Wise did not think that it would be prudent to create a Federal Court, having authority to fix the rate of wages for the whole of Australia. Mr. Isaacs thought that a federal tribunal, in which both sides would have confidence, would avert a national danger that might confront them at any time. Mr. Trenwith pointed out that in consequence of the continually increasing complexity of our industrial system, there was scarcely ever an industrial dispute of any magnitude whose effect did not spread over the borders of two or three, and sometimes of all the colonies. This was notably so in the maritime strike which took place some years ago over the difficulties with the marine officers. That dispute, at some time or other of its existence, extended to every one of the colonies, including New Zealand.

Mr. G. H. Reid believed in the compulsory investigation of trade disputes by State authorities, but he was of opinion that the proposed sub-clause would tend to enlarge the area of trade disputes, for the very reason that the employers or the men might be disposed to extend the area of a dispute, in order to get the advantage of having it settled by the federal tribunal. Sir John Forrest supported the sub-clause, because the Federal Parliament would be better able to deal with the subject, and would deal with it more moderately than the local parliaments were likely to do.

One of the principal objections raised against compulsory arbitration was that there were no means available by which an award, when made, could be specifically enforced. How, it was asked, are you going to enforce an award against a multitude of working men? The answer was found in the scheme of conciliation and arbitration legalized in New Zealand. Under the law of that country the award, when made, is in each case filed in the Supreme Court, and has the force and validity of an award made on an ordinary arbitration. Each party to the award, whether employer or workmen, or unions representing them, can obtain a judge's order exacting a penalty for breach of the award. The penalty fixed does not exceed the sum of £500 in the case of an individual employer or a trade union. Should the funds of a union be insufficient to pay the penalty, each member is liable to the extent of not more than £10. (*Review of Reviews*, December, 1897, p. 741.) On a division the sub-clause was finally adopted by 22 votes to 19.

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51. (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides[223]:

Historical Note.—This sub-section was added as a drafting amendment at the Melbourne session, before the first report, and was verbally amended after the fourth report.

§ 223. "Until the Parliament Otherwise Provides."

There are no less than twenty-two provisions in the Constitution in which it is enacted that the law of the Constitution shall be to a certain effect "until the Parliament otherwise provides." By implication this confers on the Parliament authority to provide "otherwise." Sub-section xxxvi. has been introduced to give the Parliament express power to provide "otherwise." The result is that the Parliament can alter the Constitution in respect to the following matters:—

(1.) Governor-General's Salary.—May be increased or diminished (sec. 3).

(2.) Senate Electorates.—Each State may be divided into electoral divisions (sec. 7).

(3.) Queensland Senatorial Divisions.—May be abolished (sec. 7).

(4.) Number of Senators.—May be increased or diminished, but so that no Original State shall have less than six (sec. 7).

(5.) State Electoral Laws.—Regulating the election of senators may be superseded by Federal electoral laws (sec. 10).

(6.) Quorum of Senate.—May be increased or reduced (sec. 22).

(7.) Mode of Ascertaining Quota.—May be altered (sec. 24).

(8.) Electoral Divisions.—Federal electoral divisions for House of Representatives may supersede State-made electoral divisions (sec. 29).

(9.) Qualification of Electors.—Federal law prescribing the qualification of electors may supersede State laws (sec. 30).

(10.) State Electoral Laws.—Regulating the election of the members of the House of Representatives may be superseded by Federal electoral laws (sec. 31).

(11.) Qualification of Members.—May be altered (sec. 34).

(12.) Quorum of House.—May be increased or reduced (sec. 39).

(13.) Penalty for Sitting When Disqualified.—May be altered (sec. 46).

(14.) Disputed Elections.—Mode of settling may be altered (sec. 47).

(15.) Payment of Members.—May be increased or reduced (sec. 48).

(16.) Number of Ministers.—May be increased (sec. 65).

(17.) Salaries of Ministers.—May be increased (sec. 66).

(18.) Appointment and Removal of Non-Political Officers.—May be regulated (sec. 67).

(19.) Conditions and Restrictions on Appeals.—May be regulated (sec. 73).

(20) Application of Customs and Excise Revenue.—Ten years after the establishment of Commonwealth the Braddon clause may be repealed or altered (sec. 87).

(21.) Financial Assistance to States.—Ten years after the establishment of the Commonwealth the Parliament may determine not to grant further financial assistance to States (sec. 96).

(22.) Audit.—Parliament may make audit laws (sec. 97).

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51. (xxxvii.) Matters referred[224] to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

Historical Note.—The genesis of this sub-section is to be found in the scheme for the establishment of a General Federal Assembly first recommended by the Committee of the Privy Council in its Report of 1849. Among the powers purposed to be conferred on the General Assembly was: "9. The enactment of laws affecting all the colonies represented in the General Assembly on any subject not specifically mentioned in this list, and on which it should be desired to legislate by addresses presented to it from the legislatures of all the colonies" (p. 85, *supra*). Wentworth's Constitutional Committee of 1853 recommended that the General Assembly should have power to legislate "on all other subjects which may be submitted to them by address from the Legislative Council and Assembly of the other colonies." The select Committee which drafted the Victorian

Constitution, in its report, dated 9th December, 1853, recommended that provision should be made for occasionally convoking a General Australian Assembly for legislating on such questions of vital inter-colonial interest as might be submitted to it by the Act of any legislature of one of the Australian colonies. The Memorial and Draft Bill, prepared by Wentworth in 1857 for the creation of an Australian Federal Assembly, provided that the Assembly should have power to deal with certain specified subjects "and any other matter which might be submitted to it by the legislatures of the colonies represented therein."

The same idea was developed, and first received practical expression, in the Federal Council Act of 1885, sec. 15, which assigned to the Council authority, at the request of the legislatures of two or more of the colonies represented therein, to legislate concerning :—

> (*h*) Any matter which at the request of the legislatures of the colonies Her Majesty by Order in Council shall think fit to refer to the Council :
>
> (*i*) Such of the following matters as may be referred to the Council by the legislatures of any two or more colonies, that is to say—general defences, quarantine, patents of invention and discovery, copyright, bills of exchange and promissory notes, uniformity of weights and measures, recognition in other colonies of any marriage or divorce duly solemnized or decreed in any colony, naturalization of aliens, status of corporations and joint stock companies in other colonies than that in which they have been constituted, and any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application : provided that in such cases the Acts of the Council shall extend only to the colonies by whose legislatures the matter shall have been so referred to it, and such other colonies as may afterwards adopt the same.

In the Bill of 1891 the sub-clause was passed substantially as it now stands ; and at the Adelaide session in 1897 that draft was followed.

At the Melbourne session Mr. Deakin raised the question whether the sub-clause, though suitable enough for the Federal Council, was sufficient for the purposes of the Commonwealth, and whether it authorized legislation involving expenditure or taxation ; and he also raised the question whether a reference once made would be revocable. Dr. Quick suggested that the provision afforded an easy mode of amending the Constitution without consulting the people. Finally, after considerable debate, the sub-clause was agreed to. (Conv. Deb., Melb., pp. 215-25.) It was verbally amended after the fourth report.

§ 224. "Matters Referred to the Parliament."

This sub-section evidently contemplates a class of subjects which have not been transferred to the Federal Parliament by the Constitution ; which are still within the competence of the State Parliaments to deal with separately and independently, but as to which it may be hereafter deemed desirable that there should be a law of general application within the referring States and such as afterwards adopt the law founded on their reference. For instance, the Parliaments of New South Wales, Victoria, and South Australia might find it consistent with their interests to refer to the Federal Parliament such questions as the utilization of the waters of the Murray for irrigation purposes ; the settlement of riparian rights ; the protection of game ; the preservation of inland and coastal fisheries ; inter-state sanitary laws and inspection laws generally.

51. (xxxviii.) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power[225] which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :

Historical Note.—The Bill of 1891 contained a sub-clause in substantially the same words, except that in place of the single word "power" there was the phrase "legislative powers with respect to the affairs of the territory of the Commonwealth, or any part of it." (Conv. Deb., Syd., 1891, p. 698.)

At the Adelaide session, in 1897, the sub-clause was passed practically in its present form. At the Melbourne session Mr. Barton explained that the words omitted were thought to be surplusage. Some discussion took place as to the scope of the sub-clause. (Conv. Deb , Melb., pp. 225-6.) Drafting amendments were made before the first report and after the fourth report.

§ 225. "The Exercise . . . of any Power."

It is not very clear what powers are referred to in this sub-section. It is apparently another "drag-net," intended to enable the Federal Parliament, with the concurrence of the State Parliaments, to exercise certain powers which are capable of being exercised within the Commonwealth, but which are not among the enumerated powers of the Federal Parliament, and which, not being vested in the State Parliaments, cannot be referred by those Parliaments under sub-sec. xxxvii. In contradistinction to sub-sec. xxxvii., which refers to powers exercisable by the State Parliaments, this sub-section refers to powers which at the establishment of the Constitution are "only" exercisable by either (*a*) the Parliament of the United Kingdom, or (*b*) the Federal Council of Australasia. We must therefore enquire what powers there are which are capable of being exercised "within the Commonwealth," and for the "peace, order, and good government of the Commonwealth," but which at the establishment of the Commonwealth are only exercisable by the Imperial Parliament or by the Federal Council.

(*a*) Powers Exercisable by the Imperial Parliament.—The powers referred to, being, at the establishment of the Constitution, "only" exercisable by the Imperial Parliament, must be powers which did not belong to the Parliaments of the colonies before they became States. But the Parliament of each colony had general powers to make laws for the peace, order, and good government of the colony, subject only (1) to the general exception expressed in the Colonial Laws Validity Act—that such laws must not be repugnant to any Imperial law expressly extending to the colony; (2) to certain particular exceptions expressed in the Constitution Act of each colony; and (3) to the limitation that such laws could not operate extra-territorially, except where express authority to that effect had been given by the Imperial Parliament.

It would seem, therefore that the only powers to make laws for the peace, order, and government of a colony which at the establishment of the Commonwealth are "only exercisable" by the Imperial Parliament are powers which come within one of these three classes of exceptions or limitations. Does this sub-section enable the Federal Parliament, with the concurrence of the States, to pass laws for the exercise of any of these powers?

When the Commonwealth Bill was before the Imperial Parliament, this sub-section was mentioned as one of the provisions of the Constitution which might raise a doubt as to the applicability of the Colonial Laws Validity Act. The opinion has already been expressed (pp. 347-352, *supra*) that this doubt was unfounded, and that the Common wealth has no power to pass laws repugnant to Imperial legislation extending to the

colonies—such as the Merchant Shipping Act of 1894. It seems equally clear that this sub-section does not enable the Federal Parliament to pass laws with an extra-territorial operation; the words "the exercise *within the Commonwealth*" exclude such a construction. Does it then enable the Federal Parliament, with the concurrence of the States, to exercise any powers denied to the States by the particular exceptions contained in the Constitution Acts of the States? Those Constitution Acts are Imperial laws, so that even this construction would involve, *pro tanto*, a conflict with the Colonial Laws Validity Act, which does not seem to be contemplated. It is difficult, therefore, to see what power can be conferred on the Federal Parliament by these words.

(*b*) Powers Exercisable by the Federal Council.—It is equally difficult to give any effect to the power to make laws in respect of the exercise of powers which, at the establishment of the Commonwealth, were only exercisable by the Federal Council. In the first place, the Federal Council Act is repealed by covering clause 7 of the Commonwealth Act, which took effect on the passing of the Act on 9th July, 1900; so that at the date of the establishment of the Commonwealth no powers whatever are exercisable by the Federal Council. (See remarks by Mr. Isaacs and Mr. Barton, Conv. Deb., Melb., pp. 225-6.) But apart from this question, the powers expressly given to the Federal Parliament seem to include every power which was ever exercisable by the Federal Council. The Federal Council only had independent legislative authority over seven subjects (see pp. 111-2, *supra*), every one of which is covered by sec. 51 of this Constitution; and its powers of legislation upon reference by the Parliaments of the colonies were certainly no wider, and probably narrower, than those given to the Parliament of the Commonwealth by sub-sec. xxxvii.

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51. (xxxix.) Matters incidental[226] to the execution of any power vested by this Constitution[227] in the Parliament[228] or in either House thereof[229], or in the Government of the Commonwealth[230], or in the Federal Judicature[231], or in any department[232] or officer[233] of the Commonwealth.

Historical Note.—The Constitution of the United States empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (Art. I. sec. viii. sub-s. 18.) In the Bill of 1891 the sub-clause stood: "Any matters necessary or incidental for carrying into execution the foregoing powers and any other powers vested by this Constitution in the Parliament or Executive Government of the Commonwealth or in any Department or Officer thereof." In that form it was adopted at the Adelaide session in 1897.

At the Sydney session Mr. Isaacs called attention to the absence of any mention of the Judiciary. (Conv. Deb., Syd., 1897, pp. 1190-1.)

At the Melbourne session the sub-clause was amended, in Committee and after the fourth report. (Conv. Deb., Melb., pp. 226-7.)

§ 226. "Matters Incidental."

In section 51, and in various other sections of the Constitution, certain legislative powers are conferred on the Federal Parliament. These powers are conveyed in general language. It was not necessary, and it would not have been appropriate, in framing a Constitution, to crowd it with minute details and elaborate specifications of power, or to declare the means by which those powers were to be carried into execution. (Martin v. Hunter's Lessee, 1 Wheat. 304.) This, however, is obvious: that every grant of

power draws after it others not expressed, but consequential, incidental, and vital to its exercise ; not substantive and independent, but auxiliary and subordinate. (Anderson *v.* Dunn, 6 Wheat. 204 ; McCulloch *v.* Maryland, 4 Wheat. 316.) The nature of the instrument demanded that only its bold outlines and fundamental principles should be delineated and its important objects designated, leaving the minor ingredients which compose those objects to be deduced from the nature of the objects themselves. (Prigg *v.* Pennsylvania, 16 Pet. 539 ; United States *v.* Cruikshank, 92 U.S. 542. Baker, Annot. Const. 56.)

For example, the Federal Parliament is empowered to legislate concerning trade and commerce, customs and excise, and taxation. This necessarily implies a power to provide for the making and enforcement of commercial laws and revenue laws, and for the punishment of offences against those laws. Without that incidental power the substantive power would have been paralyzed and abortive. So, likewise, the power to provide for the defence of the Commonwealth necessarily implies the power to raise, pay, and discipline forces. The power to coin money implies the power to impose punishment for the circulation of counterfeit coin. The power to conduct the postal department implies the power to inflict punishment for stealing letters from that department.

This sub-section has been introduced in order to give express authority to deal with these matters of machinery, procedure, execution, and "ways and means." It corresponds with Art. I. sec. 8, subs. 18, of the Constitution of the United States, and is a direct authority for the exercise of all necessary, incidental, or implied powers, to enable the Federal Parliament to carry out the great provisions of the instrument of government. As such, it is a distinct enlargement of power, and adds fulness and elasticity to every specific grant. (McCulloch *v.* Maryland, 4 Wheat. 316 ; Anderson *v.* Dunn, 6 Wheat. 204 ; United States *v.* Fisher, 2 Cranch, 358 ; United States *v.* Marigold, 9 How. 560. Baker, Annot. Const. 56.)

"The powers of the government are limited, and its limits are not to be transcended. But the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional." (Per Marshall, C.J., in McCulloch *v.* Maryland, 4 Wheat. 421.)

"Every power vested in a government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution." (Hamilton's Works, Lodge's ed. vol. iii. p. 181.)

"It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the Constitution would render that instrument unfit to serve the purpose of a growing and changing nation, and would, by leaving men no legal means of attaining necessary but originally uncontemplated aims, provoke revolution and work the destruction of the Constitution itself. This latter contention derived much support from the fact that there were certain powers that had not been mentioned in the Constitution, but which were so obviously incident to a national government that they must be deemed to be raised by implication. For instance, the only offences which Congress is expressly empowered to punish are treason, the counterfeiting of the coin or securities of the government, and piracies and other offences against the law of nations. But it was very early held that the power to declare other acts to be offences against the United States, and punish them as such, existed as a necessary appendage to various general powers. So the power to regulate commerce covered the power to punish offences obstructing commerce ; the power to manage the post-office included the right to fix penalties on the theft of letters ; and, in fact, a whole mass of criminal law grew up as a sanction to the civil laws which Congress had been directed to pass. The three lines along which this development of the implied powers of the government has chiefly progressed, have been those marked out by the three express powers of taxing and borrowing money, of regulating commerce, and of carrying on war." (Bryce, Amer. Comm. I. pp. 370-1.)

"But the most important work was that done during the first half century, and especially by Chief Justice Marshall during his long tenure of the presidency of the Supreme Court (1801-1835). It is scarcely an exaggeration to call him, as an eminent American jurist has done, a second maker of the Constitution. I will not borrow the phrase which said of Augustus that he found Rome of brick and left it of marble, because Marshall's function was not to change but to develop. The Constitution was, except of course as regards the political scheme of national government, which was already established, rather a ground-plan than a city. It was, if I may pursue the metaphor, much what the site of Washington was at the beginning of this century, a symmetrical ground-plan for a great city, but with only some tall edifices standing here and there among fields and woods. Marshall left it what Washington has now become, a splendid and commodious capital within whose ample bounds there are still some vacant spaces and some mean dwellings, but which, built up and beautified as it has been by the taste and wealth of its rapidly-growing population, is worthy to be the centre of a mighty nation. Marshall was, of course, only one among seven judges, but his majestic intellect and the elevation of his character gave him such an ascendency, that he found himself only once in a minority on any constitutional question." (*Id.* p. 374.)

"Had the Supreme Court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the Privy Council has recently applied to the British North America Act of 1867 (the Act which creates the Constitution of the Canadian Federation), the United States Constitution would never have grown to be what it now is." (*Id.* p. 375.)

§ 227. "Power Vested by this Constitution."

Having drawn attention in a general manner to the scope of this sub-section and illustrated it by authority, we now proceed to note several of its features which require separate treatment. It must be observed that the sub-section comprehends matters subsidiary and contributory to the execution of any power granted "by this Constitution." Now, there are five kinds of powers so granted: (1) Legislative power vested in the Parliament, (2) Regulative power vested in either House of Parliament, (3) Executive power vested in the Federal Administration, (4) Judicial power vested in the Federal Judicature, (5) Ministerial mandatory power vested in departments and officers.

§ 228. "Power Vested . . . in the Parliament."

The power of the Parliament is, for the most part, defined in sec. 51. But in addition to that complex section, with its prolific drag-net sub-sec. xxxvi., "Until the Parliament otherwise provides," there are numerous other sections in which important grants of power may be found. For example:—

METHOD OF CHOOSING SENATORS.—Parliament may make laws prescribing (sec. 9).

ROTATION OF SENATORS.—Parliament may make laws for the vacating of the places of senators, when the number of senators is increased or diminished (sec. 14).

PRIVILEGES OF PARLIAMENT.—Parliament may declare the powers, privileges and immunities of the Senate and of the House of Representatives (sec. 49).

SEAT OF GOVERNMENT.—Parliament may make laws respecting (sec. 52—i.), and may determine the site within certain limits (sec. 125).

FEDERAL DEPARTMENTS.—Parliament may make laws for the regulation of the public departments transferred to the Commonwealth (sec. 52—ii.).

FEDERAL COURTS.—Parliament may create Federal Courts (sec. 71).

JUDGES OF THE HIGH COURT.—Parliament may prescribe the number of judges of the High Court beyond a Chief Justice and two Justices (sec. 71).

REGULATION OF APPELLATE JURISDICTION.—Parliament may prescribe exceptions and regulations, subject to which the High Court may hear appeals. sec. 73).

Additional Original Jurisdiction.—Parliament may confer additional original jurisdiction on the High Court (sec. 76).

Power to Define Jurisdiction.—Parliament may define the jurisdiction of inferior Federal Courts, and invest State Courts with Federal jurisdiction (sec. 77).

Actions Against Commonwealth and States.—Parliament may confer the right to bring actions against the Commonwealth or against States (sec. 78).

Distribution of Surplus.—After five years from the imposition of uniform tariff Parliament may provide for the monthly payment to the several States of all surplus revenue on a fair basis (sec. 94).

Navigation, Shipping and Railways.—Parliament may legislate concerning navigation, shipping, and State-owned railways so far as they affect inter-state and foreign trade and commerce (sec. 98).

Inter-State Commission.—Parliament may define the adjudicatory and administrative power of the Inter-State Commission with reference to trade and commerce (sec. 101).

Preferences and Discriminations.—Parliament may with respect to trade and commerce forbid preferences and discriminations subject to certain conditions (sec. 102).

Taking Over Public Debts.—Parliament may take over from the States their public debts (sec. 105).

State Inspection Laws.—Parliament may annul State inspection laws (sec. 112).

Custody of Offenders.—Parliament may make laws giving effect to the mandate directed to the State by sec. 120 to make provision for the detention of offenders against the laws of the Commonwealth (sec. 120).

Admission of New States.—Parliament may admit or establish new States (sec. 121).

Government of Territories.—Parliament may make laws for the government of territory surrendered to it by any State or placed under its authority by the Queen (sec. 122).

Alteration of State Boundaries.—Parliament, subject to certain conditions precedent, may alter the limits of a State (sec. 123).

Sub-section xxxix. authorizes the Parliament to make laws relating to matters incidental to the execution of all these legislative powers, making them fully operative and effective, and enforcing them by appropriate legal sanctions.

§ 229. "Powers Vested . . in Either House."

Each branch of the Federal Parliament is endowed with certain special powers, necessary for its internal government, and for the conduct of its own business. As soon as convenient, after the Senate first meets subsequent to a general election, it becomes its duty to divide the senators chosen for each State into two classes, as nearly equal as practicable, so as to provide for the order of their retirement in triennial batches (sec. 15). Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, must be determined by the House in which the question arises (sec. 47). Each House of the Parliament may make rules and orders with respect to—

(1.) The mode in which its powers, privileges, and immunities may be exercised and upheld:

(2.) The order and conduct of its business and proceedings either separately or jointly with the other House (sec. 50).

Sub-section xxxix. authorizes the Parliament to make laws relating to matters incidental to the execution of these powers, some of them being regulative and others being of a quasi-judicial character; making them fully operative and effective, and providing for their due enforcement by appropriate legal sanctions.

§ 230. "Powers Vested . . . in the Government."

This means power vested in the central executive deparment of the Commonwealth. The executive power of the Federal Government is vested in the Queen and is exercisable by the Governor-General as the Queen's representative; it extends to and includes the execution and maintenance of the Constitution, and of the laws of the Commonwealth. The Executive Government will, with reference to matters which pass to it by the Constitution, have all the powers and functions which, at the establishment of the Commonwealth, were with reference to such matters vested in the executive authorities of the colonies (sec. 70). Sub-section xxxix. authorizes the Parliament to pass any laws that may be necessary in order to develop, fortify, and give effect to these constitutional declarations.

§ 231. "Power Vested . . . in the Federal Judicature."

The judicial power of the Commonwealth is vested in a Federal High Court and in such other Courts as may be created (sec. 71). Sub-sec. xxxix. authorizes the Parliament to pass any law necessary for the execution and maintenance of the judicial power. No mention is made in the Constitution of the right of litigants, and other persons interested in proceedings in the Federal Courts, to appear and be heard by Counsel learned in the law; but the grant of ancillary power covered by this sub-section will enable the Parliament to legislate, or to authorize the High Court to make rules, respecting the legal profession, its qualifications, privileges, and obligations in relation to Federal Courts. It will also authorize the appointment of proper officers to preserve the records and enforce the judgments, decrees, orders, and sentences of the Federal Courts.

§ 232. "Power Vested . . . in any Department."

On the establishment of the Commonwealth the customs and excise department will be transferred to it, whilst other departments will be taken over on dates to be proclaimed. There is no section in the Constitution directly vesting power in any department; but the Parliament is empowered by sec. 52—ii. to make laws with respect to matters relating to any department of the public service, the control of which is transferred to the Executive Government of the Commonwealth. Sub-sec. xxxix. enlarges and reinforces the grant of power contained in sec. 52—ii.; so that when the Parliament legislates concerning transferred departments, there will be no doubt as to its ability to equip them with all the subsidiary powers necessary for their successful and efficient operation.

§ 233. "Power vested . . in any . . Officer."

Section 64 enables the Governor-General to appoint political officers to administer such departments of State as may be established. Here is a bare grant of power "to administer." Sub-section xxxix. comes to the aid of the grant and says that the Parliament may make laws incidental to it and necessary to enable Ministers of State to effectively perform their administrative duties. Similarly by sec. 68 the Command-in-Chief of the naval and military forces is vested in the Governor-General. Sub-sec. xxxix. will enable the Parliament to grant such powers to the Commander-in-Chief as will enable him to efficiently perform the duties of that high office.

Exclusive powers of the Parliament.

52. The Parliament shall, subject to this Constitution, have exclusive power[234] to make laws for the peace, order, and good government[235] of the Commonwealth with respect to—

(i.) The seat of government[236] of the Commonwealth, and all places acquired[237] by the Commonwealth for public purposes:

(ii.) Matters relating to any department[238] of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii.) Other matters[239] declared by this Constitution to be within the exclusive power of the Parliament.

UNITED STATES.—To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.—Const., Art. I., sec. 8, subs. 17.

HISTORICAL NOTE.—Clause 53 of the Commonwealth Bill of 1891 defined substantially the same powers in less concise words. It also contained the sub-clause dealing with the alien races within the Commonwealth, which now forms sub-sec. xxvi. of sec. 51. (Conv. Deb., Syd., 1891, 701-4.) At the Adelaide session the clause was adopted almost verbatim. (Conv. Deb., Adel., pp. 830-4.)

At the Melbourne session the sub-clause as to alien races was transferred to sec. 51. The clause was then verbally amended. (Conv. Deb., Melb., pp. 256-62.) Drafting amendments were made before the first report and after the fourth report.

§ 234. "Exclusive Power."

This section purports to confer on the Federal Parliament exclusive power to legislate concerning certain subjects. "Exclusive" in this section, as in the corresponding sections of the British North America Act, 1867, means the sole or exclusive right of the Federal Parliament, as opposed to the State Parliaments. (Per Hagarty, C.J., in Regina *v.* College of Physicians, 44 Upper Can. Q.B. 576.) If sec. 51 is designed to enumerate powers which, for a time, may be concurrently exercised by the Federal Parliament, whilst sec. 52 is supposed to specify powers exclusively vested in the Federal Parliament, then the classification intended has not been strictly observed in the allocation of subjects among these sections. There are several powers granted by sec. 51 which, on their face, could never have been exercised by any State Parliament and which are, *ex necessitate*, federal powers only, such as the powers to make laws in respect of "borrowing money on the public credit of the Commonwealth;" "the naval and military defence of the Commonwealth;" "fisheries in Australian waters beyond territorial limits;" "the service and execution throughout the Commonwealth of State process and judgments;" "the relations of the Commonwealth with the islands of the Pacific."

COMMENCEMENT OF EXCLUSIVENESS.—Questions may arise as to the time when the character of exclusiveness attaches to any particular subject of legislation. In the case

of the powers mentioned above as being necessarily exclusive in their nature, exclusiveness of course attaches from the moment when the federal power vests—that is, from the establishment of the Commonwealth. But the powers conferred by this section cannot all become exclusive immediately on the establishment of the Commonwealth. Power over the seat of government cannot be exercised at all—much less become exclusive—until its location has been determined by the Parliament; and similarly power over places acquired by the Commonwealth cannot be exercised—much less become exclusive—until such places have been acquired. The question of the time at which the several exclusive powers of the Parliament acquire the character of exclusiveness will be found discussed under the headings of those powers.

Effect on State Laws.—The gift to the Parliament of the exclusive power to make laws in respect of certain subjects withdraws from the State legislatures all power of making laws upon those subjects. From the moment when the exclusiveness attaches, the power of the State Parliaments to legislate is gone. The question then arises—how does this exclusiveness affect the laws of the States, in respect of those subjects, passed before the exclusive federal power attached? Do they continue in existence until superseded by federal legislation, or do they cease to have effect from the moment when the Parliament that passed them ceased to have power?

In the United States there was for many years much difference of opinion as to the nature of an exclusive power. Hamilton (Federalist, No. 32) thought that until Congress had acted in pursuance of an exclusive authority, the States could legislate on the subject. Chief Justice Marshall's opinion seems to have been that where Congress had exclusive power over any subject, the States could not pass laws dealing with that subject *as such*; but that State legislation upon a subject not exclusively delegated to Congress might incidentally affect the exclusive area, so long as it did not conflict with actual Federal legislation. (See Gibbons *v.* Ogden, 9 Wheat. at p. 204; Lewis, Federal Power over Commerce, p. 39.) Thus in Chief Justice Marshall's view, the federal power over inter-state commerce was exclusive; but this, though it prevented the States from legislating for the purpose of affecting such commerce, did not invalidate a State law which flowed from an acknowledged power of the State, but which incidentally affected commerce. "Commerce, as commerce, could not be regulated by the States if the power was exclusively in Congress; but, except in case of an actual conflict, commerce might in effect be regulated, or as we have chosen to call it, 'affected,' by a law passed by a State for the purpose of providing for the health or morals of her citizens." (Lewis, Fed. Power over Commerce, p. 42.) A third view of the exclusive power was that adopted by Mr. Justice Story, that—the commerce power being taken to be indivisible and exclusive—the States were not only unable to regulate commerce as commerce, but were unable, even in the exercise of their acknowledged police powers, to pass a law affecting commerce. (New York *v.* Miln, 11 Pet. p. 132.)

The third view of the nature of an exclusive power was that most generally accepted, and it appears to have been thought that it involved the conclusion that a gift of exclusive power to the Union would not only prevent State legislation for the future, but would sweep away State legislation existing at the time of the Union. In Cooley *v.* Port Wardens, 12 How. 299, this was apparently assumed by the court, though the point was not in issue. The assumption was that when the legislative power lapsed, laws already made in pursuance of that power lapsed also.

The Constitution of the Commonwealth, however, is explicit where the American Constitution was vague. The distinction between State powers and State laws is expressly drawn (secs. 107, 108), and it seems clear that while powers which are exclusively vested in the Federal Parliament are, from the moment of such vesting, taken away from the States, laws of the States existing at that moment continue in force "subject to the Constitution." That is to say, such laws, so far as they are not inconsistent with some provision of the Constitution itself, will continue in force until superseded by federal legislation. This is the view which was taken throughout the

Convention (see especially Conv. Deb., Melb., pp. 227-257), and it is emphasized in sec. 90; where, in addition to providing that on a certain event the power to impose customs and excise duties and to grant bounties shall become exclusive, it is thought necessary to declare expressly that on that event all State laws imposing such duties or offering bounties shall cease to have effect. In this section there is no such provision.

Care must, however, be taken to distinguish between powers which are exclusive from an express gift to the Federal Parliament of "exclusive power to make laws," and powers which are exclusive because any exercise of those powers by the States is expressly, or by necessary implication, prohibited. The provisions, for instance, that a State shall not raise or maintain any naval or military force, or impose a tax on property of the Commonwealth, or coin money, prohibit not only State legislation, but also State administration. A State will not be able, under cover of its existing law, to perform executive acts which infringe these prohibitions; and existing laws which purport to give the State such power will, for all practical purposes, cease to have effect. (See Notes to sec. 108.)

§ 235. "Peace, Order and Good Government."

It has been already noted in connection with sec. 51 that the words "for the peace, order, and good government of the Commonwealth" do not in any way expand, amplify, or contract the grant of power, nor will they give jurisdiction to the Federal Courts to enquire whether a particular law does, in their opinion, tend to promote peace, or order, or good government. (See Note, § 161, *supra*).

§ 236. "The Seat of Government."

Sub-section i. gives the Federal Parliament exclusive authority to make laws with respect to the regulation and control of the seat of Federal Government. The Parliament will not, however, be able to exercise this power until the seat of Government is vested in the Commonwealth under the provisions of section 125. By sec. 125 the seat of Government must be determined by the Parliament; it must be within territory which shall have been granted to or acquired by the Commonwealth; it must be vested in and belong to the Commonwealth; it must be in the State of New South Wales, and be distant not less than 100 miles from Sydney. Such territory must contain an area of not less than 100 square miles, and such portion thereof as consists of Crown lands must be granted to the Commonwealth without any payment therefor. Within this territory, the State out of which it has been carved will cease to have even local jurisdiction; the Parliament of the Commonwealth alone will have exclusive power to make laws for its municipal and general government. As to the question of the representation of this territory in the Federal Parliament, see Note, § 473, *infra*.

The corresponding provision in the Constitution of the United States (Art. I. sec. viii. sub-s. 17) empowers Congress "to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States."

Under this clause, Congress may constitute the District of Columbia a body corporate for municipal purposes, but can only authorize it to exercise municipal power. (Stoutenburgh *v.* Hennick, 129 U.S. 141. Baker, Annot. Const. p. 54.)

Within the District of Columbia, and the other places purchased and used for federal purposes, the national and municipal powers of government are united in the government of the Union. These are the only cases in which all the powers of government are so united. (Pollard *v.* Hagan, 3 How. 212. *Id.* p. 54.)

This power is conferred on Congress as the national legislature of the Union. In no other character can it be exercised. (Cohens *v.* Virginia, 6 Wheat. 424. *Id.* p. 55.)

This power includes the power to tax; hence Congress may levy a direct tax on the District of Columbia, in proportion to the census directed to be taken by the Constitution. (Loughborough *v.* Blake, 5 Wheat. 317. *Id.*)

Courts established by federal legislatiou for the District of Columbia may issue all processes necessary to carry their orders into effect, and such process may be executed within any State. (United States *v.* Williams, 4 Cranch, C.C. 393. *Id.*)

Under this power Congress may authorize the municipal authorities of the city of Washington to provide for paving the streets of the city and to levy assessments on abutting property to pay for the same. (Willard *v.* Presbury, 14 Wall. 676. *Id.*)

An inhabitant of the District of Columbia, who there has his permanent abode, is not a citizen of a State. (Cissel *v.* McDonald, 16 Blatch. 150. *Id.*)

The sovereign power of the District of Columbia is lodged in the government of the United States and not in the corporation of the District. But the District municipal corporation is a person, and subject to suit, as any other municipality, and cannot claim exemption from the provisions of a statute of limitations on the ground that it is a department of the government of the United States. (Metropolitan R.R. Co. *v.* District of Columbia, 132 U.S. 1. *Id* p. 56.)

"The principles laid down by the Supreme Court, that the exclusive legislative power involves exclusive jurisdiction, and that Congress is not the local legislature of the District, but possesses, as the national legislature, exclusive legislative power over it, have never been seriously assailed. The power of giving the city of Washington its own municipal government has therefore always been regarded as self-evident. On the contrary, the constitutionality of organizing the District into a territory, like the ordinary territories, has been disputed, because a partial delegation of the legislative power is inadmissible, on account of the expressly-stated exclusiveness of this power. It is, however, generally admitted that 'exclusive' does not mean the same as 'unlimited.' Congress cannot grant the inhabitants of the District any rights which, according to the general political nature of the Union, belong only to the population of the States—such, for instance, as representation in Congress, participation in the Presidential election, &c. And just as little can Congress rule the District without regard to the provisions of the so-called 'bill of rights.' But what Congress cannot do in regard to the District in matters not involving the rights of the States as such, that it also cannot do in reference to anybody or anything." (Von Holst's Constitutional Law of the United States, p. 173.)

"Congress has tried all sorts of experiments as to the local government of the District, some of them with very unfortunate results. At present there are three commissioners at the head of the administration of the District. The inhabitants cannot well grieve over the loss of their short-lived enjoyment of a limited autonomy, for while their rights have again become more limited (necessarily so under the present system), their interests are better cared for. They must bear the same burdens as the rest of the people, have the same taxes to pay, and are bound to serve in the militia. But in spite of their full citizenship, political rights are withheld from them solely because they have their domicile at the seat of government. This is an anomaly that has never been justified theoretically, and its necessity—not to say its expediency—has become at least doubtful since the power of the Federal Government has become so firmly established and so far beyond the power of each separate State. This anomaly, moreover, will always remain a thorn in the flesh of the American disciples of the doctrine of natural political rights. The creation of the District of Columbia is one of those steps which it is scarcely possible to retrace, even if the circumstances, which at one time made them seem wise, have given room to a completely changed state of things." (*Id.* 173-4.)

"When the grant of an express power to incorporate a bank was proposed [in the American Federal Convention] Gouverneur Morris opposed it, observing that it was extremely doubtful whether the Constitution they were framing could ever be passed at all by the people of America; that to give it its best chance, however, they should make it as palatable as possible and put nothing into it not very essential which might raise up enemies. (Jefferson's Ana. Works, 1st ed. vol. ix. p. 191.) So Gouverneur Morris opposed the inclusion of an express grant of power to establish a university, saying, 'It is not necessary. The exclusive power at the seat of Government will reach the object.'" (Madison Papers; Elliot's Debates, 2nd ed. vol. v. p. 544. Foster, Const. I. p. 42.)

237. "And all Places Acquired by the Commonwealth."

The right of eminent domain vested in the Commonwealth, under sec. 51—xxxi. and sec. 85, enables the Parliament to acquire private and provincial property, including land, for Federal purposes. Sec. 122 enables the Parliament to accept from a State or from the Queen, or otherwise acquire, territory to be governed as Federal domain. Property and territory so acquired may become "places acquired by the Commonwealth

for public purposes" under this sub-section, and hence places in which the Parliament has exclusive jurisdiction. Where a murder was committed within a fort, purchased by the United States from a State, it was held that the Federal Circuit Court had jurisdiction over the offence, notwithstanding a reservation by the State, in the act of cession, that the State should execute, within the fort, the civil and criminal processes issuing under State authority. (United States *v.* Cornell, 2 Mason, 91. Baker, Annot. Const. p. 55.)

§ 238. "Matters Relating to any Department."

The Federal Parliament has exclusive power to make laws with respect to "matters relating to any department" of the public service transferred to the Commonwealth.

A consideration of the expression, "matters relating to any department," suggests that it does not cover the whole field of legislation relating to the subject-matter appropriate to the department. The exclusive power to make laws "with respect to matters relating to the department" of quarantine does not cover the same area as the power to make laws "with respect to quarantine;" and so with the other departments. There may be laws relating to a subject of legislation, but not relating to the corresponding department of the public service. A department of the public service is a branch of the Executive Government, not a segment of the legislative power; and what this sub-section gives to the Federal Parliament is exclusive power to control executive departments, not exclusive power to occupy legislative areas.

Matters "relating to any department" would clearly include all matters relating to the organization, equipment, working, and management of the department, the appointment, classification, and dismissal of officers, and all the general body of law relating to its conduct and administration; it would cover all the machinery, procedure, and regulation, without which a public department would be impotent; but it does not seem to cover the whole of the principal and substantive law dealing with the matters controlled or controllable by the department. With respect to the whole of that field, of course, the Federal Parliament has "power to make laws" under sec 51, and it may, in the exercise of that power, occupy the whole field, and so exclude every particle of the concurrent jurisdiction of the States; but it is not by this section given "exclusive power" over the whole of that field.

Thus the gift of exclusive power to make laws with respect to matters relating to the departments transferred by sec. 69—such as those of posts, telegraphs, and telephones, light-houses, light-ships, beacons and buoys, and quarantine—does not entirely remove from the States the concurrent power to make laws with respect to "postal, telegraphic, telephonic, and other like services" (sec. 51—x.); "light-houses, light-ships, beacons, and buoys" (sec. 51—vii.); and "quarantine" (sec. 51—ix.). With respect to matters relating to the corresponding executive departments, the federal power is exclusive, but otherwise—so far as this section is concerned—concurrent legislative power of the States is not affected. As to the time when the federal control over "custom and excise" becomes exclusive, see sec. 90; as to "naval and military defence" see sec. 114; and as to "coinage" see sec. 115.

Apart, however, from the exclusiveness enforced by this section or flowing from the prohibitions contained in secs. 90, 114, and 115, the rule that the States may not pass laws inconsistent with the laws of the Commonwealth will, from the outset, give to the Federal Parliament, in connection with these departments, a large measure of exclusive power. Thus it would be inconsistent with the transfer of the postal department to the Commonwealth if a State were afterwards to establish a competing postal service, or authorize a corporation to do so. Nor will it be possible for a State after the transfer of departments to the Federal Government to issue legislative mandates to those departments. But though the States are excluded from the field occupied by the Federal Government, they are free to fill up nooks and crannies left unoccupied. It is easy to conceive of cases in which the States may make and execute laws auxiliary or supplementary to, and not inconsistent with, the laws administered by the transferred

departments. Thus the State Parliaments could clearly, if thought necessary, grant subsidies in aid of particular federal services; afford facilities for the carriage of federal mails, and authorize the Executive of the State to contract with the Federal Government for such carriage; buoy and light harbours and channels not buoyed or lighted by the Federal Government; and so forth. These are "laws with respect to" postal services, &c., but they are not laws with respect to matters relating to the departments transferred; and therefore they are—so far as they are not inconsistent with any federal law—within the legitimate concurrent power of the States.

The next question is, when does this exclusiveness, with regard to the transferred departments, arise? It would seem that the Federal Parliament is intended to have exclusive power over matters relating to transferred departments, as soon as they are "transferred." It may, however, be argued that the words "the control of which is by this Constitution transferred" are merely intended to identify the departments enumerated in sec. 69, and not to define the time at which the character of exclusiveness attaches; and that consequently, though the administration of the departments is not transferred till a later date, the power of legislation in respect of them is exclusively vested in the Federal Parliament from the establishment of the Commonwealth. As regards the departments of customs and excise, this question does not arise, because they become transferred to the Commonwealth on its establishment.

The extent of the exclusive power over the transferred departments, and the time at which the exclusiveness arises, having been discussed, the effect of the exclusiveness may be gathered from the preceding note ("Exclusive Power," § 234, *supra*). The State Parliaments will have no power, from the moment when the federal power becomes exclusive, to pass laws in respect of matters relating to the transferred departments. It does not follow, however, that those departments will be at once emancipated from the control of the laws of the States existing at that date. On the contrary, until those laws have been superseded by federal legislation, the departments transferred from each State will be conducted by the Federal Government in accordance with the existing laws of the State—laws which the State Parliament is thenceforth powerless to alter or repeal, but which may be superseded at any moment by federal legislation.

With respect to the officers and staff of the transferred departments, the power of the Federal Parliament to make laws in respect of matters relating to the departments is subject to an important limitation. By sec. 84 every officer of a transferred department, who is retained in the service of the Commonwealth, preserves all his existing and accruing rights; and of those rights he cannot be deprived, even by the Federal Parliament. (See Note, § 356, *infra*).

§ 239. "Other Matters."

The Federal Parliament has exclusive jurisdiction to deal with other matters declared by the Constitution to be within its exclusive power. The only other matters expressly declared by the Constitution to be within this exclusive power, are (1) those comprehended in sec. 90, which provides that on the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive; and (2) that contained in sec. 111, which provides that any part of a State surrendered by the Parliament of the State and accepted by the Commonwealth shall become subject to the exclusive jurisdiction of the Commonwealth. (See Notes, §§ 381, 452, *infra*.)

In addition to those matters "declared by this Constitution" to be exclusively vested in the Federal Parliament, there are others which, though not, *ex vi termini*, "declared" to be within its exclusive power, are by necessary implication and intendment withdrawn from the States and vested solely in the Federal Parliament. It is a rule of construction that there may be an exclusive delegation in three cases, (1) where the Constitution, in express words, grants an exclusive authority to the Union, (2) where it

grants in one instance an authority to the Union, and in another prohibits the States from exercising a like authority, and (3) where it grants an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. (Hamilton, in the Federalist, No. 32.) Thus by sec. 51—vi., the Federal Parliament has power to make laws with respect to the naval and military defence of the Commonwealth and of the several States, whilst by sec. 114 the States may not, without the consent of the Federal Parliament, raise or maintain any naval or military force; the combined operation of these two sections being to give the Federal Parliament exclusive authority with respect to naval and military matters. Again, by sec. 51—xii., the Federal Parliament has power to make laws with respect to currency, coinage, and legal tender, whilst by sec. 115 a State is forbidden to coin money or make anything but gold and silver coin a legal tender in payment of debts; the combined operation of these two sections being to give the Federal Parliament exclusive power with respect to coinage and with respect to legal tender in anything other than gold and silver coin.

Powers of the Houses in respect of legislation.

53. Proposed laws[240] appropriating revenue or moneys[241], or imposing taxation[242], shall not originate in the Senate[243]. But a proposed law shall not be taken[244] to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties[245], or for the demand or payment or appropriation of fees for licences[246], or fees for services[247] under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend[248] any proposed law so as to increase any proposed charge or burden on the people[249].

The Senate may at any stage return to the House of Representatives[250] any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power[251] with the House of Representatives in respect of all proposed laws.

United States.—All Bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other Bills.—Const. Art. 1 sec. vii. sub-s. 1.

Canada.—Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.—B.N.A. Act, 1867, sec. 53.

Historical Note.—In the Sydney Convention of 1891, the first debate on the power of the two Houses with regard to Money Bills took place on the discussion of Sir Henry Parkes' resolutions. The resolutions gave to the House of Representatives "the sole power of originating and amending all bills appropriating revenue or imposing taxation." The result of the debate was that the words "and amending" were omitted, in order to leave the question open; and the detailed decision of the question stood over. (Conv. Deb., Syd., 1891, pp. 375-463; *supra*, pp. 125-8.)

The Bill brought up by the Drafting Committee embodied the "compromise of 1891." The Senate was given equal power with the House of Representatives, except that (1) Appropriation Bills and Taxation Bills were to originate in the House of Representatives; (2) the Senate was forbidden to amend Taxation Bills and Bills appropriating the necessary supplies for the ordinary annual services of Government, or to amend any Bill so as to increase any proposed charge or burden on the people. But the Senate might suggest amendments in Bills which it might not amend. (Pp. 131-2, *supra*.)

In Committee, an amendment by Mr. Wrixon to restrict the sole power of originating Appropriation Bills to Bills "appropriating the necessary supplies for the ordinary annual services of the Government" was negatived. An amendment by Mr. Baker, to give the Senate equal power with the House of Representatives in respect of all bills, was negatived after a long debate by 22 votes to 16. An amendment by Mr. McMillan, giving the Senate power to amend a Taxation Bill once, but not a second time, was negatived, and an amendment by Mr. Wrixon, providing that suggestions by the Senate, if rejected by the House of Representatives, might be dealt with at a joint sitting, was also negatived. (Conv. Deb., Syd., 1891, pp. 704-64; *supra*, pp. 138-9.)

At the Adelaide session, the "compromise of 1891" was departed from by the Constitutional Committee, and the Bill as submitted to the Convention restricted the sole originating power of the House of Representatives to bills "having for their main object" the appropriation of revenue or the imposition of taxation; and contained no prohibition against the amendment of Money Bills by the Senate (p. 169, *supra*). In Committee of the whole, an amendment by Sir George Turner requiring that *all* Appropriation Bills should originate in the House of Representatives was negatived by 26 votes to 22. An amendment by Mr. Barton, to add "or moneys" after "revenue," so as to include loan bills, was carried. An amendment by Mr. Reid, to prevent the amendment of taxation bills by the Senate, was agreed to after a long debate by 25 votes to 23. (Conv. Deb., Adel., pp. 469-575, 608-11, 1199-1200; *supra*, pp. 172-3.)

At the Sydney session, a suggestion by both Houses of the New South Wales Parliament, to omit the words "having for their main object," was agreed to, and in its place a suggestion of the House of Assembly of Tasmania, to except bills which only incidentally involved appropriation, was adopted. A suggestion by the Legislative Council of Western Australia, to allow the Senate to amend Money Bills, was again defeated, after a long debate, by 28 votes to 19. (Conv. Deb., Syd., 1897, pp. 467-539; *supra*, p. 189.)

At the Melbourne session, Mr. Higgins moved, in the "suggestion" paragraph, to omit the words "at any stage" and substitute "once." This was negatived. Mr. Reid moved to omit the paragraph altogether, and this also was negatived. (Conv. Deb., Melb., pp. 1996-9.) Drafting amendments were made before the first report and after the fourth report. (*Id.* 2450.)

§ 240. "Proposed Laws."

In the Draft Bill of 1891 the opening words of this important section were "Laws appropriating." In the Bill, as recommended by the Constitutional Committee to the Adelaide Convention, 1897, the phrase was "proposed laws."

Now, the first question to be considered is the difference between "bills," "laws," and "proposed laws."

"A law" is a legislative measure which has been passed by both Houses of the Parliament, received the Royal assent, and is in actual operation. "A proposed law" is a bill or measure which is in course of progress through the legislature. "A bill" is a proposed law.

In the section under review, and its associated section 55, there is a clear-cut distinction between "laws" and "proposed laws," and this distinction may lead to important consequences in interpretation. The corresponding provisions in the Constitution of the United States make no such distinction, nor do those of the Canadian Constitution.

When the Federal Constitution directs that a proposed law shall be initiated, and passed, in a certain manner, that method of initiation or passage involves merely a question of order, regularity, or procedure, as between the two Houses of Parliament, *inter se*, or as between the Parliament and the Crown For example, under this section a proposed law, or in other words, a bill appropriating money or imposing taxation, "shall not" originate in the Senate. No prohibition could be couched in stronger terms. Suppose that a money bill violating this prohibition were introduced into the Senate. A point of order could be at once taken that it was not within the competence of the Senate to entertain it. It would be the duty of the President of the Senate to rule such a bill out of order. But suppose that the point of order were not taken, or if taken were not sustained by the President, and that the bill were passed by the Senate and transmitted to the House of Representatives. Here again, the point of order could, and no doubt would, be taken. It would in all probability be upheld by the Speaker. It is, however, conceivable that the bill might slip through, without the point of order being taken, or that the Speaker might decide that the bill did not come within the constitutional prohibition. Suppose that the bill has run the gauntlet of points of order and objections in both houses, and has at last received the royal assent and become law. Could its validity be then challenged in the High Court? According to the view of the Convention it appears that it could not. The expression, "proposed laws," would preclude the Courts from entering into the inquiry whether the law had originated in the proper Chamber. The question of order and procedure would only be open to debate in the Houses of Parliament, whilst it was in the proposal stage, and not after that stage was passed, and it had received the final sanction of the Crown, whereby it ceased to be a "proposed law" and became a "law." But it was thought that if the expression used in the Bill of 1891—"laws appropriating," &c.—had been reproduced, the Courts would have been able to examine the history and constitutionality of the law and ascertain whether it had been initiated in accordance with the mandatory requirements of the Constitution.

At the Adelaide sittings of the Convention an attempt was made to alter the draft of the section, as submitted by the Constitutional Committee, by striking out the word "proposed" and making the phrase read "laws appropriating." In support of this suggestion Mr. R. E. O'Connor said there was a very strong reason why we should have "laws" in this part of the Bill, to indicate that the law must comply with certain conditions, and that if it did not comply with those conditions it would be unconstitutional, and must be set aside. He thought it most essential that the powers of the two houses with respect to money bills should be made matters of constitutional objection, and not mere matters of order. To this it was replied that it would be a calamity if, after an appropriation bill or a tax bill had been passed by both Houses and assented to by the Crown, it could be impeached in the Law Courts for an irregularity not appearing on its face, and if its validity could be impugned for some informality in its inception. (Conv. Deb , Adel., p. 472.) It was not at the time perceived by the opponents of Mr. O'Connor's view that it was calculated to strengthen the originating power of the House of Representatives, by rendering open to legal attack any "law" initiated in the Senate and involving appropriation or taxation. But the argument prevailed, and Mr. O'Connor yielded to it, that all such matters should be treated as political questions

to be settled by the two Houses, and not open to examination in the Federal Courts. "The question whether a bill should be originated in the House of Representatives . . . was one not intended to come before the Courts afterwards, but to be settled by the Houses themselves." (Per Mr. E. Barton, Conv. Deb., Adel., p. 473.)

As already stated, the use of the expression "proposed laws" was, in the opinion of the Convention, sufficient to deprive the Federal Courts of power to examine such questions as the origination of Money Bills. A distinguished American jurist is, however, of opinion that the Supreme Court of the United States could examine and declare null and void a bill for raising revenue originating in the Senate. Art. 1, sec. vii. sub-s. 1, above quoted, requires that all bills for raising revenue shall originate in the House of Representatives; referring to which Dr. Burgess says:—

"The vesting of the power to originate tax levies exclusively in the more popular branch of the legislative department of the government is not a defence against the whole government, and therefore is not, strictly speaking, an immunity. Its advantage to the security of private property springs from the fact that the people, *i.e.*, the suffrage-holders, have a more direct influence over this branch of the government than any other, rather than from any restriction imposed by the Constitution upon the government as to the extent of its power of taxation. The real immunity is to be found in the negative side of this provision, viz., that the power of taxation shall not be exercised at all in any other way than as thus prescribed. The House of Representatives itself has not the power, either by separate resolution or by joining with the Senate and the President in a law to that effect, to permit the Senate, or any other branch of the government, to originate a bill for the raising of revenue; and I think it is at least a question whether, should the Senate or the President undertake to assume this power, and the House acquiesce in the usurpation, the individual may not defend himself in the Courts of the United States against the collection from him of any tax so levied, on the ground of its unconstitutionality. It does not seem to me that the judicial power could excuse itself from taking jurisdiction under the plea that this is a political question. As a general principle, the distribution of powers by the Constitution between the different departments of the government is a political question; but in this particular instance private property would be directly involved, and the United States Courts have never declined jurisdiction where private property was immediately affected, on the ground that the question was political." (Burgess Political Sc. i. pp., 196-7.)

A strong argument against the application of this dictum to the interpretation of the first paragraph of sec. 53 of the Constitution of the Commonwealth will be found in the conspicuous distinction drawn between the term "proposed laws" used in sections 53 and 54, and "laws" in sec. 55. The importance of the difference between "proposed laws" and "laws" will be found further illustrated in our notes to sec. 55.

§ 241. "Appropriating Revenue or Moneys."

An appropriation of revenue or moneys is the setting apart, assigning, or applying to a particular use or to a particular person a certain sum of money. It is an application of money already raised or an authority to spend money already available. Public revenue is generally paid into a consolidated fund. Into this fund flows every stream of the revenue, the proceeds of taxation, fees, penalties, and other sums of money received by the treasury on behalf of the Crown. From this fund proceed the supplies necessary for carrying on the various branches of the public service. (May's Parl. Prac. 10th ed. 558.) In addition to the consolidated fund there may be large sums of money raised on loan, called "loan money." Of this a separate account is kept as not coming under the heading of revenue. In this section, however, the words "revenue or money" are wide enough to cover loan money as well as revenue. This revenue or money can only be issued by virtue of a legal appropriation, that is by an Act of Parliament (sec. 83). The portion of the section now under review determines in which branch of the Federal Parliament proposed laws appropriating such revenue or money may be introduced.

"Statutory provision must be made by Parliament, during each financial year, to ensure that all the money therein raised for the service of the Crown be applied to a distinct use, either wholly or partly, within the current financial year; as the proceeds of taxation should not be reserved for accumulation, pending the decision of Parliament, or otherwise left without specific appropriation." (May's Parl. Prac. 10th ed. p. 557.)

The present form of the nominative part of the section should be carefully scanned and studied. As submitted to the Convention by the Constitutional Committee, the section commenced "proposed laws having for their main object the appropriation of any part of the public money or revenue," &c. An attempt by the representatives of the larger colonies to strike out those words and insert "proposed laws appropriating," was defeated by 26 votes to 24. (Conv. Deb., Adel., p. 479.) At the Sydney sitting of the Convention the Legislative Council and Legislative Assembly of New South Wales proposed to omit the words "having for their main object," with a view to insert "for." The Legislative Assembly of Victoria proposed to omit the words, "having for their main object the appropriation of," with a view to insert the word "appropriating," and the Legislative Assembly of Tasmania proposed to omit the word "main." Mr. G. H. Reid proposed an amendment for the omission of the words "having for their main object," with a view to the insertion of the word "appropriating." This was carried, on the understanding that the following addendum, recommended by the Legislative Assembly of Tasmania, should be added to the section: "But a proposed law which provides for the imposition and appropriation of fines or other pecuniary penalties, or for the demand and payment and appropriation of fees for licenses, or for services, and does not otherwise impose any tax or appropriate any part of the public revenue, may originate either in the House of Representatives or in the Senate." The section referring to the origination of Money Bills, as it now stands, omitting the word "for," which appears in the Constitutions of the United States and of Canada, gives the House of Representatives a larger grant of exclusive originating power than that possessed by the American House of Representatives or by the Canadian House of Commons. At the same time, several important and useful exceptions to the rigid rule of exclusive financial origination are clearly expressed in the latter part of the paragraph.

Extent of Appropriating Power.—The power of the Federal Parliament to appropriate and authorize the expenditure of revenue or money, is not, by this section, restricted to any particular or general purpose. No doubt the appropriating and spending power is intended to be confined to the purposes in respect of which the Parliament can make laws. Such a limitation, however, is not expressed; if it exists at all it is implied. If such be the case could the High Court restrain the appropriation and expenditure of Federal money for a purpose not within the powers of the Parliament? Some light may be thrown on the point by the cases of United States *v.* Realty Co., and United States *v.* Gay (163 U.S. 427). In these cases it was held, per Peckham, J., that it was within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honourable obligations, and upon principles of right and justice; and that having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decisions can rarely, if ever, be the subject of review by the judicial branch of the Government.

§ 242. "Or Imposing Taxation."

Proposed laws imposing taxation are essentially different from proposed laws appropriating revenue. By one law money is raised and by the other law money already raised is made available for expenditure.

"The action taken by the House of Commons, upon the demand of aid and supply for the public service, made by the speech from the throne, is the appointment, pursuant to standing order No. 54, of those committees of the whole House, which are known as the Committee of supply and the Committee of ways and means. . . . The Committee of ways and means provides the public income raised by the imposition of annual taxation." (May's Parl. Prac. 10th ed. pp. 554-555.)

"Proposed laws . . imposing taxation" are intended to legalize charges or burdens on the people; as for instance bills imposing customs and excise duties; bills imposing stamp duties; bills imposing succession duties; bills imposing taxes on property. Now, the provision, "proposed laws . . imposing taxation shall not originate in the Senate," limits the authority of one of the Federal Chambers and confers a monopoly of originating power on the other; therefore it will be strictly construed.

§ 243. "Shall Not Originate in the Senate."

The provision, that appropriation and tax bills shall not originate in the Senate, necessarily confers the monopoly of financial origination on the House of Representatives. This part of the section crystallizes into a statutory form what has been the practice under the British Constitution for over two hundred and twenty years. On 3rd June, 1678, the House of Commons resolved—That all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords (May's Parl. Prac. 10th ed. 542.) By usage based on the foregoing resolution, the House of Lords has been excluded from the power of initiating bills dealing with public expenditure and revenue, and also from initiating public bills which would create a charge upon the people by the imposition of local and other rates, or which deal with the administration or employment of those charges. Bills which thus infringe the privileges of the Commons, when received from the Lords, are either laid aside or postponed for six months. (May's Parl. Prac. 10th ed. 542.) This exclusive power of initiating money Bills is one of the most valued privileges of the House of Commons, and one of its vital sources of constitutional strength and supremacy.

§ 244. "But a Proposed Law Shall Not be Taken."

This part of the section embraces a compromise, with reference to the originating power, which was recommended by the Legislative Assembly of Tasmania. The Tasmanian amendment, drafted by the Hon. Inglis Clark, Attorney-General of that colony (now Mr. Justice Clark), was founded on the practice recognized by the House of Commons, and thus explained by May:—

"The claim to exclusive legislation over charges imposed upon the people was formerly extended by the Commons to the imposition of fees and pecuniary penalties, and to provisions which touched the mode of suing for fees and penalties, and to their application when recovered; and they denied to the Lords the power of dealing with these matters. The rigid enforcement of this claim proved inconvenient; and in 1849, the Commons adopted a standing order, based on a resolution passed in 1831, which gave the Lords power to deal, by bill or amendment, with pecuniary penalties, forfeitures, or fees, when the object of their legislation was to secure the execution of an Act; provided that the fees were not payable into the exchequer, or in aid of the public revenue; and when the bill shall be a private bill for a local or personal act. And the Commons also agreed to another standing order, whereby they surrendered their privileges so far as they affected private and provisional order bills sent down from the House of Lords, which refer to tolls and charges for services performed, not being in the nature of a tax, or which refer to rates assessed and levied by local authorities for local purposes. The practical result of these standing orders is a waiver by the Commons of their privileges with respect to pecuniary penalties in public and in private bills. Fees imposed in a public bill can only be dealt with by the Lords provided they are not paid into the exchequer; whilst it is competent for the Lords by a private bill to impose fees and tolls for rendered services, and to authorize the levy of rates to be assessed and levied by local authorities for local purposes." (May's Parl. Prac. 10th ed., p. 547.)

"I am quite prepared to go in the direction indicated by the amendment of Mr. Inglis Clark, which not only makes things a good deal more definite, but is a step beyond the Bill of 1891, by way of making the legislative machinery work more smoothly, and securing to the Senate that degree of individuality in matters of this kind, of which it would be a scandal to deprive them through some matter of construction." (Mr. E. Barton, Conv. Deb., Syd., 1897, p. 474.)

§ 245. "Fines or other Pecuniary Penalties."

This represents the first of the group of minor financial matters which are excepted from the prohibition against the senatorial initiation of appropriations and taxes. By this proviso the Senate may originate Bills containing, *inter alia*, clauses authorizing the

imposition or appropriation of fines or other pecuniary penalties, when the object of those fines or penalties is to secure the execution of the proposed law. Such fines and penalties are exempted from the prohibition, and the proposal to so exempt them was not objected to by any member of the Convention.

§ 246. "Fees for Licences."

Bills containing provision for the demand or payment or appropriation of fees for licences, under the proposed law, may originate in the Senate. Under this exemption from the prohibition, a Bill dealing with such a subject as fisheries beyond territorial waters, and imposing or appropriating fees for licences to fish in such waters, could be introduced in the Senate. A Bill dealing with mining in Federal territories (in which the Federal Parliament will have exclusive jurisdiction to make all laws) and authorizing the issue of licences to mine upon payment of fees, could be introduced into the Senate. A Bill relating to navigation, requiring the owners of ferry boats to take out licences and pay fees, could be brought into the Senate. In the Convention objection was taken to this exemption from the prohibition, as tending to whittle away the originating financial power intended for the House of Representatives. (Mr. J. H. Carruthers, Conv. Deb., Syd., 1897, p. 478.)

§ 247. "Fees for Services."

Bills containing provision for the demand or payment or appropriation of fees for services rendered under a proposed law, could originate in the Senate. In practice some difficulty may at first be experienced in determining the limits of this exemption. Some members of the Convention, who objected to it, were inclined to magnify its importance. It was said it was wide enough to cover Bills introduced for the purpose of regulating the rates of postage, charges for telegrams, harbour dues, light dues, pilotage, wharfage rates, &c., all of which were fees for services rendered.

§ 248. "The Senate may not Amend."

The second paragraph of sec. 53 takes from the Senate absolutely the power to amend tax bills and annual appropriation bills, whilst the third paragraph restricts its power to amend other appropriation bills. The financial disabilities of the Senate may be thus classified and reviewed *seriatim* :—

(1.) The Senate cannot amend proposed laws imposing taxation :

(2.) The Senate cannot amend the ordinary annual appropriation bill :

(3.) The Senate cannot amend any bill so as to increase proposed charges or burdens on the people.

Proposed Laws Imposing Taxation.—We have had occasion, in our notes on the first paragraph of this section, to discuss the requirement that a proposed law imposing taxation shall not originate in the Senate. It is manifest that a "proposed law" is a bill, in course of passing through Parliament. The next point to consider is the meaning of the expression, "imposing taxation." May a bill providing for the raising of taxation contain auxiliary provision for the enforcement and collection of the tax? Mr. Barton expressed the view that, as a tax could not be collected without subsidiary provisions, a bill imposing taxation could embody, not merely the bare imposition of the charge, but all the machinery clauses, referring to matter, manner, measure, and enforcement, essential to make the law effectual and completely operative. This opinion is supported by the following passage in Cooley's Principles of Constitutional Law, p. 64 :—"The power to tax includes the power to make use of all customary and usual means to enforce payment. But legislation must prescribe these means and give full directions for their employment, and it is essential to the validity of the proceedings that a statute in all essential particulars shall be followed." The authorities cited in support of this proposition are Stead *v.* Course, 4 Cranch, 403 ; Williams *v.* Peyton, 4 Wheat. 77 ; Parker *v.* Overman, 18 How. 137.

The question of construction involved is one of substance, seeing that if a law imposing taxation can include all the details and incidental matters necessary to constitute a complete and workable scheme to raise revenue, those details and matters are then placed beyond the power of the Senate to amend. It would seem that this practice is recognized in the United Kingdom. According to May, the Lords may not amend bills which they receive from the Commons dealing with aids and supplies, so as to alter, whether by increase or reduction, the amount of a rate or charge—its duration, mode of assessment, levy, collection, appropriation, or management; or the persons who pay, receive, manage, or control it; or the limits within which it is leviable. (May's Parl. Prac. 10th ed. p. 542.) It is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords. (*Id.*)

Laws not Deemed to Impose Taxation.—By the first paragraph of sec. 53, a proposed law is not to be taken to impose taxation by reason only of its containing provisions for the imposition of fines or other pecuniary penalties or for the demand or payment of fees for licences, or fees for services under the proposed laws.

Ordinary Annual Appropriation Bills.—The Senate is precluded from amending proposed laws appropriating revenue or money for the ordinary annual services of the Government. Public expenditure may be divided into and considered under three separate headings:—

(1.) The costs and expenses of maintaining the ordinary annual services;
(2.) Fixed charges on permanent appropriations:
(3.) Extraordinary charges and appropriations.

(1.) *Ordinary Annual Expenses.*—The ordinary annual services include the various public departments manned and equipped to carry on the general work of the Government departments, such as customs and excise, posts and telegraphs, light-houses, light-ships, and quarantine, naval and military defence, the money to pay for which is voted by Parliament from year to year. At the beginning of each session a message from the Crown, especially addressed to the House having the initiation of money bills, demands the annual grant of aids and supplies for the services of the year, intimating that the estimates will, in due course, be laid before the House, specifying the amount required with full particulars and items of expenditure. During the session, estimates are laid before the House, showing all the details of expenditure, for which provision is required. The Crown is responsible for the preparation of these estimates, which are presented through its Ministers.

"The ordinary sessional estimates are presented in three parts or divisions, comprising the three branches of the public services—the army, the navy, and civil services; and each estimate contains first a statement of the total grant thereby demanded, and then a statement of the detailed expenditure thereof, divided into sub-heads and items. These estimates should embody the total amount of the expenditure which is required for each financial year; and accordingly, by way of example, when an increase over the demands made by the annual estimates for the army and navy was requisite, revised or additional estimates were presented, specifying the amounts ultimately found necessary for those services." May's Parl. Prac. 10th ed. p. 517.)

"Besides the ordinary sessional estimates for the service of the current year, to meet the requirements of the Executive Government, estimates for grants on account, for supplementary grants, and for excess grants, are presented each session, and occasionally an application is made for a vote of credit to cover extraordinary naval or military charges, or for such other object of exceptional expenditure as may have arisen during the session." (*Id.*)

"Owing to our financial system, and the conditions of Parliamentary business, the presentation of estimates for grants in advance upon the estimated departmental expenditure of the year, before a complete sanction has been given to that expenditure, is an annual necessity. These grants are known as "votes on account." (*Id.* 518.)

"According to established usage, demands for grants on account are restricted to such services as have received the sanction of Parliament, though an exception is

occasionally made to this rule in favour of trifling, or non-contentious new services." (*Id.* 519.)

"Until a grant of supply has been appropriated by statute to the service and object for which the grant is destined, the treasury, unless otherwise authorized, is not capable of making an issue of the sum so granted from the Consolidated Fund. The introduction of the appropriation Bill cannot, however, take place until all the grants have been voted for the service of the current year—a process usually ranging over the period of six months. A more prompt issue must therefore be made of the money granted from time to time for the current service of the Crown. Accordingly, from time to time bills are passed during each session, known as the Consolidated Fund Bills, which empower the treasury to issue out of the Consolidated Fund, for the service of the departments for whose use the grants are voted, such sums as they may require, in anticipation of the statutory sanction conferred by the Appropriation Act." (*Id.* 526.)

(2) *Permanent Appropriations.*—The fixed charges are those items of the national expenditure which are provided for by permanent appropriations. In the Government of the Commonwealth these permanent appropriations may be made, partly by the Constitution, and partly by Acts of the Federal Parliament. The constitutional appropriations already made are the salary of the Governor-General (sec. 3); allowances to members of the Federal Parliament (sec. 48); and salaries of the Queen's Ministers of State (sec. 66). There is no constitutional limit to the authority of the Federal Parliament to make permanent appropriations. It seems, however, to be assumed that the money necessary to pay for the ordinary annual services of the Government will be voted from year to year. Certain charges which customarily belong to and are included in the annual Appropriation Act could, no doubt, be removed from that Act and placed in special Appropriation Acts. The costs and expenses of the defence department could be made the subject of special appropriation. The policy of special appropriation, in matters which legitimately belong to the ordinary annual services, is justly regarded with disfavour. The Constitution of the United States (Art 1, sec. 8, subs. 12) provides that no appropriation of money for military purposes shall be for a longer term than two years. There is no such limitation in the appropriating power of the Federal Parliament, but it is not likely that the policy of special appropriations will be largely favoured, because it removes expenditure from the annual supervision and control of Parliament.

(3.) *Extraordinary Expenses.*—Extraordinary charges, which do not come within the meaning of ordinary annual services, are appropriations of revenue or loan money for the construction of public works and buildings, and for the application of revenue or loan money to public purposes of a special character. As examples of these exceptional grants May mentions the following:—Cost of an Imperial undertaking which forms no part of the current services of the year, such as the £20,000,000 granted to facilitate the abolition of slavery in the British Colonies; loans to foreign countries, and to Ireland; or the grant for the purchase of the Suez Canal shares. Demands also for pecuniary aid are made by a message from the Sovereign, bearing the sign-manual; the object of the messages being usually to obtain a grant for the maintenance of the dignity and well-being of the Crown, or for the reward of men who have rendered distinguished service to the Empire. (May's Parl. Prac. 10th ed. p. 524.)

From the above enumeration and discussion of the various kinds of appropriations it will be seen that the Senate is denied the power to amend only one of the three kinds of bills appropriating revenue or money. It is true that annual appropriation bills constitute by far the largest and most important of all appropriation bills, embracing, as they do, the expenditure necessary for the maintenance of the ordinary administrative departments of the Commonwealth. Whilst the Senate, however, could not amend an ordinary annual appropriation bill, it could with unquestionable constitutionality amend a public works bill, a railway construction bill, a harbour improvement bill, a bill relating to the salary of the Governor-General, a bill relating to the salaries of ministers of state, a bill relating to the allowances of the members of the Federal Parliament, a bill appropriating fines or other pecuniary penalties, a bill for appropriating fees for licences or fees for services under a proposed law. This power of amending appropriations must be read in conjunction with the limitation prescribed by paragraph iii. of the section.

§ 249. "Increase Any Charge or Burden on the People."

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. This provision may be described as a limitation on the reserved power of the Senate to amend money bills, other than tax bills and annual appropriation bills. Seeing that the Senate cannot amend a bill imposing taxation, it may be naturally asked—how can the Senate possibly amend a proposed law so as to increase any proposed charge or burden on the people? The answer is that the Senate is only forbidden to amend tax bills and the annual appropriation bill; it may amend two kinds of expenditure bills, viz.: those for permanent and extraordinary appropriations. If the Senate could propose an increase in the amount of money to be spent in a public work bill—say from one million sterling to two millions sterling—that amendment would necessitate increased taxation in order to give effect to it, and consequently an addition to the burdens and charges on the people. The Senate may amend such money bills so as to reduce the total amount of expenditure or to change the method, object, and destination of the expenditure, but not to increase the total expenditure originated in the House of Representatives.

§ 250. "The Senate may . . Return to the House."

Suggestion of Amendments.—The money bills which the Senate cannot amend are bills imposing taxation and bills appropriating money for ordinary annual services. Bills of this description cannot be amended by the Senate, but it may, at any stage, return them to the House of Representatives with a message, requesting the omission or amendment of any item or provision. Under this law the Senate could suggest amendments in the ordinary annual appropriation bills, and in tax bills, such as a bill to impose duties of customs and excise. If the suggestions thus made were not entertained by the House, the Senate would have to pass or reject those bills, as sent from the House, so that the responsibility of final acceptance or rejection would remain with the Senate as if no suggestion had been made. A fierce controversy has taken place with reference to the power conferred on the Senate to suggest modifications in bills which it cannot amend. The argument has been thus summed up by Sir Samuel Griffith: "Whether the mode in which the Senate should express its desire for an alteration in Money Bills is by an amendment, in which they request the concurrence of the House of Representatives, as in other cases, or by a suggestion that the desired amendment should be made by the latter House, as of its own motion, seems to be a matter of minor importance. A strong Senate will compel attention to its suggestions; a weak one would not insist on its amendments." (Notes on the Draft Federal Constitution, 1897, p. 9.)

There does, however, seem to be a substantial constitutional difference between the power of suggestion and the power of amendment, as regards the responsibility of the two Houses. A short analysis will make this clear. In the case of a bill which the Senate may amend, the Senate equally with the House of Representatives is responsible for the detail. It incorporates its amendments in the bill, passes the bill *as amended*, and returns it to the House of Representatives. If that House does not agree to the amendments, the Senate can "insist on its amendments," and thus force the House of Representatives to take the responsibility of accepting the amendments or of sacrificing the bill; whilst the House of Representatives cannot force the Senate to take a direct vote on the bill in its original form.

On the other hand, in the case of a bill which the Senate may not amend, the House of Representatives alone is responsible for the form of the measure; the Senate cannot strike out or alter a word of it, but can only suggest that the House of Representatives should do so. If that House declines to make the suggested amendment, the Senate is face to face with the responsibility of either passing the bill as it stands or rejecting it as it stands. It cannot shelve that responsibility by insisting on its suggestion, because

there is nothing on which to insist. A House which can make an amendment can insist on the amendment which it has made ; but a House which can only "request" the other House to make amendments cannot insist upon anything. If its request is not complied with, it can reject the bill, or shelve it ; but it must take the full responsibility of its action. This provision therefore is intended to declare the constitutional principles (1) that the House of Representatives is solely responsible for the form of the money bills to which the section relates ; (2) that the Senate may request alterations in any such bill ; (3) that if such request is not complied with, the Senate must take the full responsibility of accepting or rejecting the bill as it stands.

Origin of the Provision.—The origin of the plan permitting the Senate to suggest to the House of Representatives by message the addition or amendment of any items or provisions in proposed laws which it may not amend, is found in the practice of the South Australian Parliament. In 1857 a dispute arose between the Legislative Council and the House of Assembly of that province as to the true meaning and interpretation of the Constitution Act of 1856. The Assembly passed a bill to repeal a tax on the tonnage of shipping and to substitute a wharfage rate. The Council amended the bill. This was resisted by the Assembly, which declared it to be a breach of privilege. A protracted controversy took place between the two Houses, resulting, however, in a compromise. On 23rd August, 1857, the Council passed the following resolutions :—

"(3.) That this Council further declares its opinion that all Bills, the object of which is to raise money, whether by way of loan or otherwise, or to warrant the expenditure of any portion of the same, shall be held to be Money Bills."

"(4.) That it shall be competent for this Council to suggest any alteration in any such Bill (except that portion of the Appropriation Bill that provides for the ordinary annual expenses of the Government), and in case of such suggestions not being agreed to by the House of Assembly, such Bills may be returned by the House of Assembly to this Council for reconsideration, in which case the Bill shall either be assented to or rejected by this Council as originally passed by the House of Assembly."

"(5.) That this Council, whilst claiming the full right to deal with the monetary affairs of the province, does not consider it desirable to enforce its right to deal with the details of the ordinary annual expenses of the Government. That on the Appropriation Bill in the usual form being submitted to this Council. this Council shall, if any clause therein appear objectionable, demand a conference with the House of Assembly to state the objections of this Council and receive information."

On the 17th November, 1857, the House of Assembly passed the following resolution :—

"That, in order to facilitate the conduct of public business, this House of Assembly, whilst asserting its sole right to direct, limit, and appoint, in all Money Bills, the ends, purposes, considerations. conditions, limitations, and qualifications of the tax or appropriation by such Bill imposed, altered, repealed, or directed, free from all change or alteration on the part of any other House, will nevertheless for the present adopt the third, fourth, and fifth resolutions, as agreed to by the Legislative Council on the 23rd August, 1857, and forwarded to this House by message on that day."

This *modus vivendi* or compact is fully explained, and its constitutional aspects are learnedly discussed by Sir Richard C. Baker, in an able paper presented by him to the Federal Convention in Adelaide on 8th February, 1898. (See Votes and Proceedings Federal Convention, Melbourne, 250.) The same practice has been adopted by the two Houses of the West Australian Parliament. As to the manner in which the compact has worked, in the colonies whose Parliaments adopted it, the following extracts from speeches delivered in the Federal Convention of 1891 will bear testimony :—

"I would say that, considering the compromise which was arrived at was the compromise which was arrived at in South Australia over twenty years ago, between the Legislative Council of that colony and the House of Assembly, and that that compromise has worked so exceedingly well for that period, we, in making the compromise contained in this bill, have not departed from any powers we possess ; that is, we have not gone outside the colonies to adopt a mode by which we may get over the difficulties of co-ordinate powers between the two Houses. We have, however, adopted a system which has been in operation in one of the colonies for many years, with very happy results. Therefore, we have just as much right to say that by adopting the South Australian

compromise which has worked so well for so many years we have adopted a compromise which will work well for the Commonwealth of the future, as we have to say that if we had adopted the American system, which I contend exists under different conditions and apart from responsible government, it also would have worked well." (Mr. Thos. Playford, Conv. Deb., Syd., 1891, p 922.)

"Sir, something of this kind has been and is in operation in at least two colonies in the group. The hon. member, Mr. M'Millan, seemed to think that the arrangement by which an amendment in a money bill could be communicated by message to the lower house, though nominally in force in South Australia, was not operative. All I can say is, that in the first assembling of our two houses in Western Australia, when this very question came up, we carefully studied matters in South Australia, and we were convinced, from the frequent, the effective, and the conciliatory application of the system that it was a course of procedure that deserved consideration. The result was that in the very first question that arose between our two houses we adopted the South Australian mode of procedure, and in consequence an amendment of a highly desirable character was made in legislation relating to finance. Therefore, I look upon the practice as the established practice of Western Australia as well as of South Australia. This power, so far from being degrading, is really a power which is lodged in another branch of Parliament. I refer to the Governor representing the Queen. Under most of our Constitutions, he can communicate—I do not say as to money bills, but as to other legislation—by message any amendment he thinks it desirable to make in a Bill after it has passed both houses. And the same procedure would be adopted as to dealings between the Senate and the House of Representatives in regard to financial legislation." (Mr. J. W. Hackett. *Id.* p. 741.)

§ 251.* "The Senate shall have Equal Power."

Subject to the exceptions of (1) its inability to originate Bills appropriating revenue or money, or imposing taxation, (2) its inability to amend Bills imposing taxation, and (3) its inability to amend an annual appropriation Bill, and subject also to the limitation that in amending other appropriations, it cannot increase the charges or burdens on the people, it is declared by the Constitution that the Senate shall have equal powers with the House of Representatives in respect to all proposed laws. The Senate has co-ordinate power with the House of Representatives to pass all Bills or to reject all Bills. Its right of veto is as unqualified as its right of assent. But though the veto power of the Senate, so far as this section is concerned, may be absolute, it is subject to be reviewed by the procedure provided for in the deadlock clause. (Sec. 57.)

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services[252] of the Government shall deal only with such appropriation.

HISTORICAL NOTE.—The provision in the Commonwealth Bill of 1891 was: "The expenditure for services other than the ordinary annual services of the Government shall not be authorized by the same law as that which appropriates the supplies for such ordinary annual services, but shall be authorized by a separate law or laws."

At the Adelaide session, in 1897, the same words were adopted. In Committee, Mr. Holder moved an amendment to provide that the ordinary Appropriation Bill should not include expenditure "for any services which the Senate may, by an address to the Governor-General, declare to be inimical to the interests of any State." It was pointed out that this would give the Senate a power to amend Appropriation Bills, and the amendment was negatived by 21 votes to 11. Mr. Glynn moved an amendment to prevent general legislation being included in an Appropriation Bill; but this was negatived. (Conv. Deb., Adel., pp. 603-8.)

At the Sydney session, a new sub-clause suggested by both Houses of the Tasmanian Parliament was considered, that "The law which appropriates the supplies for the

ordinary annual services of the Government shall deal only with the appropriation of such supplies." Mr. Wise pointed out the importance of the provision, and it was agreed to. (Conv. Deb., Syd., 1897, pp. 539-40.)

At the Melbourne session amendments were made before the first report, and the original provision was struck out as being included in the new provision. After the second report, Mr. Isaacs moved the insertion of "proposed" before "law," and this was carried by 23 votes to 15. (Conv. Deb., Melb., pp. 2075-6.) Various amendments were then suggested to make it clear that a law should not be invalid for breach of this requirement; but on the understanding that the Drafting Committee would consider the question, these were withdrawn. (*Id.* pp. 2076-85.)

§ 252. "The Ordinary Annual Services."

Tacking.—The Senate is forbidden, by sec. 53, to amend a proposed law appropriating revenue or money for the ordinary annual services of the Government. This section is intended to prohibit any attempt on the part of the House of Representatives to embody in the annual appropriation bill provisions irrelevant and foreign thereto—a course which would prejudice the right of the Senate to amend or reject such provisions. In former years the House of Commons abused its right to grant supplies by "tacking" to Supply Bills provisions alien to supply, in order to bring such provisions within the rule of exemption from amendment by the House of Lords. This was an invasion of the undoubted privileges of the Lords. On 9th Dec., 1702, the Lords made a determined stand against this practice by passing Standing Order No. 59, as follows:—

"That the annexing any clause or clauses to a bill of aid or supply, the matter of which is foreign to, and different from, the matter of the said bills of aid or supply, is unparliamentary, and tends to the destruction of the Constitution of the Government."

Sec. 54 merely expresses in a statutory form what has been the recognized constitutional rule for nearly two hundred years.

Proposed Law.—It will be noticed that the phrase "proposed laws" is used in sec. 54, in the same sense as in sec. 53. Should a matter not properly appertaining to the ordinary annual services of the Government appear in an annual Appropriation Act, it will not be a ground for attack on its constitutionality. The objection must be taken in the Senate before that chamber gives its assent to the proposed law. After the proposed law has been passed by both Houses, and has been assented to by the Crown, it becomes an Act, and it cannot then be impeached in the Federal Courts for any breach of sec. 54 which may happen to appear on its face.

Tax Bills.

55. Laws imposing taxation[253] shall deal only with the imposition of taxation[254], and any provision therein dealing with any other matter shall be of no effect[255].

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Historical Note.—In the Commonwealth Bill of 1891, clause 55 provided (sub-clauses 2 and 3) that "Laws imposing taxation shall deal with the imposition of taxation only," and that "Laws imposing taxation, except laws imposing duties of customs on imports, shall deal with one subject of taxation only."

At the Adelaide session, in 1897, these provisions were adopted in the first draft. In Committee, Mr. Reid moved to insert "proposed" before "laws," in order to prevent the clause from affecting the validity of a law when passed. A discussion followed on the expediency of some such amendment, it being argued on the one side that the matter was merely one between the Houses, and on the other that it involved an important principle of State-rights which should have the protection of the High Court. Finally the amendment was withdrawn. Sub-clause (3) was then amended to read:— "Laws imposing taxation, except laws imposing duties of customs on imports or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only. (Conv. Deb., Adel., pp. 578-603.)

At the Melbourne session, drafting amendments were made before the first report; and after the second report Mr. Isaacs again moved the insertion of "proposed" before laws; but after a long debate this was negatived by 27 votes to 17. Mr. Barton moved to insert "and collection" after imposition, but this also was negatived by 26 votes to 16. An amendment by Mr. Deakin to enable customs and excise duties to be imposed in the same bill was negatived by 20 votes to 19. (Conv. Deb., Melb., pp. 1999-2075.) Mr. Reid moved an amendment to the effect that the prohibition of the section should not invalidate in a law any part thereof which did not infringe the prohibition; and that if a tax bill contained more than one subject of taxation, the tax first in order of enactment should be valid. This was negatived by 27 votes to 15. After the third report, Mr. Reid moved to add, to the first paragraph, "and any provisions therein which do not deal with the imposition of taxation shall be of no effect." This was agreed to. Drafting amendments were made after the fourth report. (Conv. Deb., Melb., pp. 2450-1.)

§ 253. "Laws Imposing Taxation."

As section 54 prohibits the "tacking" of extraneous matters to appropriation bills, so this section prohibits the tacking of extraneous matters to "laws imposing taxation." The difference between "proposed laws" and "laws" (see Note, § 240, *supra*) becomes clear, when we compare the two sections. If the words of this section had been "proposed laws imposing taxation shall deal only with the imposition of taxation," compliance with the direction would have been required merely as a matter of order between the two Houses; and violation of the direction would not have invalidated the law, when finally passed. In this section, however, the word "proposed" is deliberately omitted; the mandate is that "laws" imposing taxation shall deal only with taxation. If it had stopped there, absolute nullity would have been the penalty of the whole of an Act purporting to impose taxation and dealing with any other matter. This was the form of the section as settled by the Adelaide Convention. The remainder of the paragraph, "and any provision therein dealing with any other matter shall be of no effect," was added, under circumstances hereafter to be mentioned, at the final session of the Convention in Melbourne.

The principle of this limitation in favour of the Senate forms part of one of the compromises of the Constitution, in consideration of which the House of Representatives was endowed with the exclusive power to originate Money Bills, and the Senate was deprived of the power to amend bills imposing taxation and appropriating revenue or money for the ordinary annual services of the Government. The compromise itself was not strongly objected to in the Convention. What was objected to was the form of the limitation and the penalty of the absolute nullity of every law which violated the limitation. If the word "bills" or the phrase "proposed laws" had been used in place of "law," the section would have been accepted without demur, as a part of the compromise. The whole of the debates on the section, which began in Adelaide and ended in Melbourne, rallied around the question whether the section should read "laws imposing taxation," or "proposed laws imposing taxation." In the Adelaide Convention

an effort was made by Mr. Isaacs, Mr. Kingston, and Mr. Reid, to omit the word "laws" and insert the word "bills," or alternatively to insert the word "proposed" before "laws." Such an alteration would, as we have already seen, leave to the Senate the responsibility of enforcing the provision in its favour, by laying aside bills which violated the Constitutional prohibition ; it would not have permitted Acts of the Federal legislature to be reviewed by the Federal Courts, and declared void, on mere questions of form and order. It was pointed out that as the section was intended for the benefit of the Senate, that chamber should be allowed, if it thought fit, to waive the privilege without endangering the validity of the law ; it would be disastrous if, after a bill imposing taxation had been passed by both Houses and received the Royal assent, and after, perhaps, it had been brought into operation and revenue collected thereunder, it could be assailed in a court of law. Moreover, attention was drawn to the invidious distinction between this section, protecting the rights of the Senate, and the preceding section protecting the rights of the House of Representatives. It would be unfair that non-compliance with this section should be fatal to the validity of a law, if non-compliance with the preceding section were not. On the other hand the distinction was justified on the ground that the origination and amendment of money bills involved mere matters of procedure between the two Houses—matters in which the two Houses only were concerned ; and if any violation thereof took place it would not appear on the face of the law, and consequently could not be considered by the Courts, unless proved by extrinsic evidence ; whereas if a tax Act contained provisions irrelevant to taxation such irrelevant matters would appear on the face of the Act, and would be examinable by the Courts without such evidence.

In order to secure Federal taxation Acts against the possibility of attack in the Federal Courts, it was suggested that a distinct sub-section should be inserted providing that such Acts, when passed, should not be liable to be called in question in respect to any breach of the provisions of the section. Another suggestion was that any accidental failure to comply with the provisions of the section should not invalidate a law. But neither of these suggestions was accepted.

In reply to the argument that the Senate could protect itself, and should be allowed to waive its privileges, without endangering the law, it was said :—

"A law which may be introduced, in violation of one of these sub-sections, may be believed to be a violation by the Senate, and thrown out on that ground, and be sent back. It may be sent up again by the House of Representatives, and so by that way you have a question which, instead of being settled, becomes a matter of contest between the two Houses. Another matter of difference between the two Houses we know. It is where one House happens to take an unpopular view of a question—a view which for the time being is not the view of the majority of the people. We know it is easy to bring the pressure of the majority of public opinion on one House for the purpose of obtaining a violation of the law. This is not intended to be a protection to the House or the Representatives of the House, but to the States represented in the House ; that no matters of tactics between the Houses, or no playing off of public opinion by one House against another, shall ever take away the protection embedded in the Constitution for the States. I have heard of the argument of the inconvenience of laws being upset on account of some invalidity being discovered—some trifling invalidity, perhaps. I say you must submit to that inconvenience if you wish to enter a Federal Constitution. The very principle of the Federal Constitution is this : that the Constitution is above both Houses of Parliament. That is the difference between it and our Houses of Parliament now. The Federal Constitution must be above both Houses of Parliament, and they must conform to it, because it is in the Charter under which union takes place, and the guarantee of rights under which union takes place ; and, unless you have some authority for them to interpret that, what guarantee have you for preserving their rights at all. It is very necessary to insert this provision in the Constitution, because if you do not do that then these questions are questions of procedure between the two Houses, in which undue pressure may be brought to bear at any time on one House or other for the purpose of vetoing a law and doing injustice to the States represented in that House in the different ways in which the States are represented. (Mr. R. E. O'Connor, Conv. Deb., Adel., pp. 591-2.)

"Parliament is not supreme, and the very essence of the Federation is that it should not be so. Parliament, as far as constitutional questions are concerned, is under

the law, and it must obey the law. If we make an exception in regard to Money Bills we had better make an exception in the case of all other Bills which may arise under the provisions of clause 51, and thus sweep away the High Court. I thought that we were all agreed that the reason for the establishment of the High Court was a salutary one, and that it would determine constitutional law and practice. We must all remember that at one portion of the history of England a question of liberty was raised by a humble individual named John Hampden, who put forward a point on the subject of taxation. We do not know but that we may have John Hampdens in Australia raising questions of liberty; it would be well to leave the High Court of Australia to deal with such matters as that." (Mr. J. H. Symon, *Id.*, p. 594.)

At the Melbourne sittings of the Convention, the contest was renewed. An amendment was submitted by Mr. Isaacs, to insert the word "proposed" before "laws."

Once more the question was exhaustively debated. At last a middle course was agreed to. The amendment to insert the word "proposed" was negatived, but the words were inserted providing that in the event of extraneous provisions being inserted in a taxing act, the extraneous provisions only—and not the whole law—should be invalid.

§ 254. "The Imposition of Taxation."

During the debate on the financial sections 53 and 55, the meaning of the expression "the imposition of taxation" was discussed, and the question raised whether a law imposing taxation and also providing for its collection would be *ultra vires* of the Constitution. Doubts were suggested whether the restriction that tax bills should deal only with the imposition of taxation might not be read so as to exclude from tax bills the ordinary machinery clauses, providing for the assessment and valuation of property, the subject of taxation, and for the enforcement and collection of the tax.

Referring to this point, Sir Samuel Griffith wrote: "A more serious question is whether provisions regulating the collection of taxes should be allowed to form part of the same laws by which the amount of the tax is fixed. This point should be clearly settled and expressed." (Notes on the Draft Federal Constitution, 1897, p. 9.) Mr. Isaacs understood this note to mean that "imposing taxation" does not include collection and machinery. (Conv. Deb., Melb., p. 2049.) Mr. Barton was inclined to think that, according to the well-known principle that the grant of a power includes all the necessary means for its effective exercise, the exclusive power given to the House of Representatives to originate bills "imposing taxation" would carry with it the subsidiary power to provide machinery in the same Bill for the collection of the taxes. It was pointed out that according to the practice observed in some constitutionally governed countries, taxing bills, fixing the nature, amount, and incidence of proposed taxes, were kept separate and distinct from machinery bills, dealing with such details as collection, assessment, and valuation. "Would not the power of collection be embraced in the power to impose taxation?" asked Sir Edward Braddon. (Conv. Deb., Melb., p. 2036.) Mr. Barton said that power to collect would be, ordinarily, included in the power to impose taxation, but in a section such as this, so strong in its intention to restrict laws imposing taxation to the mere imposition of taxation, it might be as well to remove doubt by adding after "imposition" the words "and collection." It was pointed out, however, that as the Senate was prohibited from amending proposed laws imposing taxation, the addition of the words "and collection" would have the effect of depriving the Senate of the power to amend matters in a tax Bill, relating to its method of collection.

"I confess that when I first proposed the amendment I did not see the extent to which it went. But, having appreciated the extent to which it goes, I still feel bound to adhere to it. The difficulty that would arise unless you allowed the House of Representatives to include in these Bills the ordinary powers of assessment and collection would be, that, while you might have a certain tax imposed in the Bill fixing the amount of the tax, the machinery Bill might be so subject to amendment by the Senate that the whole financial policy of the Government which introduced it, with a majority of the

House of Representatives behind them, might be entirely subverted. That is a difficulty which, I think, none of us wish to create. Therefore, I am prepared to take the responsibility of adhering to the amendment. Holding the position I have always held, that the Senate should be a real body and not a mockery of State interests—while it should be a Second Chamber holding definite powers and rights as expressing the will of the people within the States which it represents—I have also held that we should only carry responsible Government into effect by making it real and effective, and a power of amending a machinery Bill to the extent of making a tax not worth collecting would be equal to the power of amending a Bill imposing taxation." (Mr. E. Barton, Conv. Deb., Melb., p. 2060.)

"All I am endeavouring to do is to attribute a meaning to words in this Constitution, which I believed in Adelaide—and I explained my belief as I have read—that they did convey, which I am inclined to believe now they do convey, without a special explanation; but as to which I am in serious doubt, because of the very strong express nature of the words 'shall deal with the imposition of taxation only.' It is in order to remove that doubt, and for that purpose only, that I wish these words to be inserted, and I really do believe that the insertion of the words will carry out the real spirit of the understanding of 1891." (*Id.* p. 2067.)

Mr. Barton's amendment to add the words "and collection" was rejected by 26 votes to 16. But see Note, § 248, *supra*.

§ 255. "Shall be of No Effect."

The next important point discussed was whether a law violating the rule forbidding the combination of taxation with any other matter, or the rule forbidding a tax Act to contain more than one subject of taxation, should be void *in toto*, or should be void only to the extent of the irrevelancy, or to the extent of the additional subjects. Mr. G. H. Reid moved that the prohibition should not invalidate any part of the law which did not infringe the provisions of the Constitution, and that if any law imposing taxation contained more than one subject of taxation, the tax first in order of enactment should be taken to be properly passed. (Conv. Deb., Melb., p. 2089.) This amendment was negatived by 27 to 15 votes. The feeling, however, prevailed in the Convention that some provision should be made in the Constitution, to the effect that only the parts of the Act in which the forbidden matter existed should be invalid. At a later stage Mr. Reid moved the insertion of the words "and any provision therein dealing with any other matter shall be of no effect." This amendment was accepted without a division. (Conv. Deb., Melb., 2415.)

§ 256. "One Subject of Taxation Only."

By the first paragraph of the section, laws imposing taxation must deal only with the imposition of taxation. If the section contained no other limitation regulating and restricting the exercising of the taxing power there would be nothing to prevent the House of Representatives from sending to the Senate a bill containing a number of separate and independent taxes. The section, however, goes on to enact that laws imposing taxation shall, with the exception of those relating to customs and excise, deal with one subject of taxation only. It is necessary to explain the object of this limitation. By the second paragraph of sec. 53, the Senate is deprived of the power to amend tax bills, but it may constitutionally reject them. In order to maintain its right to veto, in detail, each specific tax to which it objects, without thereby involving the rejection of other taxes of which it approves, the Constitution prohibits the combination of taxation proposals; it requires each proposed tax to be submitted by the House of Representatives to the Senate, in a separate bill. This procedure being followed, the Senate can exercise its discretion with respect to each tax, without being coerced to pass a tax to which it objects, in order to carry a tax which it desires. In this respect the Senate will have greater control over taxation than the House of Lords enjoys.

The Papers Duties Precedent may be here referred to in illustration of the manner in which sec. 55 will operate in strengthening the Senate. In 1860, the Commons

determined to balance the year's ways and means by an increase of the property tax and stamp duties, and the repeal of the duties on paper. The increased taxation had already received the assent of Parliament, when the Lords rejected the Paper Duties Repeal Bill, and thus overruled the financial arrangements voted by the Commons. That House was naturally sensitive to this encroachment upon its privileges; but the Lords had exercised a legal right, and their vote was irrevocable during that session. The Commons, therefore, to maintain their privileges, recorded upon their journal, 6th July, resolutions affirming that the right of granting aids and supplies to the Crown is in the Commons alone; that the power of the Lords to reject bills relating to taxation "is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant the Supplies, and to provide the ways and means for the service of the year: and that to guard, for the future, against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate." In accordance with these resolutions, during the next session, the financial scheme of the year was presented to the Lords for acceptance or rejection as a whole. The Commons again resolved that the paper duties should be repealed; but, instead of seeking the concurrence of the Lords to a separate bill for that purpose, they included in one bill the repeal of those duties with the property tax, the tea and sugar duties, and other ways and means for the service of the year; and this bill the Lords were constrained to accept. The budget of each year has since that occasion been comprised in a general and composite Act—a proceeding supported by precedent. In 1787, Mr. Pitt's entire budget was comprised in a single bill: and during many subsequent years great varieties of taxes were imposed and continued in the same Acts. (May's Parl. Prac. 10th ed. pp. 550-1.)

From this precedent it appears that the Commons have the right to send to the Lords a single scheme of taxation embodying the repeal of old taxes and the imposition of new taxes; the functions of the Lords being, in such a case, limited to a simple assent to the whole scheme or a simple negative of the whole scheme. Such a composite or general tax bill could not be submitted by the House of Representatives to the Senate; it would be unconstitutional, the maxim being "one tax one bill," except in the case of bills dealing with customs and excise.

We have now to consider what will be the consequence if Parliament should, whether by accident or design, pass a law imposing taxation, yet dealing with more than one subject of taxation—a law, say, imposing an income tax and a stamp duty. A proposal that the tax standing first in order in the enactment should be valid, whilst the other, or others, next in order should be null and void, was rejected by the Convention. No provision is made in the Constitution, therefore, for segregating the taxes and providing for the validity of one and the nullity of the others. Where the Constitution intends that one portion of an Act only shall be of no effect and the rest operative it is so expressed. The only conclusion is that an Act embodying a plurality of taxes would be absolutely and completely *ultra vires*.

Recommendation of money votes.

56. A vote, resolution, or proposed law[257] for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated[258].

Historical Note.—The provision in the Commonwealth Bill of 1891 was:

"It shall not be lawful for the House of Representatives to pass any vote, resolution, or law for the appropriation of any part of the public revenue, or of the produce of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the session in which the vote, resolution, or law is proposed."

This provision was taken from the Constitution Acts of the several colonies; see, for instance, Constitution of New South Wales, sec. 54.

The draft Constitution as settled at the Adelaide session restricted the exclusive originating power of the House of Representatives to Bills whose "main object" was to appropriate money or impose taxation. It was then seen that bills for the appropriation of revenue or moneys, but whose "main object" was not such appropriation, might be introduced into the Senate, and would require a message; and consequently the clause as drafted at Adelaide provided that it should not be lawful for "the Senate or the House of Representatives" to pass a vote, &c., for appropriation without a message. It was pointed out that this would involve a message to both Houses in the case of every appropriation Bill; and the clause was therefore altered to read as follows:—

"It shall not be lawful for the Senate or the House of Representatives to pass any vote, resolution, or proposed law for the appropriation of any part of the public revenue or moneys to any purpose which has not been first recommended to the House in which the proposal for appropriation originated by message of the Governor-General in the session in which the vote, resolution, or law is proposed." (Conv. Deb., Adel., pp. 616, 1200)

That was the second stage in the evolution of the message section. At the Sydney session the clause relating to the origination of Money Bills was altered by the omission of the "main object" limitation, and the substitution of the provision that a Bill should not be deemed an Appropriation or Tax Bill merely because it provided for fines or fees. This took away from the Senate the power to initiate that large class of Appropriation Bills contemplated by the Adelaide clause; but the Chairman, Sir Richard Baker, thought that the decision to allow the Senate to initiate Bills imposing and appropriating fines and fees would still necessitate messages to the Senate; and, therefore, suggestions made by several of the Houses of Legislature, to require a message to the House of Representatives only, were not put from the chair. (Conv. Deb., Syd., 1897, pp. 540-1.)

At the Melbourne session, the words "for the Senate or the House of Representatives" were omitted by the Drafting Committee before the first report, and the clause then read as follows: –

"It shall not be lawful to pass any vote, resolution, or proposed law for the appropriation of any part of the public revenue or moneys to any purpose which has not been first recommended to the House in which the proposal for appropriation originated by message of the Governor-General in the session in which the vote, resolution, or law is proposed."

This was the shape in which the clause was debated in Melbourne, after the second report. The first point discussed was the meaning of the words "it shall not be lawful." They apparently amounted to a prohibition, any breach of which would render the law, even if passed, invalid, thereby enabling the courts to enquire into the question whether an Appropriation Bill had been recommended by message or not. (See Todd, Parl. Gov. in Col. 2nd ed. p. 637.) Mr. Reid pointed out the undesirableness of this; and to prevent any difficulty arising from the circumstance of a preliminary vote being taken on an Appropriation Bill before the necessary message was brought down to the House, he also suggested the omission of the word "first," so that the clause should read "which has not been recommended to the House." With this alteration it would only be necessary that the message should reach the House before the Bill was passed by the House. The Drafting Committee subsequently gave effect to these suggestions by omitting the words "it shall not be lawful," and the word "first," and re-casting the clause into its present form. Mr. Isaacs moved to substitute "House of Representatives" for "House in which the proposal originated," on the ground that the Senate, under

sec. 53, had no power to originate a "proposed law for the appropriation of revenue or moneys" within the meaning of the Constitution. This was negatived by 26 votes to 17. (Conv. Deb., Melb., pp. 2096-2104, 2451)

§ 257. "Vote, Resolution, or Proposed Law."

No vote, resolution, or proposed law for the appropriation of revenue or moneys can be passed, unless the purpose of the appropriation has been recommended by the Crown. Public revenue can be raised without the preliminary recommendation of the Crown, but once raised and once placed in the custody of the Crown, it cannot be expended except on the recommendation of the Crown, and for a purpose so recommended. The constitutional principle, which vests in the Crown the sole responsibility over national expenditure, is a most important one, and it greatly enhances the power and influence of the Executive.

"The modern change in the pecuniary position of the Crown has not affected the necessity of such an application to Parliament. The supplies are still granted to the Crown. To the Crown still belongs the management of the revenues of the State ; and by it all payments for the public service are still made. The Crown, therefore, makes known to the Commons the pecuniary requirements of the Executive Government ; and the Commons, upon this information, both grant such supplies towards these requirements as they think fit, and provide suitable means for raising the necessary amount. The foundation, therefore, of parliamentary taxation is its necessity for the public service as declared by the Crown through its political advisers. It is accordingly a fundamental rule of the House of Commons that the House will not entertain any petition or any notice for a grant of money, or which involves the expenditure of any money, unless it be communicated by the Crown. We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money for their respective constituencies, of the 'log-rolling,' and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that 'good government is not attainable while the unrestricted powers of voting public money and of managing the local expenditure of the community are lodged in the hands of an Assembly.' This salutary rule has too often been evaded. The House of Commons sometimes addresses the Crown, requesting that a sum of money be issued for some particular purpose, and promising to make good the amount. This practice has been generally confined to small sums and to services, the amount of which cannot be immediately ascertained. It is sometimes also adopted at the end of the session, when the Committee of Supply has closed, and when the sum is not of sufficient magnitude to induce the re-opening of the Committee. It is rarely used, and never to any considerable extent, to overcome the reluctance of Ministers to some proposed outlay. Even in this extent the best parliamentary authorities regard the practice with great disfavour." (Hearn's Gov. of Eng. 2nd ed. p. 376-7.)

"In colonies under responsible government, the Governor ought not to assume responsibility for the financial arrangements regarding expenditure which has been authorized by Parliament, so long as they do not contravene existing law : such matters of detail are distinctly within the province of ministers responsible to Parliament. Moreover, a constitutional Governor 'takes no part in the settlement of the estimates, which are prepared by the responsible ministers at the head of the several departments of the public service.' His signature to a message to enable the Assembly constitutionally to take into their consideration any proposed vote of public money is, therefore, under ordinary circumstances, 'a formal act,' which does not necessarily express or imply a personal opinion with regard to the policy of the proceeding which, upon the advice of his ministers, he has thus initiated and authorized. But the omission of the Governor's recommendation to a measure appropriating public revenue is contrary to law, and invalidates all proceedings thereon." (Todd, Parl. Gov. in Col. 2nd ed. p. 637.)

"In 1868, the then Governor of Victoria, Sir Henry Manners-Sutton, was instructed by the Colonial Secretary, in a despatch dated January 1, 1868, to refuse his sanction to placing on the estimates a grant in favour of the wife of ex-Governor Darling. But this objection was based on the ground of Imperial policy, which forbade any gift to be received by a colonial Governor, or any of his family, from the colony over which he had resided, either during his term of office or upon his retirement." (*Id.* p. 638.)

"Governor Bowen, of Victoria, on September 19, 1877, telegraphed Her Majesty's Secretary of State for the Colonies to know whether he was at liberty to consent to his

ministers placing on the estimates a vote for the payment of members of the local legislature, the principle of which had been twice affirmed by both Houses, notwithstanding that, subsequently, separate bills to authorize the payment of members had been rejected by the Legislative Council. In reply, the Colonial Secretary stated that, as the matter was one of purely local concern, and involved no question calling for the intervention of the Imperial Government, responsibility must rest entirely with ministers, and he saw no reason why the Governor should hesitate to follow their advice." (*Id.*)

§ 258. "To the House in which the Proposal Originated."

An important discussion was raised on a proposal by Mr. Isaacs to add the words, "of Representatives," after "House," in the above section, so as to make it clear that Crown messages recommending appropriations of revenue or moneys could only be sent to the House of Representatives. As sec. 53 then stood it apparently contemplated that bills appropriating revenue or moneys or imposing taxation should originate solely in the House of Representatives, and that bills imposing or appropriating fines or other pecuniary penalties, or fees for licences or services, should not be deemed to appropriate revenue or money, and therefore that bills of such a kind could be introduced into the Senate without a message. It was stated by Mr. Barton that the Drafting Committee entertained a doubt whether a proposed law containing provisions to impose or appropriate fines or penalties, or for the demand or payment or appropriation of fees for licences or for services, was not an appropriation as far as the appropriatory part was concerned, which would require a message. It was for that reason that the words, as they stood, had been left in. The Committee had since arrived at the conclusion that the provision that such bills should "not be taken to appropriate revenue or moneys," would be construed to mean that, by the law of the Constitution, such things are not to be deemed an appropriation and would not require messages.

Dr. Cockburn insisted on the necessity of a message from the Crown to justify the imposition and appropriation of fines, penalties, forfeitures, and fees, by the Senate. Mr. Kingston considered that the Senate should not be permitted to originate impositions and appropriations, of even the limited kind referred to, without a message from the Crown. That was a safeguard which should be demanded as a part of the system of responsible government.

"My point is this: That whilst you may well let matters of that sort originate in the Senate, it is not desirable, either as regards the House of Representatives or the Senate, in connection with these minor matters, to throw away that control over the purse which is vested in the Executive; and which is evidenced by the giving or withholding of a Governor's message. The leader of the Convention will see that, according to the terms in which clause 56 has been framed, it is evidently intended to apply to both Houses, and I hope it will be so continued, and that the Senate shall not be given, any more than the House of Representatives, the power of originating measures of that sort for the expenditure of public funds, unless it is recommended by the Executive." (Mr. C. C. Kingston, Conv. Deb., Melb., p. 2100.)

Mr. Barton was not in doubt as to the advisability of requiring these impositions and appropriations to be recommended by message:—

"Even if I am right in thinking that a Bill of the character indicated in the first part of clause 54 does not require a message, still I do not find anything in the Constitution to do away with the necessity of a message, even in the Senate, for a vote or resolution, if such vote or resolution is taken in the Senate. But now let us come to the practical side of the question. Under this Constitution, with the Ministry practically responsible to the House of Representatives, as they will be if this Constitution is carried, is it likely that a Ministry responsible to that House, no matter which House he sits in, will ever bring down a message to the Senate? It seems to me to be most unlikely that he will, and therefore there is not any serious practical difficulty." (Mr E. Barton, Conv. Deb., Melb., 2102.)

The point made by Mr. Isaacs, that fines, penalties, and fees, were declared by the Constitution itself not to come within the meaning of the terms "imposing taxation" and "appropriating revenue and money," was overborne by the considerations advanced by Dr. Cockburn and Mr. Kingston, and Mr. Isaacs' amendment was rejected. A

practical side of the question is this, that if a message be required as the condition precedent to the origination of such minor financial matters in the Senate, it will deprive the power, contemplated by the proviso to sec. 53, of much of its value. It will make the exercise, by the Senate, of that modicum of financial initiation, absolutely dependent on the Ministry of the day. It is doubtful, however, notwithstanding the rejection of the amendment, whether a message is necessary as a preliminary to the introduction into the Senate of the class of Bills referred to.

Disagreement between the Houses.

57. If the House of Representatives[260] passes any proposed law, and the Senate rejects[261] or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months[262] the House of Representatives, in the same or the next session, again passes[263] the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve[264] the Senate and the House of Representatives simultaneously. But such dissolution shall not take place[265] within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting[266] of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the

proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

Historical Note.—The first deadlock proposal was made in the Sydney Convention of 1891, when Mr. Wrixon proposed a joint sitting in case suggestions of the Senate as to Money Bills were rejected by the House of Representatives. This was negatived. (Conv. Deb., Syd., 1891, pp. 706, 759-62; *supra*, p. 139.)

At the Adelaide session in 1897, deadlock proposals were moved by Mr. Wise and Mr. Isaacs, but were negatived on division. (Conv. Deb., Adel., pp. 1150-73; *supra*, pp. 180-2.)

During the statutory adjournment, the Legislative Assemblies of New South Wales, Victoria, and South Australia, suggested the insertion of different deadlock provisions (*supra*, pp. 182-7), and at the Sydney session the question was debated at length, with the result that two schemes were inserted in the Bill:—(1) A consecutive dissolution of both Houses, proposed by Mr. Symon; (2) a simultaneous dissolution of both Houses, followed if necessary by a joint sitting at which a three-fifths majority should decide—a proposal built up on propositions made by Mr. Wise, Sir Geo. Turner, and Mr. Carruthers. (Conv. Deb., Syd., 1897, pp. 541-778, 807-980; *supra*, pp. 189-193.)

At the Melbourne session, after the second report, the question was again discussed, with the result that the scheme for a consecutive dissolution was omitted; but otherwise—except in minor details—the Sydney decision was adhered to. (Conv. Deb., Melb., pp. 2104-2249, 2451-2; *supra*, pp. 202-4.) Drafting amendments were made before the first report and after the fourth report.

The three-fifths majority was strongly objected to in New South Wales, and both Houses of the Parliament of that colony recommended the substitution of a simple majority. At the Premiers' Conference at Melbourne in 1899, an absolute majority was substituted for a three-fifths majority. (*Supra*, pp. 214-8.)

§ 259. "Disagreement Between the Houses."

This section provides several distinct and successive stages in the procedure by which a disagreement may be determined. The first stage is the rejection or failure by the Senate to pass a bill proposed by the House of Representatives; then succeeds an interval of three months for consideration and possible compromise; next, if there is no amicable settlement, the House again passes the bill, with or without amendments; if the Senate rejects, or fails to pass it a second time, the Governor-General may dissolve both Houses simultaneously; if, after the double dissolution, the House of Representatives again passes the proposed law, and the Senate rejects it for the third time, the Governor-General may convene a joint sitting of the whole of the members of the Senate and of the House of Representatives. At this joint sitting the members present may deliberate and vote together upon the proposed law, and upon amendments previously proposed thereto.

The debates in the Convention, on the question what provision should be made in the Constitution for the settlement of deadlocks, were prolonged and exhaustive, and second to none in interest. A sketch of those debates will be found in the Historical Introduction, and here we must content ourselves with presenting a brief analysis of the section, as it now stands, representing as it does the matured thought of the Convention, subsequently modified in one matter of detail by the Conference of Premiers and approved by the People.

§ 260. "If the House of Representatives Passes."

A preliminary feature in the scheme for the settlement of deadlocks is that it does not extend to Bills originating in the Senate ; it is only applicable to Bills which have been initiated in and passed by the House of Representatives. There is no limit to or qualification of the class of measures which may become the subjects of the deadlock procedure. It covers every proposed law which may have been passed by the national chamber.

§ 261. "And the Senate Rejects."

The next step in the history of a possible deadlock is that the Senate rejects or fails to pass the proposed law, or passes it with amendments to which the House of Representatives will not agree. If it is not a Bill imposing taxation or appropriating revenue or money for the ordinary annual services of the Government, the Senate may of course amend it. If it is such a Bill, the Senate may not amend, but may return it to the House of Representatives, with a message suggesting the omission or amendment of any items or provisions therein. If the Senate rejects the Bill absolutely, or if its amendments or suggestions are not accepted by the House, and the Senate refuses to pass the Bill without the acceptance of its amendments or the adoption of its suggestions by the House, the Bill is lost.

§ 262. "An Interval of Three Months."

After the failure of the proposed law to receive the concurrence of both Houses, an interval of three months must be allowed to elapse before any further action can be taken under this section. That interval is required to give time for consideration and conciliation, and to permit of the development and manifestation of public opinion throughout the Commonwealth. That interval may be composed of time wholly within the same session of Parliament as that in which the bill was proposed and lost, or it may be composed of time partly in that session and partly in a recess, or in another session. The interval may be longer than three months, but it cannot extend beyond the next session of the Federal Parliament.

§ 263. "If the House of Representatives Again Passes."

After the interval of three months the House of Representatives may again pass a proposed law, with or without any amendments which have been made by the Senate, or amendments suggested by the Senate, or amendments made in the House and agreed to by the Senate. It must not be a new bill, but the original bill modified only by amendments made, suggested or agreed to by the Senate. If the bill is one of ordinary legislation, not relating to taxation or the appropriation of revenue or money for the ordinary annual services of the Government, the Senate could, at this stage, as at the first stage, amend it. If it is a tax bill or an annual Appropriation Bill the Senate could by message suggest amendments. The House of Representatives could agree to the amendments, or it could amend as suggested by the Senate, in which case the bill would be saved ; it could refuse to agree to the amendments made, or it could refuse to amend as suggested ; in which case the bill would again be lost.

§ 264. "The Governor-General may Dissolve."

Upon the concurrence of all these conditions precedent the Constitution enables the Governor-General to dissolve the Senate and the House of Representatives simultaneously. This power would be exercised by him, as the Queen's representative, in the same manner as other prerogatives of the Crown ; viz., according to the advice of Ministers who have the confidence of Parliament.

§ 265. "Such Dissolution shall not Take Place."

There is one restriction on the power of the Crown to grant a double dissolution. It may not take place within six months before the date of the expiry of the House of Representatives by effluxion of time. The policy of this restriction is that the House of Representatives may not be permitted to court a deadlock, and to force a dissolution of the Senate, when the House of Representatives is on the point of expiry. If there is to be a dissolution of both Houses, the House of Representatives must submit to sacrifice as well as the Senate. Under this restriction its members will have to lose at least six months of their prospective term of membership. This loss, however, would be small compared with the term of membership which the Senators would lose. It is thus assumed that under this procedure the members of both Houses will have every opportunity to agree and every inducement to abstain from unreasonable disagreement.

On the dissolution of the Senate the Governor of each State will cause writs to be issued for the election of new senators for the State. The writs must be issued within ten days from the proclamation of the dissolution. They will appoint the day of election and the officers to conduct the election (sec. 12). The Constitution does not limit the time within which, after the issue of the writs, the election of senators must be held. Power, however, is given to the Parliament of each State to make laws for determining the time and places of election of senators for the State (sec. 9).

After the first meeting of the Senate, following a dissolution thereof, the Senate is required by sec. 13 to proceed to make provision for the retirement of its members by rotation, similar to that made by it after its first election.

The writs for the election of members of the House of Representatives will be issued by the Governor-General in Council, within ten days from the proclamation of the dissolution (sec. 32). The time appointed for the return of the writs will be specified in the writs. Parliament must be summoned to meet not later than thirty days after the day appointed for the return of writs (sec. 5).

§ 266. "A Joint Sitting."

The joint sitting is not a new contrivance in Parliamentary government. It is founded on the practice of conflicting legislative chambers at times appointing representatives to meet in conference authorized to discuss questions in dispute, and to suggest possible modes of settlement. In that practice, recognized both in Great Britain and her colonies, as well as in the United States, may be found the germ of which the joint sitting elaborated in this Constitution is the development.

After the re-assembling of Parliament the House of Representatives, if disposed to carry on the campaign in favour of the proposed law, is entitled to again pass it with or without amendments which have been made, suggested or agreed to by the Senate, in the last session of the dissolved Parliament. It is again sent to the Senate, which is again, and for the third time, invited to pass it, or to pass it with amendments agreeable to the House of Representatives. If the Senate rejects the bill or fails to pass it with amendments to which the House of Representatives will agree, the Governor-General, acting according to the advice of his responsible ministers, may convene a joint sitting of the members of the Senate and of the House of Representatives. The conduct of the business and proceedings of the joint sitting will be regulated by joint standing rules and orders made and agreed to by the Houses under sec. 50.

The question upon which the members present at the joint sitting "may deliberate and shall vote together" are :—(1) the bill as last proposed by the House of Representatives ; and (2) any amendments which have been made by one House and not agreed to by the other. Any such amendments which are affirmed by an absolute majority of the total number of the members of both Houses will be taken to be carried ; and the bill itself, with any amendments so carried, must be voted upon, and if affirmed by a similar "absolute majority" of members it will be presented for the Royal assent just as if it had been passed by both Houses separately.

Money Bills.—These dead-lock provisions apply to all bills—as well bills which the Senate may not amend as bills which it may amend. But it should be noticed that the section is careful not to give the Senate any power, by means of the joint sitting, to secure any amendment which the Senate could not have made in the first instance. The only questions, besides the Bill itself, which can be voted on at the joint sitting, are amendments "made by one House" and not agreed to by the other. In the case of a Bill which the Senate may amend, amendments which it has made may be voted on at the joint sitting; but in the case of bills which the Senate may not amend, mere suggestions made by the Senate cannot be dealt with at the joint sitting. This section, therefore, does not give the Senate any indirect power of moulding the form of those financial measures for which the House of Representatives is solely responsible.

The Absolute Majority.—Under the clause as adopted by the Convention, the proposed law and any amendments had to be carried, not by a simple majority, as in the case of business done in the Houses sitting separately, but by three-fifths of the members "present and voting." The main reason assigned in the Convention for this special majority was that, as the House of Representatives was twice as strong in numbers as the Senate, it would not be fair to the Senate to invite it to a joint conference at which it would be easily swamped and outvoted by overwhelming numbers. At the Premiers' Conference, 1899, Mr. Reid asked for a simple majority—instead of three-fifths—of the members present and voting; and the matter was compromised by providing for a majority, not of those present and voting, but of all the members of both Houses—or what is concisely called an "absolute majority." In this way the artificiality of an extraordinary majority was avoided, and at the same time it was ensured that a majority of the Senate could never be defeated at a joint sitting except by a vote which would amount to a majority of a full joint sitting.

The effect of the requirement of an "absolute majority" to carry a proposal is that the opponents of a proposal need not muster in force to defeat it; whether they are present or absent the proposal cannot be carried unless its supporters have an absolute majority, and will be carried if its supporters have that majority. On the other hand, the supporters of the proposal must be present to the required number, or they cannot succeed. In view, however, of the fact that a joint sitting, when it occurs, will be the final stage in a long political struggle, the difference between a simple and an absolute majority loses much of its importance. If the supporters of a proposal do not number an absolute majority, they will be unlikely to win in any case: and if they do number an absolute majority, it is very unlikely that any member of that majority will absent himself and thereby betray his party at the moment when victory is within their grasp.

The Deadlock Machinery.—Some of the members of the Convention, representing the more populous colonies, feared that through the principle of equal representation the less populous States would be able to exercise undue influence in the Senate, so as to thwart the will of the popular majority of the whole Commonwealth. At any rate this was the argument as interpreted by Sir Samuel Griffith. (Notes on the Draft Commonwealth Bill, 1899, p. 18.) Thus the whole of this complex and elaborate machinery for the settlements of deadlocks is founded on the assumption that two Representative Chambers, directly elected by the same class of people in all the States, will not work in harmony, but may at times come into deadly conflict.

Should this assumption be well founded, and should the deadlock clause be brought into action with undue frequency, it will not be any evidence against the principle of equal representation, but rather proof of a temporary divergence of interests, and absence of that unity and identity of political growth which in the course of time should weld together the federated community. Such divergences will, no doubt, inevitably disappear, to be succeeded by a permanent tendency to integration, as the resultant of the national elements which pervade the Constitution.

The provision made by this Constitution for the dissolution of the Senate is the latest and greatest experiment in Federal Government. No other second Chamber in

any federal system is liable to be dissolved on any question of general legislation. By the Swiss Constitution (Art. 120), if the two Chambers are unable to agree on the question whether there shall be a total revision of the Constitution, the question is then referred to the people ; and if a majority of the electors voting support a revision, both Chambers are dissolved, and the work of revision devolves upon the new federal legislature. (See Deploigne, Referendum in Switzerland, 1898, p. 129.) But in respect of ordinary legislation there is no such provision. Immunity from dissolution *en masse* has been hitherto one of the recognized privileges, and certainly the strongest bulwark, of Upper Houses generally. That feeling of constitutional indifference to such disturbing events as general elections has been one of the charms and attractions of the Upper-House-Membership. The precedent, however, has been established once and for all time, and sooner or later it will invade the sacred precincts of most of the second Chambers in the world.

It would be premature as well as unwise to indulge in speculations as to whether its liability to dissolution will tend to weaken the effective power of the Australian Senate. If the Senate is well led, a dissolution may result in its being supported and strengthened by the States. Although the Senate represents the States, as corporate units, it is based on the elective principle, as much as the House of Representatives. It will feel what Goldwin Smith describes as the "sap of popular election in its veins." In a disagreement with the House, it may assert its views with ability, dignity, and determination, it will fully realize its responsibility to the States, and will insist that its responsibility to its corporate constituents is as great as that of the other chamber to the people as individual units. If an uncompromising attitude on the part of both Houses leads to a double dissolution, the Senate may be reconstituted with added, and not diminished, authority. On the other hand, it is equally possible that the Senate, badly led, may be badly beaten in the appeal to the people and to the States. This much is certain, that the people as final arbiters will be the gainers of power by the liability of both Houses to dissolution.

Royal assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent[267], he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments[268] which he may recommend, and the Houses may deal with the recommendation.

Historical Note.—The clause as introduced in the Sydney Convention of 1891 was in substance the same as this. The first paragraph follows the provisions of the Act for the Government of New South Wales and Van Diemen's Land, 1842 (5 and 6 Vic. c. 76, sec. 31), with the important exception that it makes no mention of the royal instructions. The second paragraph is taken from sec. 36 of the Constitution of Victoria, and sec. 28 of the Constitution of South Australia, which are in substantially the same terms. (Conv. Deb., Syd., 1891, p. 763.)

At the Adelaide session the clause was adopted in substantially the same form. At the Sydney session, a suggestion by the Legislative Assembly of Victoria, to insert "and to Her Majesty's instructions" after "Constitution," was negatived. (Conv. Deb., Syd., 1897, pp. 778-9.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 267. "Presented to the Governor-General for the Queen's Assent."

When a bill passed by both Houses of the Federal Parliament is presented to the Governor-General for the Queen's assent he may do one of three things:

(1.) He may assent to the Bill in the Queen's name; and thereupon it becomes law, and remains law unless within one year from the date of the assent it is expressly disallowed by the Queen.

(2.) He may withhold assent, that is absolutely veto the Bill, and thereupon it is lost for the time being.

(3.) He may reserve the Bill for the signification of the Queen's pleasure, and thereupon it becomes subject to the procedure defined by sec. 60.

The assent of the Queen to proposed laws is Her Majesty's assent as a separate, independent, and co-equal branch of the Federal Parliament. The form in which this section is drawn is materially different from the wording of corresponding sections in preceding Constitutional Acts, and this difference of form indicates the difference in the structure of the Federal Parliament compared with that of other colonial legislatures, and also the larger grant of power with which it is invested.

By Act 5 and 6 Vic. c. 76 (30th July, 1842) it was provided that the Governor of New South Wales, with the advice and consent of the Legislative Council, should have authority to make laws for the peace, welfare, and good government of the colony, provided that such laws should not be repugnant to the law of England or interfere in any way with the sale or appropriation of the Crown lands within the colony (sec. 29). In accordance with the old constitutional principle, that section recognized the Crown as the sole legislature, and the Legislative Council merely as an advisory body. Consistently with the same principle, sec. 30 gave the Governor authority to transmit to the Council drafts of such laws as appeared to him desirable to pass. The Governor was also entitled to return to the Council bills which it had passed, recommending that amendments should be made in such bills. By sec. 31 it was enacted—

"That every Bill which has been passed by the said Council and also every law proposed by the Governor which shall have been passed by the said Council whether with or without amendments shall be presented for Her Majesty's assent to the Governor of the said Colony and that the Governor shall declare according to his discretion but subject nevertheless to the provisions contained in this Act and to such instructions as may from time to time be given in that behalf by Her Majesty Her Heirs or Successors that he assents to such Bill in Her Majesty's name or that he withholds Her Majesty's assent or that he reserves such Bill for the signification of Her Majesty's pleasure thereon."

Upon the presentation to the Governor of a Bill for Her Majesty's assent, he was directed to declare "according to his discretion" that he assented to such Bill in Her Majesty's name, or that he withheld Her Majesty's assent or that he reserved such Bill for the signification of Her Majesty's pleasure thereon, but the Governor's discretion was limited in two ways. It could only be exercised:—

(1.) Subject to the provisions contained in the Act, and

(2.) Subject to such instructions as might from time to time be given to him in that behalf by Her Majesty, her heirs and successors.

The first limitation referring to the provisions of the Act evidently alludes to the constitutionality of the proposed law, the Governor being required to satisfy himself that it was within the legislative authority conferred on him with the advice and consent of

the Council. The second limitation required the Governor to exercise his discretion according to royal instructions, which would from time to time be given to him. Here then we come upon the statutory origin of an authority for royal instructions to Australian Governors. By sec. 40 of the same Act it is declared that Her Majesty may, with the advice of her Privy Council, or under Her Majesty's signet and sign manual, or through one of her principal Secretaries of State, from time to time convey to the Governor of New South Wales such instructions as to Her Majesty shall seem meet for his guidance in the exercise of his powers of assenting to, dissenting from, or reserving Bills passed by the Council, and that it shall be his duty to act in obedience to such instructions. Next came the Act 7 and 8 Vic. c. 74, sec. 7 (6th Aug., 1844), which recited that the object of providing for the reservation of Bills was to insure that such Bills should not be assented to by the Governor "without due consideration," and provided that it should not be necessary for the Governor to reserve any such Bill, from which, in the exercise of his discretion as limited in the Act of 1842, he should declare that he withholds Her Majesty's assent, or to which he should have previously received instructions on the part of Her Majesty to assent.

The Constitutional Act for the better government of the Australian colonies, 13 and 14 Vic. c. 59 (5th Aug., 1850), which created Victoria as a separate colony, re-enacted 5 and 6 Vic. c. 76, ss. 31 and 40, and 7 and 8 Vic. c. 74, s. 7, and made them applicable to the newly-created Australian Legislatures. The Constitution Statute of New South Wales, 18 and 19 Vic. c. 54, s. 3 (16th July, 1855), and the Constitution Statute of Victoria, 18 and 19 Vic. c. 55 (16th July, 1855), continued the operation of the old laws directing the Governor to assent to or reserve Bills in conformity with instructions. The old law was made applicable to the new system of representative and responsible government then introduced.

From this review of constitutional legislation it will be seen that the practice of limiting by instructions the Governor's discretion in giving or withholding the royal assent to Bills began in 5 and 6 Vic. c. 76, s. 31, statutory authority for those instructions being first found in sec. 40 of that Act; that the intention of sections 31 and 40 of the said Act is explained and extended by sec. 7 of the Act 7 and 8 Vic. c. 74; that the provisions of those Acts were confirmed by sec. 33 of the Act 13 and 14 Vic. c. 59; that previous legislation relating to the subject was confirmed by the Constitution Statutes of New South Wales and Victoria (16th July, 1855); and that those Statutes still remain in force, so far as they are applicable to the Governments of the States. Under this series of Imperial Acts, rules and instructions were formulated by the Imperial authorities, regulating the exercise of the discretion of Australian Governors, in giving or withholding the royal assent to Bills passed by the Australian legislatures.

Among the instructions referred to, the following may be mentioned: That in the passing of all laws, each different matter be provided for by a different law, without intermixing in one and the same Act such things as have no proper relation to each other; that no clause or clauses be inserted in or annexed to any Act which shall be foreign to what the title of such Act imports, and that no perpetual clause be part of any temporary law. Then followed a list of the classes of Bills to which the Governor was not permitted to assent, but which he was required to reserve for the signification of the Queen's pleasure. These instructions remained in force in most of the Australian colonies until 1892 (see p. 398, *supra*), when they were superseded by a new draft of instructions, in which the Governor was allowed greater freedom in the exercise of his discretion in assenting to or withholding assent from Bills; he was not directed to attend to the petty details above recited, but he was still directed to reserve Bills of the following classes:—

(*a*) Any Bill for the divorce of persons joined together in holy matrimony.

(*b*) Any Bill whereby any grant of land or money, or other donation or gratuity may be made to himself.

(*c*) Any Bill affecting the currency of the colony.

(*d*) Any Bill imposing differential duties (other than as allowed by the *Australian Colonies Duties Act*, 1873).

(*e*) Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by treaty.

(*f*) Any Bill interfering with the discipline or control of Our forces in the colony by land or sea.

(*g*) Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced.

(*h*) Any Bill containing provisions to which Our assent has been once refused, or which has been disallowed by Us.

Since the appointment of the Marquis of Lorne, on 6th October, 1878, the instructions associated with the office of Governor-General of Canada have been amended by the omission of the clause which formerly prescribed the classes of bills to be reserved by the Governor-General for Imperial consideration. Pursuant to this change in the tenor of the Royal Instructions to Governors of Canada—first introduced in 1878, by the omission of any direction for the reservation of bills—an Act passed by the Canadian Parliament in 1879, to effect the judicial separation of certain parties from the bonds of matrimony, was assented to by the Governor-General (42 Vic. 79), which Act previously must needs have been reserved for the signification of the royal pleasure thereon. (Todd's Parl. Gov. in Col., 2nd ed. p. 163.)

The instructions associated with the office of Governor-General of the Commonwealth will probably be framed on the lines of the Canadian model. Indeed, according to a strict interpretation of sec. 58 of the Constitution of the Commonwealth it would not be legal for Her Majesty, through the Secretary of State for the Colonies, to fetter the discretion of the Governor-General by instructions such as those which, with unquestionable legality, were given under the authority of the Act 5 and 6 Vic. c. 76, ss. 31 and 40. The Governor-General is authorized to assent in the Queen's name to Bills, to withhold the Royal assent to Bills, or to reserve Bills for the signification of the Queen's pleasure, "according to his discretion," and subject only to the Constitution; not subject to instructions, as under the Act of 1842. In determining the exercise of his discretion, the Governor-General will be entitled to receive from the law officers of the Commonwealth a report in reference to each Bill to be submitted for his sanction, specifying whether there is any legal objection to his assenting to it, or whether his duty and obligations, as Representative of the Crown, necessitate that he should withhold his assent or reserve the Bill for the consideration of the Imperial Government. (Todd's Parl. Gov. in Col., 2nd ed. p. 166.) As a general rule, a Governor would be justified in accepting and acting upon statements of such functionaries in local matters. But if his own individual judgment does not coincide with their interpretation of the law, his responsibility to the Crown may require him to delay acting on the advice of his Ministers. But whatever steps he may think fit to take upon such a grave emergency, and from whatever materials his opinion may be formed, he is individually responsible for his conduct, and cannot shelter himself behind advice obtained from outside his Ministry. (*Id.* p. 167.)

§ 268. "The Governor-General may . . Transmit . . Amendments."

The origin of the constitutional legislation enabling the Governor of a colony to recommend to its legislature amendments in proposed laws, may be traced back to 5 and 6 Vic. c. 76, s. 30 (p. 689 *supra*). It was reproduced in the Constitution Act of Victoria, 1855, sec. 36, as follows:—

"It shall be lawful for the Governor to transmit by message to the Council or Assembly for their consideration any amendment which he shall desire to be made in any

Bill presented to him for Her Majesty's assent; and all such amendments shall be taken into consideration in such convenient manner as shall by the rules and orders aforesaid be in that behalf provided."

This power of recommending amendments, vested in the Governor, has been found in parliamentary practice a very useful one, and even under our system of responsible government it has been used with advantage. It is of special value, towards the end of a session, when Bills have been passed through all their stages in both Houses of Parliament, and when it has been found that inaccuracies or discrepancies have crept into some of them. In such circumstances Ministers formulate the required amendments, and upon their advice the Governor transmits a message to the House in which the Bill or Bills requiring rectification originated. Thereupon amendments recommended are duly considered and dealt with, and if adopted, are transmitted to the other Chamber for its concurrence.

Disallowance by the Queen.

59. The Queen may disallow[269] any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Historical Note.—The first draft of this clause in the Commonwealth Bill of 1891 was taken from the Act for the Government of New South Wales and Van Diemen's Land, 1842 (5 and 6 Vic. c. 76, sec. 32). It was to the same effect, except that the period for disallowance was within two years from the receipt of the Bill by the Queen. In Committee, Mr. Cockburn moved to substitute "one year" for "two years," but this was negatived. He then moved to add:—"Provided that such disallowance shall be exercised on such subjects only as affect Imperial interests and are specified in schedule B." This also was negatived. (Conv. Deb., Syd., 1891, pp. 763-5.)

At the Adelaide session, 1897, the clause was introduced and adopted in the same form, except that the period for disallowance was one year from the receipt of the Bill. At the Melbourne session, before the first report, this period was altered to "one year from the Governor-General's assent," and further drafting amendments were made. A verbal amendment was made after the fourth report.

§ 269. "The Queen May Disallow."

In the abandonment of power to regulate, by instructions, the Governor-General's discretion in assenting to, withholding assent from, or reserving, Bills presented to him for the Royal Assent, the Crown has not relinquished one iota of its rightful authority, nor has the paramount sovereignty of the Imperial Parliament been in the smallest degree abated or impaired. The Constitution assumes that the Queen's Representative will have the absolute confidence of the Queen's Imperial Government, and that he will be able to exercise his discretion without the assistance or dominating guidance of standing rules and directions formulated by the Secretary of State for the Colonies. The grant of legislative power is determined by the Constitution, and the Imperial Parliament would not have granted the power if it were not satisfied that its exercise was placed in safe hands. To appoint the Governor-General as the Queen's Representative, in one section of the Constitution, and in another section to withhold the free and trusted exercise of his discretion, within the limits assigned by the Constitution, would have been a manifestation of distrust in the Queen's Representative, unworthy of the

dignity of his high office. At the same time the grant of a constitutional discretion to the Governor-General is quite compatible with the existence and maintenance of that supreme supervision over all the affairs of the Empire, which is exercised by the Queen through her Imperial Ministers. Even after the Governor-General has assented to a law, the ultimate power of disallowance is, by the Constitution, reserved to the Queen, subject only to the condition that the right of disallowance must be exercised within one year from the date of the Governor-General's assent. Consequently if a Bill assented to by the Governor-General is afterwards found by the Imperial Government to contain matter which justifies the interposition of the Royal veto, so as to suspend its operation, it may be disallowed, pursuant to the power reserved in the Crown. This method of conserving Imperial interests is more satisfactory, and more in harmony with the larger measure of self-government granted by the Constitution, than the old system of instructing the Governor not to assent to certain classes of Bills, many of which were quite within the competence of the colonial legislatures and related to matters of purely local interests.

There can be no doubt that the reserved power of disallowance will be wisely and sparingly exercised, in accordance with the rule long established, that Her Majesty's Government refrains from interfering with any colonial legislation which is consistent with colonial constitutional law, except in cases involving Imperial and international relations. From a return recently presented to the House of Lords, showing the number of cases in which laws, assented to by colonial Governors, have been afterwards vetoed by the Crown, it appears that it has been only necessary to use this extraordinary prerogative on a few occasions. (See Note, § 270 *infra*.)

The assent of the Queen's Representative to a proposed law, passed by the two Houses of the Federal Parliament, and the subsequent non-exercise of the power of disallowance, would not make it a good and valid law, if it were passed on a matter over which the Federal Parliament had no authority or control under the Constitution of the Commonwealth; such a law would be a nullity according to the maxim, "*defectus potestatis nullitas nullitatum.*" (Per Taschereau, J., in Lenoir *v.* Richie, 3 S.C.R. [Can.] 624.) The same law which prescribes limits to the legislative power imposes on the Federal Courts the duty of seeing that that power is not exceeded. (Per Duval, C.J., in L'Union St. Jacques de Montreal *v.* Belisle, 1 Cartwright, 84.) Where a statute is adjudged to be unconstitutional it is as if it had never been. (Cooley's Const. Lim. 6th ed. p. 222.) But the Courts will not presume that the Federal Parliament has exceeded its power, unless upon grounds of a really serious character, and they will not listen to an objection to the constitutionality of any Federal Act, unless it is raised and pleaded in due form by some one having an interest in questioning its validity. (Stuart, J., in Belanger *v.* Caron, 5 Quebec L.R. 25.)

Signification of Queen's pleasure on Bills reserved.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

Historical Note.—Clause 59, Chap. I., of the Commonwealth Bill of 1891 was to the same effect, and follows the usual provisions in colonial Constitutions. See for

instance the Act for the Government of New South Wales and Van Diemen's Land, 1842 (5 and 6 Vic. c. 76, sec. 33). The Bill of 1891 also contained a further provision:—"An entry of every such speech, message, or proclamation shall be made in the journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer, to be kept among the records of the Parliament."

At the Adelaide session, 1897, the draft of 1891 was substantially followed. In Committee, Mr. Reid moved to substitute "one year" for "two years," on the ground that two years was too long to keep the Commonwealth in suspense. It was pointed out, however, that to limit the time might limit the opportunities for securing the assent; and the amendment was negatived by 17 to 16. (Conv. Deb., Adel., pp. 833-4.) At a later stage Dr. Cockburn suggested the omission of the clause, but it was carried. (*Ib.* pp. 1200-1.)

At the Sydney session, a suggestion by the Legislative Assembly of South Australia, that a reserved bill should come into force unless disallowed by the Queen within one year, was supported by Dr. Cockburn, on the ground that "the veto, if exercised, should be expressly exercised, and not simply brought into effect by silence." Mr. Isaacs pointed out that this would mean that a law should take effect without the Queen's assent. The amendment was negatived. (Conv. Deb., Syd., 1897, pp. 779-82.) At the Melbourne session, drafting amendments were made before the first report and after the fourth report.

§ 270. "A Proposed Law Reserved."

The power of reservation will be exercised by the Governor-General according to his discretion. The principal consideration influencing his discretion will probably be whether the proposed law is in conflict with Imperial legislation applicable to the colonies, or inconsistent with the treaty obligations of Her Majesty's Government.

The following are extracts from a return presented to the House of Lords on the motion of the Earl of Onslow (2nd August, 1894) giving particulars of (1) Acts passed by both Houses of the Legislatures and assented to by Governors of Colonies possessing Responsible Government, and subsequently disallowed; (2) bills reserved, as to which Her Majesty was subsequently advised to withhold her assent, showing in each case whether the principle contained in such measure had or had not, up to the date of the return, become law in the colony:—

DOMINION OF CANADA.

Title.	Action taken.	Whether the principle is now law
1868— A Bill to fix the salary of the Governor-General (*reserved*)	Assent withheld	No change since
1872— A Bill to amend the Act respecting Copyright	Not assented to	Partly embodied in subsequent Act of 1875; assented to by Order in Council, under Imperial Act, 38 and 39 Vic. c. 53
1873— An Act to provide for the examination of witnesses on oath by Committees of the Senate and House of Commons in certain cases	Disallowed	Re-enacted and allowed, 1876
1874— A Bill to regulate the construction and maintenance of Marine Electric Telegraphs	Not assented to	Left in abeyance. *See* Desp. 220, 29 October, 1874, c. 1171, p. 7
1874— A Bill to amend "The Extradition Act, 1873"	Not assented to	Yes. *See* Consolidated Statutes of Canada, 1886, c. 142

DOMINION OF CANADA (*Continued*).—

Title.	Action taken.	Whether the principle is now law.
1878—		
A Bill to repeal Section 23 of the Merchant Shipping Act, 1876, as to Ships in Canadian Waters	Not assented to	Re-enacted as cap. 24 of 1879, to meet Board of Trade objections to original Act
1889—Cap. 29—		
A Bill to amend "The Copyright Act," c. 62 of the Revised Statutes	Not assented to	Still under consideration
1891—Cap. 40—		
A Bill to provide for the Marking of Deck and Load Lines	Not assented to	*See* cap. 22 of 1893
1893—Cap. 22—		
A Bill to amend the Merchant Shipping Act with regard to Load Lines	Not assented to	Still under consideration

NEW SOUTH WALES.

Title.	Action taken.	Whether the principle is now law.
1875—A Bill to enforce claims against the Crown (reserved)	Not assented to	Yes; amended Bill of 1876 allowed
1877—A Bill to amend the law relating to Divorce and Matrimonial Causes (reserved)	Not assented to	Yes; Act allowed in 1881
1879—A Bill to amend and extend the law of Divorce (reserved)	Not assented to	Yes; Act allowed in 1881
1887—A Bill to amend and extend the law of Divorce (reserved)	Not assented to	Yes; Act of 1892 allowed

VICTORIA.

Title.	Action taken.	Whether the principle is now law.
1857—		
A Bill to explain to whom the term "Crown" as used in certain cases shall apply (reserved)	Not assented to	No
1860—		
An Act to provide for the better regulation and discipline of armed vessels in the service of Her Majesty's Local Government in Victoria, No. 96 of 1890.	Disallowed	Yes; *see* the Colonial Naval Defence Act, 1865, 28 and 29 Vic. c. 14
1860—		
A Bill to abolish pensions to retiring responsible officers (reserved)	Not assented to	Amended Bill passed and assented to, 1864
1860—		
A Bill to amend the law relating to Divorce and Matrimonial Causes in Victoria (reserved)	Not assented to	Yes; Bill passed and assented to, 1864
1862—		
A Bill to alter the sum appropriated to the payment of the salary and allowances of the Governor (reserved)	Not assented to	Amended Bill passed in 1863, and assented to, 1864
1862—		
A Bill to give a preferable lien on growing crops without delivery (reserved)	Not assented to	Yes; similar measure passed, 1876

QUEENSLAND.

Title.	Action taken.	Whether the principle is now law.
1860—		
A Bill to amend the constitution of the Supreme Court of Queensland, and to provide for the better administration of justice (reserved)	Not assented to	No
1874—		
A Bill to consolidate and amend the laws relating to the marine board, navigation, pilotage, harbour lights, and the keeping and carriage of gunpowder (reserved)	Not assented to	Amended Bill, passed in 1877, assented to
1875—		
A Bill to legalize the marriage of a man with the sister of his deceased wife (reserved)	Not assented to	Yes; Bill passed in 1877, assented to
1879—		
A Bill relating to wrecks, casualties, and salvage (reserved)	Not assented to	Yes; by the Colonial Courts of Admiralty Act, 1890, 53 and 54 Vic. c. 27
1881—		
A Bill to provide for the execution in Queensland of warrants of apprehension issued in other colonies (reserved)	Not assented to	Yes: *see* the Fugitive Offenders Act, 1881, 44 and 45 Vic c. 69
A Bill to prevent the influx of foreign and other criminals into Queensland (reserved)	Not assented to	No

SOUTH AUSTRALIA.

Title.	Action taken.	Whether the principle is now law.
1860—		
A Bill to legalize the marriage of a man with the sister of his deceased wife (reserved)	Not assented to	Yes; Bill passed in 1871, assented to
1862—		
An Act to amend the Acts relating to marriage in the Province of South Australia, by extending certain provisions thereof to persons professing with the Society of Friends, called Quakers	Disallowed	Yes; amended Bill, passed in 1864
1863—		
A Bill to legalize the marriage of a man with the sister of his deceased wife	Not assented to	Yes; Bill passed in 1871, assented to
1864—		
An Act to amend the Marine Board Act of 1860	Disallowed	Further legislation in 1867, 1873, 1876, 1878, 1881-82
1864—		
An Act to repeal Act, No. 18 of 1857-58, intituled, "An Act to prevent the introduction into the Province of South Australia of convicted felons and other persons sentenced to transportation for offences against the laws," and to make other provision in lieu thereof	Disallowed	No

SOUTH AUSTRALIA (*Continued*).—

Title.	Action taken.	Whether the principle is now law.
1870—		
A Bill to legalize the marriage of a man with the sister of his deceased wife (reserved)	Not assented to	Yes; Bill passed in 1871, assented to
1871—		
A Bill to make better provision for the interchange of colonial products and manufactures between the Colonies of Australasia (reserved)	Not assented to	Yes; *see* Australian Colonies Duties Act, 1873, 36 Vic. c. 22
1871—		
A Bill to provide for the regulation of precedency in South Australia (reserved)	Not assented to	No
1891—		
A Bill to amend the Marine Board and Navigation Act, 1881 (reserved)	Not assented to	Governor informed, 7th June, 1893

TASMANIA.

Title.	Action taken.	Whether the principle is now law.
1859—		
A Bill to provide for the abolition, upon certain terms, of State aid to religion in the Colony of Tasmania (reserved)	Not assented to	Yes; Bill passed in 1868, assented to
1861—		
Bill to alter the sum payable for defraying the allowances and contingent expenses of the establishment of the Governor of Tasmania (reserved)	Not assented to	No. (This Act affected the Governor then in office)
1863—		
An Act to make further provision for the control and disposal of offenders under sentence of imprisonment	Disallowed	No
1867—		
Bill to reduce the salary and allowance of any future Governor of Tasmania (reserved)	Not assented to	Bill passed in 1873, assented to; further Act, 1883
1867—		
Bill to promote intercolonial free trade (reserved)	Not assented to	No
1868—		
Bill to reduce the allowances of every future Governor of Tasmania (reserved)	Not assented to	Bill passed in 1873, assented to; further Act, 1883
1870—		
Bill to make better provision for the interchange of Colonial products and manufactures between the Colonies of Australasia (reserved)	Not assented to	Act of 1873 allowed; passed after the enactment of the Australian Colonies Duties Act, 1873, 36 Vic. c. 22
1890—		
Bill to amend "The Crown Redress Act" (reserved)	Not assented to (by desire of Colonial Government)	Act of 1891 allowed

NEW ZEALAND.

Title.	Action taken.	Whether the principle is now law.
1856—		
An Act to empower the superintendents and provincial councils to enact laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown	Disallowed	No
1856—		
A Bill to enable the native tribes of New Zealand to have their territorial rights ascertained, and to authorize the issue in certain cases of Crown grants to natives (reserved)	Not assented to	No
1860—		
A Bill to establish a council to assist in the administration of native affairs (reserved)	Not assented to	No
1861—		
A Bill to enable the superintendent of the Province of Marlborough to construct a railway from Pictou Harbour to the Wairau, both in the said Province of Marlborough (reserved)	Not assented to	No
1863—		
A Bill to enable provincial legislatures to pass laws authorizing the compulsory taking of land for works of a public nature (reserved)	Not assented to	Bill passed and assented to, 1866 or 1867, and [illegible] repealed
1866—		
An Act for indemnifying persons acting in the suppression of the native insurrection	Disallowed	Amended Act, passed in 1867, allowed
1867—		
A Bill to alter the salary of the Governor of New Zealand	Not assented to	—
1870—		
A Bill respecting reciprocity with the Australasian Colonies and Tasmania, as to Customs Duties (reserved)	Not assented to	Yes; *see* Australian Colonies Duties Act, 1873, 36 V. c. 22
1873—		
A Bill to provide for the surrender of fugitive criminals (reserved)	Not assented to	Yes; Bill passed in 1874, assented to
1883—		
A Bill to facilitate the confederation with, and annexation to, the Colony of New Zealand of any Island or Islands in the Pacific the Government or constituted authority of which may make proposals to that effect to the Government of New Zealand (reserved)	Not assented to	No

CHAPTER II.—THE EXECUTIVE GOVERNMENT[271].

§ 271. "The Executive Government."

The term government is sometimes specially used to denote the Executive authority f a political State. Strictly speaking, however, it comprehends all the organic agencies gaged in the legislative, administrative, and judicial regulation of public affairs. The mmonwealth is a united political community, composed of the people and of the ates. The organization and distribution of its governing instrumentalities are termined by the Constitution. Under that instrument the political government of e Commonwealth is partitioned and divided among two separate sets of ruling organs,) the organs of Federal Government as provided in Chapters I., II., and III., and (2) e organs of State Governments as provided in Chapter V. The Federal Government nsists of a Parliament, an Executive, and a Judiciary, and the Government of each ate similarly consists of a Parliament, an Executive, and a Judiciary. Chapter I. fines the structure and power of the Federal Parliament; we now come to the usideration of Chapter II. which defines the structure and power of the Federal ecutive.

The tripartite division of every government into Legislative, Executive, and dicial departments has been already referred to and illustrated; it is a division mmon to and inherent in alike federal and unitarian governmental systems. In the nstitution of the Commonwealth there is a sharp distinction drawn between the gislative, Executive, and Judicial powers, and a separate and independent organization secured for the exercise of each. The Legislative functions of the Federal Parliament clearly and expressly defined by the Federal Constitution; so also the Legislative nctions of each State Parliament are defined in the Constitution of each State which ntinues in full force and effect, subject only to the Federal Constitution (secs. 106-7). e Executive functions of the Federal Government are clearly and expressly defined by e Federal Constitution; so also the Executive functions of each State Government are ined by the State Constitution and State laws founded thereon, subject only to the deral Constitution. The Judicial powers of the Federal Courts are clearly and pressly defined by the Federal Constitution; so also the Judicial powers of the State urts are preserved by the State Constitutions, subject only to the Federal Constitution.

The Executive authority, in the system of government established by the Federal nstitution, includes all those discretionary or mandatory acts of government which e be lawfully done or permitted by the Executive Government, in pursuance of powers sted in it, or in pursuance of duties imposed upon it partly by the Constitution and rtly by Federal legislation. Generally described, the powers and duties of the deral Executive Government relate to the execution and maintenance of the Constitun and the execution and maintenance of the laws of the Federal Parliament, ssed in pursuance of the Federal Constitution.

Among the principal executive powers and functions which may be found in various ctions of the Constitution may be mentioned the following, viz., the appointment of mes for the holding of sessions of Parliament, the prorogation of Parliament, the dissolution of the House of Representatives, the summoning of Parliament to meet (sec. 5) the issue of writs for general elections of members of the House of Representatives (sec. 32); the transmission of messages to the Federal Parliament recommending the appropriation of revenue or money (sec. 56); the dissolution of the Senate and the

House of Representatives simultaneously (sec. 57); the convening of a joint sitting of the members of the Senate and of the House of Representatives (sec. 57); the choice and summoning of Executive Councillors (sec. 62); the establishment of departments of State and the appointment of political officers to administer departments of State (sec. 64); the command of the naval and military forces of the Commonwealth (sec. 68); the proclamation of dates on which certain departments of the public service shall become transferred to the Commonwealth (sec. 69); the appointment of Justices of the High Court and of other Federal Courts (sec. 72); the drawing of money from the treasury of the Commonwealth in pursuance of appropriation made by law (sec. 83); the control of departments of the public service transferred to the Commonwealth (sec. 84); the appointment and control of public officers in the service of the Commonwealth (sec. 67). The foregoing are some of the powers and duties of the Federal Executive, as enumerated in the Constitution. But other powers, duties, and functions will hereafter form the subject of Federal legislation.

Nationalism of the Executive.—The Executive Government established by this Constitution is essentially national in form, as well as in its powers and functions. It is true that the Council of the Crown, from which political officers to administer the departments of state are selected, is described as the Federal Executive Council. In that collocation the phrase "federal" is not inconsistent with "national." (Foster on the Constitution, I. p. 92.) In structure the Executive is certainly national. The framers of the Constitution refused to build it according to federal principles, by making it dependent upon or partly elected by the Senate. The Governor-General, as the official head of the Executive, does not in the smallest degree represent any federal element; if he represents anything he is the image and embodiment of national unity and the outward and visible representation of the Imperial relationship of the Commonwealth. In selecting his Prime Minister, the Governor-General will be constrained to choose the statesman who possesses the confidence of the people of the Commonwealth as a whole, and that confidence will be mainly evidenced by the majority which he can command in the national Chamber. In a speech delivered at Halifax in August, 1875, Lord Dufferin, then Governor-General of Canada, indicated the ideal position of a representative of the Crown as follows:—

> My only guiding star in the conduct and maintenance of my official relations with your public men is the Parliament of Canada. I believe in Parliament, no matter what way it votes; and to those men alone whom the deliberate will of the Confederate Parliament of Canada may assign to me as my responsible advisers, can I give my confidence. Whether they are heads of this party, or of that party, must be a matter of indifference to the Governor-General; so long as they are maintained he is bound to give them his unreserved confidence, to defer to their advice, and to loyally assist them with his counsels. As a reasonable being he cannot help having convictions on the merits of different policies, but these considerations are abstract and speculative and devoid of practical effect in his official relations. As the head of a constitutional State engaged in the administration of Parliamentary government, the Governor-General has no political friends—still less can he have political enemies. The possession, or even suspected of such possession, would destroy his usefulness. (Leggo's Life of Lord Dufferin, 662.)

The powers and functions of the Executive of the Commonwealth are for the most part national. The execution and maintenance of the Constitution, the execution and maintenance of the Federal laws, and the Command-in-Chief of the naval and military forces, are the foremost attributes of a national government. Annexed, however, to the Command-in-Chief of the naval and military forces are obligations of a federal character. One of those obligations is imposed by sec. 119, which requires the Commonwealth to protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence.

Executive power.

61. The executive power of the Commonwealth[272] is vested in the Queen[273], and is exerciseable by the Governor-General[273] as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

CANADA.—The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen. (B.N.A. Act, 1867, sec. 9.)

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, the substance of this section as contained in clauses 1 and 8 of Chap. II. (Conv. Deb., Syd. (1891) pp. 777-8.)

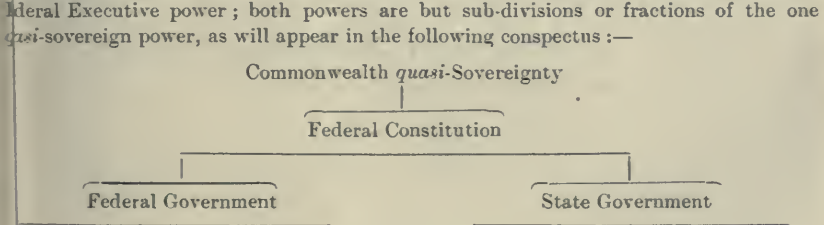
At the Adelaide session, the clauses were introduced in the same form. In Committee, Mr. Reid and Mr. Carruthers suggested adding "in Council" after "Governor-General." Mr. Reid argued that the prerogative, so far as the colonies were concerned, was limited to the right of assembling, proroguing, and dissolving Parliament, pardoning offenders, issuing proclamations, &c. Executive acts were always done on the advice of the Executive Council; the refusal to receive advice was not an Executive Act at all. Mr. Barton replied that Executive acts were either (1) exercised by prerogative, or (2) statutory. Constitutional practice would prevent the prerogative, except occasionally, being exercised without ministerial advice, and the words were unnecessary and opposed to usage. No amendment was moved. (Conv. Deb., Adel., pp. 908-15.)

At Sydney, Mr. Reid obtained the substitution of "exercisable" for "exercised"—apparently to avoid a direction to the Queen, and make the words declaratory. (Conv. Deb. Syd., p. 782.)

At Melbourne, the words "and authority" (after "power") were omitted; and after the fourth report the two clauses were condensed into one. (Conv. Deb. Melb. p. 1721.)

§ 272. "The Executive Power of the Commonwealth."

The expression, "The Executive power of the Commonwealth," must be read to mean the Federal Executive power as distinguished from the Executive power reserved to the States. As to the secondary meaning of the term "Commonwealth," in which it is equivalent in signification to Federal Government, see note, § 43, *supra*. The Executive power reserved to the States by the Federal Constitution is as much a part of the Executive power of the Commonwealth, as a united political community, as the Federal Executive power; both powers are but sub-divisions or fractions of the one *quasi*-sovereign power, as will appear in the following conspectus:—



It may be said that the whole mass of the Executive authority of the Commonwealth is divided into two parts; that portion which belongs to the Federal Government, in relation to Federal affairs, being assigned to the Governor-General as the Queen's Representative, and that portion which relates to matters reserved to the States being vested in Governors of the States. The Executive authority reserved to the Governors

of the States, is of the same origin but of higher antiquity than that newly created authority conferred on the Governor-General. The State Executive authority is of as much importance within its sphere as the Federal Executive authority is within the Federal sphere. The Executive authority possessed by a State Governor, acting as the Queen's Representative in and for a State, is not of a subordinate nature, or of an inferior quality; it is of the same nature and quality as that possessed by the Queen's Representative acting in the name of the Commonwealth. See the arguments in the Attorney-General of Canada *v.* Attorney-General of Ontario (1892, 3 Ont. App. 6).

§ 273. "Vested in the Queen."

The Federal Executive power granted by this Constitution is vested in the Queen. This statement stereotypes the theory of the British Constitution that the Crown is the source and fountain of Executive authority, and that every administrative act must be done by and in the name of the Crown.

"We are at the present day so accustomed to think and to speak of the Government of Sir Robert Peel or Lord Russell, of Lord Derby or Lord Palmerston, that we almost overlook the Royal Personage whom these Statesmen serve. We forget the Queen for the Minister. The means, as so often happens, obscure the end; the object limited is lost in the limitation. Yet whatever may be our mode of speech, any such indistinctness of thought will effectually exclude all clear views of the Constitution. In our political system the Crown always has been and still is the sun." (Hearn's Gov. of Eng. p. 16.)

"They derive everything from the Crown, and refer everything to its honour and advantage. Nor is this less true of the modern form of our Constitution than it was of an age when the prerogative was exercised chiefly for the King's personal benefit. The lustre of the triple crown of the United Kingdom is not less brilliant than the lustre of that single crown of England which rested on the brows of our Henries and our Edwards. With us no less than with all our ancestors, ever since England was a nation, the Crown enacts laws; the Crown administers justice; the Crown makes peace and war and conducts all the affairs of State at home and abroad; the Crown rewards them that have done well, and punishes the evil doers; the Crown still enjoys the other splendid prerogatives which have at all times graced the diadem of England." (*Id.* p. 17.)

In our analysis of sec. 1 of this Constitution we have seen that the dictum that "the Crown still enacts the law," is not strictly applicable to the legislative department of the Federal Government, seeing that by that section the legislative power is vested in a Federal Parliament, in which the Senate and the House of Representatives are co-ordinate branches with the Queen. The old theory of legislation has been encroached upon, to some extent, by that section. The dictum that "the Crown conducts all the affairs of State," is still true in theory, and has been followed and maintained in form, by sec. 61, which says that the executive power of the Federal Government is vested in the Queen.

§ 274. "Exercisable by the Governor-General."

The Executive power vested in the Queen is exercisable by the Governor-General as the Queen's Representative. The Governor-General appointed by the Queen is authorized to execute, in the Commonwealth, during the Queen's pleasure and subject to the Constitution, such powers and functions as may be assigned to him by Her Majesty (sec. 2) and by the Constitution (sec. 61). Foremost amongst those powers and functions will necessarily be the execution and maintenance of the Constitution, and the execution and maintenance of the laws passed in pursuance of the Constitution.

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General[275] in the Government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as the Executive Councillors, and shall hold office during his pleasure.

CANADA.—There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from time to time removed by the Governor-General.—B.N.A. Act, 1867, sec. 11.

HISTORICAL NOTE.—The clause in the Commonwealth Bill of 1891, which was adopted verbatim at Adelaide in 1897, only differed verbally from the section as it now stands. At Adelaide Mr. Glynn suggested that the Executive Council should consist only of Cabinet Ministers; but he moved no amendment. (Conv. Deb., Adel., p. 915-6.)

At Sydney, Sir Richard C. Baker proposed to add "of six" after "Executive Council." This he intended as a test question between Responsible Government and Elective Ministers, and he proposed to follow it up, if it were carried, with a provision that three Ministers should be chosen by the Senate and three by the House of Representatives at the commencement of each Parliament, to hold office for three years unless a joint sitting of both Houses should otherwise determine. He thought Cabinet Government inconsistent with federation, because the one meant responsibility to one predominant House, and the essence of the other was two co-ordinate and approximately co-equal Houses. Dr. Cockburn supported the amendment; Mr. Higgins and Mr. Carruthers opposed it. It was negatived without division. (Conv. Deb., Syd., 1897, pp. 782-92.)

At Melbourne, drafting amendments were made before the first report and after the fourth report. (Conv. Deb., Melb., p. 2453.)

§ 275. "A Federal Executive Council to Advise the Governor-General."

Whilst the Constitution, in sec. 61, recognizes the ancient principle of the Government of England that the Executive power is vested in the Crown, it adds as a graft to that principle the modern political institution, known as responsible government, which shortly expressed means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative according to the advice of ministers, having the confidence of that branch of the legislature which immediately represents the people. The practical result is that the Executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman of the Cabinet, or in other words the Prime Minister. (Dicey, Law of the Const. p. 9.) There is therefore a great and fundamental difference between the traditional ideal of the British Constitution, as embodied in sec. 61, giving full expression to the picture of Royal authority painted by Blackstone (Comm. I. p. 249) and by Hearn (Gov. of Eng. p. 17), and the modern practice of the Constitution as crystallized in the polite language of sec. 62, "there shall be a Federal Executive Council to advise the Governor-General in the Government of the Commonwealth." (See Note on the Cabinet, p. 382, *supra*.)

"There are perhaps few political or historical subjects with respect to which so much misconception has arisen in Australia as that of Responsible Government. It is, of course, an elementary principle that the person at whose volition an act is done is the proper person to be held responsible for it. So long as acts of State are done at the

volition of the head of the State he alone is responsible for them. But, if he owns no superior who can call him to account, the only remedy against intolerable acts is revolution. The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State. Revolution is therefore no longer a necessary possibility ; for a change of Ministers effects peacefully the desired result. The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people. In practice they are themselves members of the Legislature. . . . The 'sanction' of this unwritten law is found in the power of the Parliament to withhold the necessary supplies for carrying on the business of the Government until the Ministers appointed by the Head of the State command their confidence. In practice, also, the Ministers work together as one body, and are appointed on the recommendation of one of them, called the Prime Minister. And, usually, an expression of want of confidence in one is accepted as a censure of all. This is not, however, the invariable rule ; and it is evidently an accidental and not a fundamental feature of Responsible Government." (Sir Samuel Griffith, Notes on Australian Federation, 1896, pp. 17-18.)

The gradual transfer of the executive power from the sovereign to Responsible Ministers forms one of the most remarkable and interesting revolutions recorded in the history of England. Ever since the resignation of Sir Robert Walpole in 1742, it has been recognized that the Crown could not for any length of time continue to carry on the government of the country, except through Ministers having the confidence of the House of Commons. That constitutes the essence of Responsible Government. It was the great ambition of the framers of the Australian Constitutions of 1855-6 to acclimatize, in the colonies which they were then helping to found, the system thus known as Responsible Government. The Constitution Act of New South Wales, as well as those of Victoria and South Australia, contained a clause which to some extent amounted to a statutory recognition of that system. It was to the effect that "the appointment of all public offices under the Government of the colony hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor with the advice of the Executive Council, with the exception of the appointments of the officers liable to retire from office on political grounds, as hereinafter mentioned, which appointments shall be vested in the Governor alone. Provided always that this enactment shall not extend to minor appointments which by the Act of the Legislature or by order of the Governor and Executive Council may be vested in heads of departments or other officers or persons within the colony." (Sec. 37.)

Annexed to each of those Constitutions was a civil list providing compensation for the holders of high departmental offices in each colony on their retirement from office on political grounds. The Constitution of South Australia was clear in the expression of its intention to introduce Responsible Government, for, by sec. 32, it required the holders of certain public offices to occupy seats in Parliament; whilst sec. 39 was particularly explicit in its intention that officers administering public departments would have to retire from office upon their ceasing to retain the confidence of the Colonial Parliament.

The Federal Executive Council is founded on the model of the Executive Council established in each colony. The members of the Executive Council will be chosen, summoned and sworn in by the Governor-General ; they will hold office during his pleasure, in the same manner that members of the Executive Council in each State are chosen, summoned, sworn in, and hold office.

It must be remembered, however, that the Executive Council as created by statute is not the Cabinet as known in parliamentary practice. The Cabinet is an informal

body having no definite legal status ; it is in fact an institution unknown to the law ; it exists by custom alone, and yet it is the dominant force in the Executive Government of every British country. The Executive Council corresponds to the Privy Council of England, a Council of the Crown whose origin can be traced back to the earliest period of English history. The Executive Council also corresponds to the Privy Council of Canada, which was established in the Dominion by the British North America Act, 1867. As the Crown in England may appoint and summon to the Imperial Privy Council worthy and distinguished subjects of the Queen, whether they be members of Parliament or not, so the Crown in the Commonwealth may appoint, and summon to the Executive Council, citizens of merit and ability who are considered worthy of the honour, without reference to Parliamentary qualifications. Their tenure of office is during the pleasure of the Crown. Membership of the Imperial Privy Council, like membership of the Federal Executive Council, carries with it titular honours and distinction, but not necessarily any office or place of profit under the Crown. It is, however, from among those members of the Privy Council in England, and of the Executive Council of the Commonwealth, who are also members of Parliament, that persons are selected to become officers administering departments of State, and hence responsible servants of the Crown. The persons so selected constitute the Ministry or Cabinet, and are styled "the Queen's Ministers of State." Membership of Parliament is, as a matter of custom, essential as a qualification for appointment as a political minister, although in the absence of express statutory enactment it is not absolutely necessary, either in England or the colonies.

As to the question whether under the Constitution of the Commonwealth there can be, as there frequently are in the Cabinets of the States, "Ministers without portfolios," who partake of the general responsibility of the Ministry, but do not administer departments of State, see Note "The Queen's Ministers of State," § 278, *infra*.

There are thus two commonly recognized qualifications necessary for ministerial appointment, (1) membership of the Privy or Executive Council, (2) membership of Parliament. From the point of view of the first qualification the ministry may be described as a select committee of the Privy or Executive Council ; the remaining members of that body not being summoned to attend either the meetings of committees or the ordinary meetings of the Council. From the point of view of the second qualification the ministry may be called a Parliamentary committee, whose composition and policy is determined by the party commanding a majority in the national chamber.

In the formation of a Cabinet the first step is the choice and appointment of its President or spokesman, the Prime Minister ; he is chosen and appointed by the Crown or by its representative. In the choice of a Prime Minister, however, the discretion of the Crown is fettered ; it can only select one who can command the confidence of a majority of the popular House. The other members of the Cabinet are chosen by the Prime Minister and appointed by the Crown on his recommendation.

Some of the pre-eminent features of Cabinet organization, and some of the rules of Cabinet discipline and government, may be here presented. The proceedings of the Cabinet are conducted in secret and apart from the Crown. The deliberations of the Executive Council are presided over by the representative of the Crown. Resolutions and matters of administrative policy requiring the concurrence of the Crown, decided at meetings of the Cabinet, are formally and officially submitted to the Executive Council, where they are recorded and confirmed. The principle of the corporate unity and solidarity of the Cabinet requires that the Cabinet should have one harmonious policy, both in administration and in legislation ; that the advice tendered by the Cabinet to the Crown should be unanimous and consistent ; that the Cabinet should stand or fall together.

The Cabinet as a whole is responsible for the advice and conduct of each of its members. If any member of the Cabinet seriously dissents from the opinion and policy approved by the majority of his colleagues it is his duty as a man of honour to resign.

Advice is generally communicated to the Crown by the Prime Minister, either personally or by Cabinet minute. Through the Prime Minister the Cabinet speaks with united voice. The Cabinet depends for its existence on its possession of the confidence of that House directly elected by the people, which has the principal control over the finances of the country. It is not so dependent on the favour and support of the second Chamber, but at the same time a Cabinet in antagonism with the second Chamber will be likely to suffer serious difficulty, if not obstruction, in the conduct of public business.

This brings us to a review of some of the objections which have been raised to the application of the Cabinet system of Executive Government to a federation. These objections have been formulated with great ability and sustained with force and earnestness by several Australian federalists of eminence, among whom may be mentioned the names of Sir Samuel Griffith, Sir Richard C. Baker, Sir John Cockburn, Mr. Justice Inglis Clark, and Mr. G. W. Hackett, who have taken the view that the Cabinet system of Executive is incompatible with a true Federation. (See "The Executive in a Federation," by Sir Richard C. Baker, K.C.M.G., p. 1.)

In support of this contention it is argued that, in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber; that the State House would be justified in withdrawing its support from a ministry of whose policy and executive acts it disapproved; that the State House could, as effectually as the primary Chamber, enforce its want of confidence by refusing to provide the necessary supplies. The Senate of the French Republic, it is pointed out, has established a precedent showing how an Upper House can enforce its opinions and cause a change of ministry. On these grounds it is contended that the introduction of the Cabinet system of Responsible Government into a Federation, in which the relations of two branches of the legislature, having equal and co-ordinate authority, are quite different from those existing in a single autonomous State, is repugnant to the spirit and intention of a scheme of Federal Government. In the end it is predicted that either Responsible Government will kill the Federation and change it into a unified State, or the Federation will kill Responsible Government and substitute a new form of Executive more compatible with the Federal theory. In particular, strong objection is taken to the insertion in the Constitution of a cast-iron condition that Federal Ministers must be members of Parliament. Membership of Parliament, it is argued, is not of the essence of Responsible Government, but only an incident or an accidental feature, which has been introduced by modern practice and by statutory innovation.

Two suggestions have been made, the adoption of either of which will tend to mould a form of Executive in harmony with the Federal principle. The first is that the approval of the Senate should be demanded as a condition precedent to the original appointment of Federal Ministers, subject to the understanding that once Ministers were so approved by the Senate, the Senate should not withdraw its approval, but that Ministers should remain in office as long as they retained the confidence of the House of Representatives. The second proposal is that Federal Ministers should be elected for a fixed term, at a joint sitting of the members of both Federal Houses. (Sir Samuel Griffith, Notes on Australian Federation, 1896, p. 20.) If it is desired to prevent a theoretical Federation from becoming a practical amalgamation "we must look for an adaptation of a Swiss form for our ideal of a Federal Executive." (Sir Richard C. Baker, The Executive in a Federation, 1897, p. 18.)

It is not our province to comment on the opinions and contentions of these eminent federalists. Their views have not been accepted; and, for better or for worse, the

system of Responsible Government as known to the British Constitution has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment of the instrument. There can be no doubt that it will tend in the direction of the nationalization of the people of the Commonwealth, and will promote the concentration of Executive control in the House of Representatives. At the same time it ought not to impair the equal and co-ordinate authority of the Senate in all matters of legislation, except the origination and amendment of Bills imposing taxation and Bills appropriating revenue or money for the ordinary annual services of the Government.

Provisions referring to Governor-General.

63. The provisions of this Constitution referring to the Governor-General in Council[276] shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Historical Note.—This section is identical with clause 3 of Chap. II. in the Commonwealth Bill of 1891, and has appeared in every subsequent draft of the Bill without alteration and without debate.

§ 276. "Governor-General in Council."

Certain Executive powers and functions are, by the Constitution, vested in the Governor-General; others are vested in the Governor-General in Council. The distinction between these two classes of powers and functions is historical and technical, rather than practical or substantial. The particular powers and functions vested in the Governor-General belong to that part of the Executive authority which was originally vested in the Crown at common law, and is not at present controlled by statute; they are called prerogatives of the Crown. For example, the prorogation and dissolution of Parliament, the appointment of ministers of state, and the command of the army and navy, are prerogatives of the Crown, which have been exercised by the Crown from time immemorial. Contrasted with these prerogative powers are other powers and functions, the exercise of which by the Crown is now controlled by statute law; these are not prerogatives of the Crown, and consequently, without any appearance of invasion or encroachment on the domain of prerogative, they are vested in and exercised by the Governor-General in Council. Among these may be mentioned the issue of writs for the general election of members of the House of Representatives; the establishment of departments of state; the appointment and removal of public officers.

Sec. 63 is an interpretation section; its object is to make it clear that wherever in the Constitution there is a provision that the Governor-General in Council may do certain acts, such provision refers to the Governor-General acting with the advice of the Federal Executive Council. This, as we have already seen, means the advice of the select committee of the Federal Executive Council known as the Ministry.

Ministers of State.

Ministers to sit in Parliament[279].

64. The Governor-General may appoint officers to administer such departments[277] of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State[278] for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Historical Note.—The original draft in 1891 was as follows :—

"For the administration of the Executive Government of the Commonwealth, the Governor-General may from time to time appoint officers to administer such Departments of State as the Governor-General in Council may from time to time establish, and such officers shall hold office during the pleasure of the Governor-General, and shall be capable of being chosen and of sitting as members of either House of the Parliament. Such officers shall be members of the Federal Executive Council."

In Committee, Sir John Bray proposed to add that two members at least should be senators, but this was negatived. Mr. Wrixon proposed to add "and responsible Ministers of the Crown." Sir Samuel Griffith objected that this was a mere "epithet," and that the Ministers must be responsible in any case. Mr. Deakin cited the judgment of the Supreme Court of Victoria in Ah Toy *v.* Musgrove (14 V.L.R. 349 ; 1891, App. Ca. 272), and supported the introduction of "words claiming all the prerogatives of the Crown directly relating to Australia." After debate, Sir Samuel Griffith suggested the words "and shall be the Queen's Ministers of State for the Commonwealth," which were agreed to. (Conv. Deb., Syd., 1891, pp. 765-76.)

At the Adelaide session, the clause was introduced in the same form, with the additional provision that after the first election no Minister should hold office for more than three months without a seat in the Parliament.

At the Sydney session, a proposal of the Legislative Council of South Australia to omit the first portion of the clause, with a view to leaving the question of elective Ministers open, was negatived. An amendment of the House of Assembly of Tasmania, giving every Minister a right to sit and speak in either House (but not to vote, unless a member) was negatived on division by 21 votes to 14. (Conv. Deb., Syd., 1897, pp. 793-9.)

At the Melbourne session, drafting amendments were made before the first report, and after the fourth report.

§ 277. "Officers to Administer such Departments."

The Governor-General may appoint officers to administer such Federal departments as may be established. This refers to the appointment of Federal Ministers for the time being. Their appointment is a prerogative act, vested in the Governor-General. The appointment, however, must be distinguished from the choice. In actual practice the choice of the Crown is limited to the selection of the Prime Minister, and even in that choice its discretion is restricted ; often it has no choice at all, since it must choose one who is the official leader of the party commanding a majority in the National Chamber.

Even in the choice of a first minister, which has been termed the only personal act the King of England has to perform, that choice is practically influenced by the necessity for its being confirmed by the approbation of Parliament. (Todd's Parl. Gov. in Col. 2nd ed. p. 17.) The other members in the Ministry are selected by the Prime Minister and by him recommended to and appointed by the Crown. The tenure of office of ministers is said to be during the pleasure of the Governor-General, which signifies that they will remain in power so long as they can carry on the Queen's Government.

It is assumed in this section that the Governor-General in Council can establish departments of state for the Commonwealth. The authority of the Governor-General in Council in that respect is restricted to the organization of such departments as may be transferred from the States to the Commonwealth, and such others as may be necessary for the maintenance of the Constitution and the execution of Federal laws.

The first Executive Act of the Governor-General will be the appointment of an Executive Council under Section 62. This appointment will no doubt be made on the day on which the Commonwealth is established. The Executive Council so appointed will be convened and presided over by the Governor-General. One of the first Executive Acts of the Governor-General in Council will be to determine and establish Departments of State under Section 64. This will be done by an order in Council. Thereupon the Governor-General will appoint, from the Executive Council, officers to administer such Departments.

§ 278. "The Queen's Ministers of State."

These remarkable words seem to be an entirely new departure in the direction of expressing in a Constitutional Act the principles of responsible government. The words "and shall be the Queen's Ministers of State for the Commonwealth" were introduced by Sir Samuel Griffith at the Sydney Convention in 1891, in substitution for the words "and responsible Ministers of the Crown," which Mr. Wrixon had proposed to insert. Mr. Wrixon had no doubt that the effect of the clause as it then stood—providing for members of an Executive Council, who should administer departments of State, hold office during the Governor-General's pleasure, and be capable of sitting in Parliament—provided for a system of responsible government; but he did not think that it would clothe them with all the vast constitutional powers which, under the system of the English Government, belong to responsible Ministers of the Crown. The greatness of those powers, and the vastness of the authority which any responsible Minister of the Crown exercises in binding the Crown and the sovereign, was well illustrated in the old case of Buron *v.* Denman (2 Exch. 167); and he thought it highly important that the Ministers of the Crown here should, in regard to all Australian matters, be invested with exactly the same presumptions of authority and ratification from the Crown as apply to Imperial Ministers.

"I myself would propose that we add to the last sub-clause 'and responsible Ministers of the Crown;' and I believe that then the Court would interpret that with reference to ordinary constitutional usage, of which they would take judicial notice, and it is well known, of course, in England, what a responsible Minister is. It is known as a matter of fact and constitutional law. The courts recognize that, and if we declared that these officers were responsible Ministers of the Crown I believe the court would import to that definition the knowledge which they would get from reading in the light of ordinary constitutional law." (Mr. Wrixon, Conv. Deb., Syd., 1891, p. 767.)

Sir Samuel Griffith took an entirely different view. He thought that Mr. Wrixon's object was already clearly provided for in the Bill, and would be made no clearer by the amendment.

"'Responsible Ministers of the Crown' is a term which is used in common conversation to describe the form of government that we have. It is really an epithet, but a bill is not the place for an epithet. What we should put into the bill is a definition of the powers and functions of the officers—not call them by names. We might as well say that they shall be called 'Honourable.' The Executive Government is vested in the

Queen. The Queen cannot act in person. She therefore, by the Governor-General, appoints officers to administer departments of State. Is not that exactly expressing the real theory of government—the head of the State, through her officers, administering departments of State? The common name by which they are called is 'Ministers of the Crown,' and because they hold office during pleasure, which pleasure is exercised nominally by the head of the State, but in reality by Parliament, they are called responsible, because, if their conduct is not such as to give satisfaction, they have to answer for it by going out of office. The whole theory of responsibility is contained in clauses 1 and 4. To say that they shall be called Ministers of the Crown would not make them so more than they are already. The powers of officers are not vested in them because they are called responsible Ministers, but because they are Ministers." (Sir Samuel Griffith, Conv. Deb., Syd., 1891, p. 767.)

Sir John Bray put the matter very clearly by pointing out that though the Constitution provided that these officers should administer certain departments of State, it did not provide that they should administer the entire Government of the Commonwealth, and though the provision that they were to be members of the Federal Executive Council would probably be sufficient, he thought all doubts ought to be removed by the adoption of Mr. Wrixon's amendment. Mr. Inglis Clark contended that the responsibility of Ministers flowed, not from their administering departments of State, but from their being members of the Executive Council. But Mr. Deakin pointed out that in some of the colonies a man remained an Executive Councillor after he had ceased to be a Minister, and contended that a distinction should be expressed between those who were Executive Councillors and not Ministers, and those who were Executive Councillors and Ministers. Moreover, it might be contended that the authority given to members of the Executive Council was given to them as a whole, sitting in Council, and that it did not clothe the Ministers individually with that power and authority which Ministers in Great Britain possess as Responsible Ministers of the Crown. Doubts had already been raised as to the authority of Ministers in the colonies (Ah Toy *v.* Musgrove, 14 V.L.R. 349), and there should be no doubt as to the authority of Ministers of the Commonwealth.

"Complete as is the skeleton of constitutional government which the hon. member Sir Samuel Griffith has given us in these clauses, I maintain that it is, after all, only a skeleton, and that the life which is implied by its being administered by Responsible Ministers has yet to be imparted to it. We do not desire to introduce words which might seem to claim for Australia royal prerogatives; but we do wish to introduce words claiming all the prerogatives of the Crown directly relating to Australia. What we say is that these clauses, as they stand, do not with sufficient distinctness make that claim, and that we should seize every opportunity of placing points of this importance beyond all dispute, that we should embody in these clauses the claim of Ministers of the Commonwealth to exercise all the prerogatives of the Crown which may be necessary in the interests of the Commonwealth. I would ask the hon. member, Sir Samuel Griffith, to himself suggest a phrase, and in default of that to accept my hon. colleague's amendment." (Mr. A. Deakin, Conv. Deb., Syd., 1891, p. 773.)

Mr. Kingston agreed that every effort ought to be made to secure Mr. Wrixon's object, and to ensure that the Ministers of the Commonwealth should be clothed with all necessary powers. At the same time, he thought that there was some room for objection to the word "responsible."

"We know what we wish to do. We desire to confer on the executive Ministers the right to exercise this prerogative as far as the Commonwealth is concerned, but I do not think we desire to expressly perpetuate responsible government. I am certainly an advocate for the continuance of that system; but in view of the discussion which took place at a previous stage, I think we have done well in avoiding the use of any expression which, it might be urged, would have the effect of preventing us from altering our practice with reference to responsible government in future as occasion may require. I hope the hon. member who has moved the amendment will leave out this word to which I have referred, and to which it seems that objection can fairly be taken." (Mr. C. C. Kingston, Conv. Deb., Syd., 1891, p. 775.)

Finally Sir Samuel Griffith suggested the words "and shall be the Queen's Ministers of State for the Commonwealth," which Mr. Wrixon accepted as adequately carrying out his object.

The above debate is valuable, not merely as a guide to the intentions of the framers, but as an exposition of the meaning of the words under discussion. It remains, however, to discuss some other aspects of the matter.

The object of the words is to secure a formal recognition of the authority of the Ministers of the Commonwealth individually and collectively. But they do more than that; they formally recognize, not indeed every phase or feature of what is currently known as "responsible government," but the existence of a body something like a Cabinet within the Executive Council—a committee whose members are individually Ministers of Departments, and collectively "the Queen's Ministers of State for the Commonwealth." In other words, some kind of Cabinet, or Ministry, as distinct from the Executive Council, or from its English equivalent the Privy Council, has a status recognized by the express words of the Constitution. The Ministers must all be members of the Executive Council, but the members of the Executive Council need not all be Ministers; and thus the Constitution expressly makes the distinction, for which Mr. Deakin contended, between the merely titular members of the Federal Executive Council, and the responsible Ministers of the Crown.

One other point deserves mention. In some of the Australian colonies the practice has grown up of including in the Cabinet one or more "Ministers without portfolios;' that is to say, members of the Executive Council who join in the deliberations of the Ministry, and represent it in one of the Chambers, but who do not administer any department. This practice is especially resorted to in order to secure the adequate representation of a Ministry in the Upper House; but it does not appear to be contemplated by this Constitution. The heads of the chief departments are to be "the Queen's Ministers of State"—a phrase which appears to mean not only that these officers are to be Ministers of the Queen, but that they are to be *the* Ministers of the Queen; in other words, that all the Ministers of State are to administer departments of State.

§ 279. "Ministers to sit in Parliament."

The appointment of a Federal Ministry will necessarily precede the election of the first Federal Parliament. There must be a Ministry to assist and advise the Governor-General in the performance of Executive Acts essential for the conduct of the first general election. The first Federal Ministry cannot at their appointment be members of the Federal Parliament, because at the time of their appointment there is no such Parliament in existence. After the first general election, however, no Federal Minister is permitted to hold office for a longer period than three months, unless he is or becomes a senator or a member of the House of Representatives.

Section 32 of the Constitution Act of South Australia (4th January, 1856) contained a similar provision, viz., that after the first general election of the South Australian Parliament, no person should hold the offices of Chief Secretary, Attorney-General, Treasurer, Commissioner of Crown Lands and Immigration, or Commissioner of Public Works, for more than three calendar months, unless he should be a member of the Legislative Council or House of Assembly. The Constitution Act of Victoria (consolidated 10th July, 1890), sec. 13, provides that there may be ten Responsible Ministers of the Crown, of whom not less than four shall be members of the Legislative Council or Legislative Assembly, and not more than eight shall be members of the Assembly. The Constitution Act of Western Australia contains somewhat similar provisions.

Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Historical Note.—In the Bill of 1891, and in the Adelaide draft of 1897, this clause occurred with merely verbal variations. (Conv. Deb., Adel., —. 916.)

At the Sydney session, in 1897, an amendment of the Legislative Council of Victoria, that two Ministers at least should be senators, was negatived on division by 19 votes to 13. (For a similar proposal in 1891, see Historical Note, sec. 64.) Mr. Dobson then moved that if there were five Ministers, one should be a senator, and if there were seven, two should be senators. This was negatived by 20 votes to 12. (Conv. Deb., Syd., 1897, pp. 799-806.)

At Melbourne, drafting amendments were made before the first report, and after the fourth report.

Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Historical Note.—As originally drafted in 1891, the clause ran :—"There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for salaries of such officers, a sum not less than fifteen thousand pounds per annum." In Committee, at the suggestion of Mr. Adye Douglas, it was amended on the motion of Sir Samuel Griffith by fixing the amount at £15,000 "until other provision is made by the Parliament." (Conv. Deb., Syd., 1891, pp. 776-7.)

At Adelaide, the clause was introduced and passed in substantially the same form, with the substitution of £12,000 for £15,000.

At Sydney, the words were altered to "a sum not exceeding £12,000." A suggestion of the Legislative Council of Tasmania, to reduce the amount to £10,000, was negatived. (Conv. Deb., Syd., 1897, p. 806.)

At Melbourne, a drafting amendment was made before the first report.

Appointment of civil servants[280].

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Historical Note.—Clause 7 of chap. II. in the Bill of 1891 was substantially similar. At Adelaide the clause was first framed as follows :—"Until the Parliament

otherwise provides, the appointment and removal of all other officers of the Government of the Commonwealth shall be vested in the Governor-General in Council." In Committee, Mr. Wise, with a view to preventing the introduction of the "spoils" system, moved to add—"Provided that no such officer shall be removed except for cause assigned." This was negatived by 28 votes to 8. (Conv. Deb., Adel., pp. 916-20.)

At Sydney the following words were added as a drafting amendment :—"except officers or persons whose appointments may be delegated by the Governor-General in Council or by a law of the Commonwealth to some other officer or person." At Melbourne further drafting amendments were made before the first report.

§ 280. "Appointment of Civil Servants."

The appointment and removal of all Federal officers, other than the Queen's Ministers of State, is vested in the Governor-General in Council. Pending the adoption of Federal laws regulating such appointments and removals the Governor-General in Council is empowered to delegate the making of appointments to some subordinate Federal authority, such as a Board or a commission. It does not seem that the Governor-General in Council can delegate to such a body the duty of deciding upon the removal of officers; though of course the Federal Parliament can do so.

This section must be read in conjunction with sec. 84, which provides that when any department of the public service of a State is transferred to the Commonwealth, all officers of the department whose services are retained become subject to the control of the Executive Government of the Commonwealth, but preserve all their existing and accruing rights.

Command of the naval and military forces.

68. The command in chief[281] of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

CANADA.—The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.—B.N.A. Act, 1867, sec. 15.

HISTORICAL NOTE.—Clause 9 of Chap. II. of the Bill of 1891 was in almost identical words, as was also the clause adopted at Adelaide. Compare Volunteer Act, 1867 (N.S.W.), sec. 4.

At Melbourne, Dr. Cockburn (for Mr. Deakin) moved to substitute "acting under the advice of the Executive Council" for "as the Queen's Representative." A debate upon the exercise of prerogative powers followed, and the amendment was negatived. (Conv. Deb., Melb., pp. 2249-64.) Drafting amendments were made before the first report and after the fourth report.

§ 281. "The Command-in-Chief."

The command-in-chief of the naval and military forces of the Commonwealth is, in accordance with constitutional usage, vested in the Governor-General as the Queen's Representative. This is one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner. The Governor-General could not wield more authority in the naval and military business of the country than he could in the routine work of any other local department. Of what use would be the command without the grant of the supplies necessary for its execution? All matters, therefore, relating to the disposition and management of the federal forces will be regulated by the Governor-General with the advice of his Ministry having the confidence of Parliament. (Todd's Parl. Gov. in Col. 2nd ed. p. 377.)

The Governor of a colony, though bearing the title of Commander-in-Chief, is not invested with the command of Her Majesty's regular forces in the colony without special appointment. He is not entitled to take the immediate direction of military operations, or, except in cases of urgent necessity, to communicate officially with subordinate military officers. (Revised Regulations, Colonial Office List, 1892, p. 301.)

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth, the following departments of the public service in each State shall become transferred[282] to the Commonwealth :—

Posts, telegraphs, and telephones :
Naval and military defence :
Lighthouses, lightships, beacons, and buoys :
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Historical Note.—The clause as passed in 1891 was :—

"The control of the following Departments of the Public Service shall be at once assigned to and assumed and taken over by the Executive Government of the Commonwealth, and the Commonwealth shall assume the obligations of any State or States with respect to such matters, that is to say—Customs and Excise, Posts and Telegraphs, Military and Naval Defence, Ocean Beacons and Buoys, and Ocean Lighthouses and Lightships, Quarantine." (Chap. II. sec. 10.)

In Committee, Mr. Wrixon asked whether sub-departments attached to the Customs department (*e.g.*, Immigration Office, or Mercantile Marine Office) would be included. Sir Samuel Griffith was clear that they would not. Mr. Baker raised the question whether telephones would be included in "Posts and Telegraphs." Mr. Douglas thought that the Customs and Excise Department was the only one which need be taken over at once. He moved to omit "Posts and Telegraphs," and also "Ocean Beacons," &c.; but this was negatived. (Conv. Deb., Syd., 1891, pp. 778-9.)

At the Adelaide session the clause was introduced in substantially the same words. In Committee Mr. Higgins raised the question whether "obligations" included public debts. Mr. Barton thought that only current obligations were meant. Mr. Walker moved to add "railways," but after a short debate this was negatived by 18 votes to 12. (Conv. Deb., Adel., pp. 920-34.) Verbal amendments were made on reconsideration. (*Id.* pp. 1201-2.)

At Melbourne, a suggestion of the Legislative Assembly of New South Wales, to provide for the transfer "as soon as possible after" the establishment of the Commonwealth, was negatived, and a suggestion of the Legislative Council of New South Wales, to provide for the transfer on "a date to be proclaimed by the Governor-General after" the establishment, was adopted. On Mr. Barton's motion, the words "Executive Government of the" were omitted. Sir John Forrest suggested that the internal posts and telegraphs of each State should be retained, as the existing postal union was sufficient. On Dr. Quick's motion, "telephones" were added. (Conv. Deb., Melb., pp. 262-5.) Drafting amendments were made after the first report and before the fourth report.

§ 282. "Departments . . Transferred."

By the operation of the Constitution, and without the necessity of any other formal act, the departments of Customs and Excise in each State will become transferred to the Commonwealth simultaneously with the establishment of the Commonwealth, on 1st January, 1901, the day named in the Queen's proclamation (clause 4). The other departments of the Public Service in each State enumerated in this section will become transferred to the Commonwealth on the date or dates to be proclaimed by the Governor-General.

In addition to the departments mentioned in this section, which will become transferred without the necessity of federal legislation, there are other departments which will come under the control of the Commonwealth whenever the Federal Parliament chooses to authorize their transfer; such as Astronomical and Meteorological Observations (51.—viii.); Census and Statistics (51.—xi.); Currency and Coinage (51.—xii.); Bankruptcy and Insolvency (51.—xvii.); Copyrights, Patents, and Trade Marks (51.—xviii).

Revenue and Expenditure.—One result of the transfer of a department will be that the State from which it is transferred will be relieved of the annual expenditure in respect of the department and the property used in connection therewith, and will be compensated for the value of such property. Another result will be that the State will be deprived of the revenue received in connection with the department.

The following table, based on a return presented to the Convention at the Melbourne session (Conv. Proceedings, Melb., p. 231) shows:—(1) the annual expenditure of which each State will be relieved in respect of the above mentioned services, together with interest at 3 per cent. on the value of property used in connection therewith; (2) the annual revenue of which each State will be deprived in connection with such services (apart from the taxation revenue from duties of Customs and Excise). The figures are those of 1896 or 1895-6:—

I. ANNUAL EXPENDITURE.

Department.	Victoria.	New South Wales.	Queensland.	South Australia.	Tasmania.	Western Australia.	Total
	£	£	£	£	£	£	£
1. Customs and Excise (less cost of border offices)	75,588	78,608	40,915	28,266	7,888	30,509	261,774
2. Posts, telegraphs, and telephones	559,881	763,550	355,869	247,729	62,945	212,728	2,202,702
3. Naval and military defence	198,785	214,206	105,480	33,489	12,593	10,620	575,173
4. Lighthouses, lightships, beacons and buoys	17,356	16,908	32,844	15,018	5,950	12,077	100,153
5. Quarantine	4,059	5,537	3,496	1,431	165	685	15,364
6. Astronomical and 7. Meteorological	4,050	5,911	2,391	947	97	253	15,649
8. Census and Statistics	6,444	11,599	5,238	1,767	1,244	1,800	28,092
9. Currency and Coinage	23,395	18,000	.....	.. ...	.....	.....	41,395
10. Bankruptcy and Insolvency	4,542	3,599	2,685	2,241	100	1,248	14,415
11. Copyrights, Patents, and Trade Marks	2,411	2,981	2,057	395	250	101	8,195
Total Amounts	896,502	1,120,899	550,975	331,283	91,232	270,021	3,260,912

II. ANNUAL REVENUE.

Department.	Victoria.	New South Wales.	Queensland.	South Australia.	Tasmania.	Western Australia.	Total.
	£	£	£	£	£	£	£
2. Post, telegraphs, and telephones	512,647	639,929	211,712	250,061	72,539	179,146	1,866,034
4. Lighthouses, lightships, beacons and buoys (estimated apportionment)	17,356	16,908	32,844	15,018	5,950	12,077	100,153
9. Currency and Coinage	40,511	41,550	.....	7,829	.....	.....	89,890
10. Bankruptcy and Insolvency	3,767	5.151	588	777	.....	1,099	11,382
11. Copyrights, Patents, and Trade Marks	3,683	3,584	2 547	1,544	1,465	1,500	14,323
Total annual Revenue (except from Customs)	577,964	707,122	247,691	275,229	79,954	193,822	2,081,782
Net Expenditure	318,538	413,777	303,284	56,054	11,278	76,199	1,179,130

Certain powers of Governors to vest in Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth[283], all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony[284], shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers[285] under the Commonwealth, as the case requires.

CANADA.—All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the advice, or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.—B.N.A. Act, 1867, sec. 12.

HISTORICAL NOTE.—Clause 11 of Chap. II. of the Bill of 1891 was drawn from sec. 12 of the British North America Act (*supra*). (Conv. Deb., Syd., 1891, p. 779.) At the Adelaide session, 1897, it was introduced and passed in the same form. In Sydney some drafting amendments were made; and at Melbourne, before the first report, it was re-drafted and condensed into its present form.

§ 283. "Matters Which . . Pass to the . . Commonwealth."

Among the matters which, under this Constitution, pass to the Executive Government of the Commonwealth are (1) from the establishment of the Commonwealth=the administration of the departments of customs and excise (sec. 69); the collection and control of duties of customs and excise, and the control of the payment of bounties; the control of officers and the appointment and removal of officers connected with those departments (secs. 67, 84, and 86). (2) from and after dates to be proclaimed subsequently to the establishment of the Commonwealth=the administration of other departments of the public service of each State, which become transferred to the Commonwealth, and the control, appointment, and removal of all officers connected therewith (secs. 69 and 84). In respect of such matters, from the moment when they are transferred to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony vest in the Governor-General of the Commonwealth; all powers and functions which are then vested in the Governor of a colony with the advice of his Executive Council vest in the Governor-General in Council; and all powers and functions which are then vested in any authority of a colony vest in the authority exercising similar powers under the Commonwealth.

§ 284. "Or in any Authority of a Colony."

In connection with the public service of each colony there may be local authorities, boards or commissions which are endowed with special powers and functions. When a public department is transferred to the Commonwealth it is placed beyond the jurisdiction of such local authorities, boards, and commissions, and becomes subject to the exclusive control of the Federal Executive. In such cases the powers and functions, formerly exercised in respect to the department by the local authority, vest either in the Governor-General or in the Governor-General in Council, until Federal legislation creates a Federal authority to exercise similar powers and functions under the Commonwealth.

§ 285. "In the Authority Exercising Similar Powers."

Of the administrative powers and functions which, under the Constitution, pass to the Federal Executive Government, some were previously vested in the Governors of the Colonies, some in the Governors of the Colonies with the advice of their respective Executive Councils, and some in local authorities within the Colonies appointed by law. Those described as vested in the Governors belong, technically, to the prerogatives of the Crown; those described as vested in the Governors with the advice of their respective Executive Councils, are dependent on statute law; those described as vested in "any authority of a Colony" were founded on statute and by statute were vested in Ministers, local boards, bodies, commissions, or officers. Thus in connection with the department of light-houses, light-ships, beacons, and buoys, certain powers and functions have been, under the Colonial system, generally assigned to marine boards; so in connection with the quarantine department certain powers and functions have been exercised by Boards of Health. Now, the intention of this section is that on the transfer to the Federal Executive Government of matters involving the exercise of Executive powers and functions, those powers and functions which in the pre-federal period were, by express terms, vested in the Colonial Governors, shall under the Federal regime and by express terms be vested in the Governor-General; that, likewise, those Executive powers and functions which were vested in the Colonial Governors with the advice of their respective Executive Councils shall, by express terms, be vested in the Governor-General in Council; and lastly, that those Executive powers and functions which were formerly vested in local authorities shall be vested in some Federal Authority, exercising similar powers under the Commonwealth.

The difference between transferred powers and functions vested in the Governor-General, and transferred powers and functions vested in the Governor General in Council, is purely an historical one and not one of substance, and all such powers and functions will be exercised by the Governor-General through Ministers having the confidence of the Federal Parliament.

The substantive meaning of this section (which is adapted from section 12 of the British North America Act, quoted above) is that executive functions which were formerly exercised in relation to the separate colonies, but which are now to be exercised in relation to the Federal Government, are vested in some Federal officer or authority corresponding to the provincial officer or authority in whom they were formerly vested.

The section is intended to facilitate the proper performance of duties in connection with transferred departments, before those duties have been regulated by federal law. After the transfer, the exclusive legislative power in respect of those departments belongs to the Federal Parliament; but until the Federal Parliament acts in pursuance of its exclusive power, the departments will be administered in accordance with the provisions of this section. It does not appear to interfere in any way with the discretion of the Federal Parliament to afterwards assign any of these duties to what officers it pleases. It declares that all these powers and functions "shall vest" in the corresponding department, officer, or authority, but it does not declare that they shall continue to be so vested; and to construe the vesting as permanent would introduce a conflict with sec. 61, which declares that the executive power of the Commonwealth is vested in the Queen, and exercisable by the Governor-General as the Queen's Representative. The whole power is vested in the Queen; but particular statutory powers are to "vest in"—*i.e.*, to be exercisable by—certain officers. The power of the Parliament (sec. 51—xxxix.) to make laws as to matters incidental to the execution of any power vested in the Governor-General of the Commonwealth, or in any department or officer of the Commonwealth, does not seem to be affected by this provisional vesting.

The only other point arising out of this section which requires consideration is, how is "the authority exercising similar powers under the Commonwealth" to be created? Could the Executive Government of the Commonwealth appoint a marine board to supervise lighthouses, &c., taken over according to the terms of a proclamation issued under sec. 90? Could the Executive Government establish a Board of Health to manage the quarantine department taken over according to a proclamation under the same section? Would Federal legislation be necessary in order to authorize certain proceedings and operations of those services to be conducted through the agency of Boards? It is conceived that such legislation would be necessary, and that pending its adoption those services, if taken over by proclamation only, would have to be managed directly by responsible Ministers of State. Probably those and other services would not be taken over by the authority of proclamation alone, but by proclamation accompanied by Federal laws, making temporary arrangements for preserving, in each State, the jurisdiction of local authorities until uniform Federal legislation is adopted.

CHAPTER III.—THE JUDICATURE.

Judicial Power and Courts.

71. The judicial power[286] of the Commonwealth shall be vested[287] in a Federal Supreme Court, to be called the High Court of Australia[288], and in such other federal courts as the Parliament creates[289], and in such other courts as it invests with federal jurisdiction[290]. The High Court shall consist of a Chief Justice, and so many other Justices[291], not less than two, as the Parliament prescribes.

UNITED STATES.—The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.—Const., Art. III., sec. 1.

CANADA.—The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.—B.N.A. Act., sec. 101.

HISTORICAL NOTE.—The idea of a federal Supreme Court is as old as the report of Earl Grey's Committee in 1849 (see pp. 83-85, *supra*). In the Bill of 1891 the Court was called the "Supreme Court of Australia." Instead of being established by the Constitution, it was left for the Parliament to establish, and the minimum of Justices in addition to the Chief Justice, was fixed at four.—Conv. Deb., Syd. (1891), pp. 779-85.

At the Adelaide Session the clause was drafted in its present form, but with a minimum of four Justices. An amendment by Mr. Carruthers to strike out the minimum was negatived.—Conv. Deb., Adel., pp. 935-43.

At the Melbourne Session a suggestion by the Legislative Council of Tasmania, to insert at the beginning "Until the Parliament otherwise provides," was negatived; also an amendment by Mr. Glynn that the Court should consist of "a Chief Justice, and until the Parliament otherwise provides, the Chief Justices of the States." A suggestion by the Legislative Assemblies of New South Wales and Victoria and the Legislative Council of Tasmania, to strike out the minimum, was negatived, and the minimum was altered to "two." An amendment by Mr. Holder to insert a maximum was negatived on division, by 26 to 14. (Conv. Deb., Melb., pp. 265-308.) Drafting amendments were made after the 4th Report.

§ 286. "The Judicial Power."

SEPARATION OF POWERS.—The judicial power is the power appropriate to the third great department of government, and is distinct from both the legislative and the executive powers. The judicial function is that of hearing and determining questions which arise as to the interpretation of the law, and its application to particular cases. "The distinction between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law." Per Marshall, C.J. (U.S.), Wayman *v.* Southard. 10 Wheat. 46; Cooley's Constitutional Limitations (5th Ed.) 109.

But though the distinction between the three departments is broad and fundamental, it is difficult to define their powers exactly. Judicial acts have, of necessity, points of contact with both executive and legislative acts. In Great Britain, owing to the supremacy of the legislative power, the distinction has not been the subject of decision in the Courts, though it is recognized by commentators. See Wharton's Judicial Dictionary, sub. tit. Judges.

In this Constitution, however, each power is vested in distinct organs, and it becomes important to define the principles on which the distinction is based. A similar separation of functions is prescribed in the Constitution of the United States, as well as in the Constitutions of the States of the Union; and also, though to a less degree, in the Constitution of the Canadian Dominion. American and Canadian decisions are therefore important, but with some reservation in each case. The Constitution of the United States goes somewhat farther in the separation of powers than this Constitution, because it not only vests them in distinct organs, but contains certain specific limitations, such as the prohibition on Congress and the State legislatures to pass any bill of attainder or *ex post facto* law, and the prohibition on the State legislatures to pass laws impairing the obligation of contracts. (Art. I., secs. 9, 10.) On the other hand, the British North America Act does not go nearly as far; it does not expressly mention the "judicial power," and it does not establish a federal judiciary as a co-ordinate department, but merely empowers the Dominion Parliament to establish Courts. See Lefroy, Legislative Power in Canada, p. lvi. Accordingly the tendency of Canadian decisions seems to be that legislation on a subject within the competence of the Dominion Parliament cannot be held to be invalid on the ground that it invades judicial functions. (*Id.*, pp. 124, 279).

This Constitution vests the legislative, executive and judicial powers respectively in distinct organs; and, though no specific definition of these powers is attempted, it is conceived that the distinction is peremptory, and that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional. Thus it has been held in the United States that "neither the legislative nor the executive branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner. Nor can the executive or legislative departments review or sit as a court of errors on the judicial acts or opinions of the courts of the United States." (Baker's Annot. Const. of the U.S., p. 121.) "Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to" [*i.e.*, cases where the exercise of judicial functions by the legislature is warranted by parliamentary usage, and incidental, necessary, or proper to the exercise of legislative authority].—Cooley, Constit. Lim., p. 106.

Executive Encroachments.—The distinction between judicial and executive functions is not always easy to draw. "Doubtless the non-coercive part of executive business has no affinity with judicial business. . . . . The same may be said, for the most part, of such coercive work of the executive as consists in carrying out decisions of judges; *e.g.*, the imprisonment or execution of a convict. But there are other indispensable kinds of coercive interference which have to be performed before or apart from any decisions arrived at by the judicial organ; and in this region the distinction between executive and judicial functions is liable to be evanescent or ambiguous, since executive officials have to 'interpret the law' in the first instance, and they ought to interpret it with as much judicial impartiality as possible." (Sidgwick, Elements of Politics, p. 358). There may sometimes be a difficulty in deciding whether a particular

act is ministerial or judicial. "Perhaps we may say that in such cases, where the official has a discretionary power to act or not to act, according to considerations of expediency, the function is properly regarded as executive." (*Id.*, p. 359.) There are, however, some undoubtedly judicial powers into the exercise of which considerations of expediency may enter; for instance, the power to determine the punishment to be awarded to a convicted criminal.

Legislative Encroachments.—Nor is there a hard and fast line between judicial and legislative acts. A law which is retrospective, or which declares or modifies existing rights, may often have the effect of a judicial decision. But although the application of the principle to particular facts may sometimes be difficult, the principle itself is clear. "It is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." (Cooley, Const. Limitations, p. 91.) "The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative." (Newland *v.* Marsh, 19 Illinois, 383; Cooley, Const. Lim., p. 91.) "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced." (Ervine's Appeal, 16 Penn. St. 266; Cooley, Const. Lim., p. 91.) "It is the province of judicial power to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights."—Merrill *v.* Sherburne, 1 N. Hamp. 203; cited Cooley, Const. Lim., p. 92.

Great care must, however, be taken in applying American decisions as to the validity or invalidity of declaratory or retrospective legislation. Those decisions are based, not only upon the invasion of judicial power, but also upon certain specific limitations contained in the Federal and State Constitutions—such, for instance, as the prohibition against depriving any person of life, liberty, or property, without due process of law (Amendment V.), and the prohibition against laws impairing the obligation of contracts (Art. I., sec. x. 1.). These limitations are the foundation of the rule that "vested rights must not be disturbed" (Cooley, Const. Lim., p. 357.) The length to which these principles are carried in the United States is forcibly stated by Lefroy, Legis. Power in Canada, pp. xlvi.-lx. The practical result is that retrospective or declaratory acts have usually been held void, apart altogether from the question of invasion of the judicial power, so far as they disturbed vested rights. For the definition and extent of this principle, see Cooley, Const. Lim., Ch. XI., on "The Protection to Property by 'The Law of the Land.'" Under this Constitution, however, the principle would seem to have no application: for, although the protection to every man's life, liberty, or property, except as forfeited by the judgment of his peers, or the law of the land, is guaranteed by section 39 of Magna Charta, no constitutional limitation is thereby imposed on the plenary power of a colonial legislature. The propriety of any interference with these rights is a matter of legislative policy and morality, not of constitutional law. It is conceived that the following proposition stated by Lefroy (Legis. Power in Canada, p. 279) is applicable:—

"When once an Act is passed by the Dominion Parliament, or by a provincial legislature, in respect to any matter over which it has jurisdiction to legislate, it is not

competent for any Court to pronounce the Act invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, or of the Provincial Legislatures, respectively, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected."

Apart, however, from questions of vested rights, there remains the principle that "to declare what the law *is*, or *has been*, is a judicial power; to declare what the law *shall be* is legislative." (Cooley, Const. Lim., p. 94.) It cannot be doubted that any attempt by the Parliament, under cover of a declaratory law or otherwise, to set aside or reverse the judgment of a court of federal jurisdiction, would be void as an invasion of the judicial power.

But what is the application of this principle to a case where the Courts have interpreted the law in one way, and the legislature afterwards, by a declaratory enactment, has laid down a different interpretation? In such a case, the Court, in the exercise of its function as interpreter, has declared what it believes to be the law; and the legislature has in effect declared the judicial interpretation to be unfounded and unwarrantable. Under these circumstances Cooley, Const. Lim., p. 94, offers the following test of the constitutionality of the law:—

"The decision of this question must depend, perhaps, upon the purpose which was in the mind of the legislature in passing the declaratory statute; whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts."

It is submitted that the true test is indicated in the latter part of the above quotation; but that there is no need to refer to anything so vague as the "purpose" or "design" of the legislature. The simple rule would seem to be that, just as the legislature cannot directly reverse the judgment of the court, so it cannot, by a declaratory law, affect the rights of the parties in whose case the judgment was given. A declaratory law must always be in a sense retrospective, and will not be unconstitutional because it alters existing rights; but it will be unconstitutional, and therefore inoperative, so far as it purports to apply to the parties or the subject-matter of particular suits in which judgment has been given. That is to say, the legislature may *overrule* a decision, though it may not *reverse* it; it may declare the rule of law to be different from what the courts have adjudged it to be, and may give a retrospective operation to its declaration, except so far as the rights of parties to a judicial decision are concerned. In other words, the sound rule of legislation, that the fruits of victory ought not to be snatched from a successful litigant, is elevated into a constitutional requirement; but the general question of retrospective legislation is left to the discretion of the legislature.

Political Questions.—On the other hand, the courts cannot be clothed with legislative or executive powers, or decide questions which in their nature are not judicial, but political. Thus it has been held in the United States that the question whether the constitution of a State has been properly ratified is a political question, and is not cognizable by the federal courts. (Luther *v.* Borden, 7 How. 1.) On the same grounds the courts of the United States have refused to interfere with the exercise of political discretion by the executive department. For instance, when a bill was brought

by the State of Georgia against the Secretary of War of the United States to restrain him from carrying into execution certain Acts of Congress, on the ground that their execution would overthrow and destroy the corporate existence of the State, the Supreme Court refused to take cognizance of the matter, as it called for the judgment of the court on political questions which did not involve personal or property rights. (Georgia *v.* Stanton, 6 Wall. 50.) Again, in Mississippi *v.* Johnson, 4 Wall. 500, the Supreme Court refused to entertain a bill brought to restrain the President from carrying into execution a law alleged to be unconstitutional. "It can hardly be contended that Congress [*sic*; but query, "the Court"] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished in principle from the right to such interposition against the execution of such law by the President? The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance."

It has also been held in the United States that the political department has exclusive authority to recognize, or not to recognize, a new Government in a foreign country; and therefore that this is not a matter for judicial cognizance; Kennett *v.* Chambers, 14 How. 38.

The distinction between the judicial and political powers has received recognition by English Courts. Thus it has been decided that political treaties between a foreign State and a subject of the Crown acting as an independent State under powers granted by Charter are not subject to municipal jurisdiction, and a bill founded on such treaties was dismissed. (Nabob of Carnatica *v.* East India Company, 1 Ves. Jun. 375-393, 2 ib. 56-60.)

Legislation Incidental to Judicial Power.—Sec. 51, subs. xxxix., gives the Parliament power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in . . the Federal Judicature." Under this power the Parliament can legislate with respect to the practice and procedure of the Courts, the conduct of appeals, the admission and status of legal practitioners in the courts of federal jurisdiction, and so forth.

§ 287. "Shall be Vested."

Mandatory Words.—These words are imperative, at least so far as the High Court is concerned; and are mandatory on the Parliament to carry the vesting into effect by prescribing the number of Justices of which the Court is to consist, to fix their salaries, and to make provision for their appointment. Under the same words in the United States Constitution there was at one time much discussion whether Congress possessed any discretion as to creating a Supreme Court or investing it with jurisdiction—a discretion which would allow Congress to practically annihilate the judiciary as a co-ordinate department. It has been decided, however, that no such discretion exists. (Story, Comm. § 1590.)

"The language of the [third] article throughout is manifestly designed to be mandatory upon the legislature Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? . . . . But one answer can be given to these questions; it must be in the negative." (Martin *v.* Hunter, 1 Wheat. at p. 328.)

In one sense, it may be said that the judiciary is not exactly a co-ordinate department with the legislature, because before it can come into existence certain action must be taken by the legislature. The same reasoning, however, would show that the

legislature is not a co-ordinate department with the executive, because before it can come into existence certain action must be taken by the executive. The Judiciary may be fairly called co-ordinate with the legislature, though not absolutely independent of it. The position is concisely expressed by Dr. Burgess, with reference to the United States Constitution:—

"Apparently the Supreme Court is here created by the Constitution, while the inferior Courts depend for their existence on the will of the Legislature. When we come to consider the subject more closely, however, we find that the existence of the Supreme Court itself virtually depends upon the will of the Legislature. The Legislature, in the absence of constitutional provisions, must determine the number of the Judgeships which the Supreme Court shall contain, create the same, and fix the salaries of the judges. It might be thought that, these things once done, the Court would then have a constitutional anchor against the Legislature, since the Constitution provides the term of good behaviour for the judges, and forbids the diminution of the salary of any judge during his continuance in office. But it must be again remembered that at the end of any term, concluded by the death, resignation, or impeachment of any judge, the Legislature may modify or abolish that particular judgeship for the future. It is thus possible for the Legislature virtually to disestablish the Supreme Court at the conclusion of the terms of the judges who may be holding at the time the Legislature may adopt this destructive policy. A sound view of the Constitution would, I think, interpret the constitutional provision in reference to the creation of the judicial department as a command to the Legislature to organize the Supreme Court in such force, and inferior courts in such number and force, as to provide for the transaction of the judicial business of the central government; but the Legislature alone is the authoritative interpreter of the Constitution upon this subject, and the Legislature is here subject to control by the State only. [By "the State" Dr. Burgess means in effect the political organization which has the power of amending the Constitution.] The constituencies may influence the legislators, but the sovereignty alone [*i.e.*, the amending power] can command the Legislature. It will thus be seen that the judicial department, even in the Constitution of the United States, does not really have an equally independent existence with the legislative and executive departments. In order to accomplish this, the Constitution must establish all the courts and all the judgeships thereof, and create means for the selection of the judges without action by the other departments." (Burgess, Pol. Science, ii. 321.)

"In this respect it is mandatory upon the Legislature to establish Courts of justice commensurate with the judicial power of the union. Congress have no discretion in the case. They were bound to vest the whole judicial power, in an original or appellate form, in the courts mentioned and contemplated in the Constitution, and to provide courts inferior to the Supreme Court, in which the judicial power, unabsorbed by the Supreme Court, might be placed. The judicial power of the United States is, in point of origin and title, equal with the other powers of the government, and is as exclusively vested in the courts created by or in pursuance of the Constitution, as the legislative power is vested in Congress, or the executive power in the President." (Kent, Comm. i. 292.)

§ 288. "The High Court of Australia."

The High Court is the crown and apex, not only of the judicial system of the Commonwealth, but of the judicial systems of the States as well. It is in the first place a court of original jurisdiction in certain enumerated matters of specially federal concern (sec. 75), and this jurisdiction may be extended by federal legislation to cover certain other enumerated matters of specially federal concern (sec. 76). In the next place, it is a court of appeal from federal courts and courts exercising federal jurisdiction (sec. 73); and this appellate power is of course confined within the same limits as the original jurisdiction in respect of which it exists—that is to say, within the matters enumerated in secs. 75 and 76. But in the third place, the High Court is a court of appeal from all decisions of the Supreme Courts of the States, utterly irrespective of the subject-matter of the suit or the character of the parties. In this respect it resembles the Supreme Court of Canada, and differs from the Supreme Court of the United States. In the United States there is only an appeal to the Federal Supreme Court in those enumerated cases to which the "judicial power" is expressed to extend. In all cases which do not come within one or other of the enumerated classes, the

decision of the last court of resort in each State is final. That is because, in the construction of the federal judiciary of the United States, strictly federal principles were adhered to, and the union was given no more power of interfering with the administration of justice in the States than was necessary for national purposes. But in Australia, as in Canada, the appellate jurisdiction is not one of those jealously-guarded State rights which make anything more intimate than a federal union impossible. We are accustomed to a common court of appeal in the shape of the Privy Council: we are so assured of the independence and integrity of the Bench that the advantages of having one uniform Australian tribunal of final resort outweigh all feelings of localism, and the federal tribunal has been entrusted (subject to the rights reserved with respect to the Privy Council) with the final decision of all cases, whether federal or purely local in their nature.

Thus, notwithstanding the differences of laws which may exist in the different States, and the independence of their several judicial systems, there is established a complete unity of *interpretation* throughout Australia. This is not the case in the United States, where the federal Supreme Court has only a limited appellate jurisdiction, and where, outside the limited "judicial power," there are as many final courts of appeal as there are States in the Union. "Where the laws of the United States are in question, uniformity is assured by the appellate jurisdiction conferred upon the Supreme Court of the United States, but there is no such common appellate tribunal in the case of questions of State law." Story, Comm. § 1795, n. The American State Courts are the final interpreters of State laws, except so far as they may conflict with federal laws; and accordingly in cases which are governed by State law, but in which the federal courts get jurisdiction owing to the character of the parties, the federal courts do not claim any right of "independent interpretation" of the law, but follow the decisions of the State courts. In other words, they adopt the principle that the interpretation of the law of a State by its own courts is of itself part of the law of the State. (See Burgess, ii., 328.) Under this Constitution no such distinction arises. The High Court has a right of "independent interpretation" in every case that comes before it. In its jurisdiction as "general court of appeal from the courts of the States," it is not and cannot be bound to follow the decisions of those courts in any degree whatever.

Guardian of the Constitutions.—The High Court, like the Supreme Court of the United States, is the "guardian of the Federal Constitution;" that is to say, it has the duty of interpreting the Constitution, in cases which come before it, and of preventing its violation. But the High Court is also—unlike the Supreme Court of the United States—the guardian of the Constitutions of the several States; it is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government. (See Notes on "Interpretation," § 330, *infra*.)

§ 289. "Such Other Federal Courts as the Parliament Creates."

These words impliedly give the Federal Parliament a power to create other federal courts besides the High Court. The words, however, are not mandatory, as in the case of the High Court; they leave it to the Parliament to decide whether any other federal courts are necessary.

In the United States, Congress has established federal Circuit Courts and District Courts, which have been steadily growing in number. There are now about 60 districts —each State consisting of one or more districts—and nine circuits. The Constitution of the United States has been interpreted as denying to the Supreme Court any original jurisdiction in those cases in which appellate jurisdiction was given to it; and Story reasons from this that Congress was bound to create some inferior tribunals in order to vest the whole judicial power:—

"Congress cannot vest any portion of judicial power of the United States, except in Courts ordained and established by itself; and if, in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court . . could not reach those cases; and consequently, the injunction of the Constitution that the judicial power '*shall be vested*' would be disobeyed. It would seem, therefore, to follow that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance." (Story, Comm., § 1593.)

This reasoning does not apply to the Constitution of the Commonwealth. In the first place, the Federal Parliament has power to extend the original jurisdiction of the High Court to any case to which original cognizance under the judicial power of the Commonwealth can extend. And in the second place, the Parliament is expressly empowered to "invest any court of a State with federal jurisdiction." With these provisions, it is probable that for some time there will be no necessity for the creation of any inferior federal courts, but that all the cases in which the original jurisdiction of the Commonwealth is invoked can be dealt with either by the High Court itself or by Courts of the States.

Under sec. 72, the Justices of federal courts created by the Parliament must be appointed in the same way, and for the same tenure, as Justices of the High Court.

Under sec. 73, the High Court has jurisdiction, "with such exceptions and subject to such regulations as the Parliament prescribes," to hear and determine appeals from any federal court. It may be noted that the power of "exception and regulation" in this case is not subject to the limitation imposed by sec. 73 with regard to appeals from the Supreme Court of a State, so that the right of appeal from the other federal courts to the High Court is, in the words of Burgess (ii., 331) "very nearly at the mercy of the legislature."

Under sec. 77, the Federal Parliament may make laws defining the jurisdiction of these federal courts, and defining the extent to which that jurisdiction is exclusive of that of the State Courts. The jurisdiction of these federal courts is thus—unlike that of the High Court—wholly dependent on the gift of the Parliament. This jurisdiction can only be given "with respect to any of the matters mentioned in" secs. 75 and 76—the sections which enumerate the "matters" in respect of which the High Court has, or may have conferred upon it, *original* jurisdiction. It is not expressly stated in sec. 77 that the jurisdiction in respect of these matters which may be conferred upon the "other federal courts" is original jurisdiction only. (See notes, § 334, *infra.*)

In the American Constitution, the courts which Congress may create are styled "inferior courts." It has been held, however, that the Circuit Courts of the United States, though "inferior" in the sense of being subordinate to the Supreme Court, are not "inferior courts" in the common law sense—*i.e.*, "courts of specific and limited jurisdiction, which are erected on such principles that their judgments when taken alone are entirely disregarded, and the proceedings must show their jurisdiction." (Per Marshall, C.J., Kempe's Lessee *v.* Kennedy, 5 Cranch 185; and see McCormick *v.* Sullivant, 10 Wheat. 199.) In other words, the circuit courts are courts of limited, but not of inferior, jurisdiction; and their judgments, if without jurisdiction, cannot be treated as nullities, but are valid unless and until reversed. (See Encyclopedia of American and English Law, sub. tit. "Inferior Courts.") The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but what specifically appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but what is so expressly alleged. (Peacock *v.* Bell, 1 Saund. 73.)

The power to create these courts implies a power to abolish them, or to re-organize them from time to time. This seems to have been definitely settled in the United States (Kent, Comm. i. 303), and follows logically from the plenary nature of the powers of the Parliament, within the sphere allotted to it. A judgeship, however, cannot be abolished so as to destroy the tenure of an occupant. (See notes, § 287, *supra.*)

§ 290. "Such Other Courts as it Invests with Federal Jurisdiction."

These words enable the Federal Parliament, instead of or in addition to creating federal courts, to confer upon other courts, not established by the Commonwealth—such as State courts—a federal jurisdiction.

There is no corresponding provision in the Constitution of the United States, with the result that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." (Story, Comm. § 1593; and see Kent, Comm. i. 397.)

§ 291. "A Chief Justice and so Many Other Justices."

PRECEDENCE.—The precedence of the Justices *inter se* may be regulated by the Letters Patent of the Crown; see *Re* Bedard, 7 Moo. P.C., 23; Webb, Imperial Law in Vic. (2nd Ed.), 94.

JURIES.—The provision that the High Court shall consist of a Chief Justice and other Justices cannot be construed to exclude federal legislation to provide for the trial of issues of fact by juries under the direction of the Justices. The Constitution makes no mention of juries in civil cases; but in criminal cases it expressly provides that trials on indictment "shall be by jury" (sec. 80). The Constitution of the United States similarly made no mention of juries in civil cases, though the seventh amendment, adopted immediately afterwards, provided that "in suits at common law, where the value in controversy shall exceed 20 dollars, the right of trial by jury shall be preserved."

Under this Constitution there is clearly no obligation to try civil cases with a jury; but it is submitted that the power given by sec. 51—xxxix., to make laws with respect to "matters incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature," includes the power to provide for trial of issues of fact by jury in any federal court in all cases in which the Federal Parliament shall think it expedient to do so. The trial of civil issues by juries is such an ancient and established institution of English law, that it may well be deemed not only incidental, but even necessary, to the due administration of justice according to English ideas.

§ 292. "As the Parliament Prescribes."

The Executive seems clearly precluded by these words from appointing any Justices of the High Court until Parliament has prescribed the number of Justices of which the Court is to consist. It appears, too, that no appointment of a Chief Justice or any other Justice can legally be made until an ascertained salary has been made payable by law; see Buckley *v.* Edwards (1892), App. Ca. 387, and notes, § 293, *infra*.

"The Constitution impliedly vests the Congress with the power to create the judgeships of the Supreme Court and endow them. The language of the Constitution is that 'the judicial power of the United States shall be vested in one Supreme Court,' &c. The Supreme Court itself seems thus to be created by the Constitution and therefore not subject to any power of Congress to constitute or abolish it; but the Constitution does not itself create the judgeships in this Court nor expressly declare what organ shall do so. Without the judgeships, however, the Court would be only an abstraction. From the clause which alludes to the general power of the Congress to provide for the establishment of all offices not established by the Constitution and for the method of filling the inferior offices, we infer that the Congress is vested with the power to create the judgeships of the Supreme Court in such number as it shall deem proper. Once established, however, and filled, the Congress has no power to abolish them during the good behaviour of the existing incumbents . . . . . nor to diminish the compensation attached thereto. It is a question whether Congress has the power to abolish the judgeships of this Court at the legal expiration of the respective terms of the existing incumbents. It seems to me that it has, although this might reduce the

Supreme Court to an abstraction again. The Congress ought, certainly, to maintain these offices in sufficient number to do the business of the Court; but if it should not do so, I see no redress save at the elections. The only imperative command which the Constitution issues to the Congress upon this subject is that there shall be but one Supreme Court. Judicial unity is absolutely required, but everything else is left to the discretion of the legislative body." (Burgess, ii., 157-8).

Judges' Appointment, Tenure, and Remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

(i.) Shall be appointed[293] by the Governor-General in Council:

(ii.) Shall not be removed[294] except by the Governor-General in Council[295], on an address from both Houses[296] of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity[297]:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished[298] during their continuance in office.

UNITED STATES.—The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.—Art. III., sec. 1.

CANADA.—The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.—B.N.A. Act, sec. 99.

HISTORICAL NOTE.—The origin of this clause dates from the early constitutional struggles in England between the Crown and the people. Anciently, the judges held their commissions during the King's pleasure, and under the Stuart kings the Bench was systematically packed with partizans of the Crown. As early as Lord Coke's time, indeed, the Barons of the Exchequer were appointed during good behaviour (4 Inst. 117); and at the restoration of Charles II. the Commissions of the Common Law Judges were in this form. (Kent's Commentaries, i., 293.) But there was no statutory restriction on the Crown's pleasure until 1700, when the Act of Settlement (12 and 13 Will. III. c. 2) provided that "judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them." In 1760, by the Act 1 George III. c. 23, it was further provided that judges' commissions should continue notwithstanding the demise of the Crown, and their salaries were secured to them during the continuance of their commissions. These enactments for securing the dignity and independence of the Bench form the basis of the constitutional provisions to a similar effect throughout the British Empire.

In Great Britain, therefore, as well as all the Australian colonies, and in the Dominion of Canada, judges hold their office "during good behaviour," and can be removed by the Crown for misbehaviour without any address from Parliament; whilst, apart altogether from any question of technical misbehaviour, they can be removed by the Crown upon an address from both Houses. In the Commonwealth Bill of 1891 a new principle was introduced, and it was provided that the Judges should hold office during good behaviour, and that it should "not be lawful for the Governor-General to remove any Judge except upon an address from both Houses of the Parliament praying for such removal." The intention apparently was to make the Address a necessary part of the procedure in cases of misbehaviour.

In the first draft of the Adelaide Bill this intention was made clear. In Committee, at Mr. Kingston's suggestion, the tenure was still further secured by limiting the Parliamentary power of intervention to cases of "misbehaviour or incapacity." It was pointed out that in a Federal Constitution, where the Courts were the "bulwarks of the Constitution" against Parliamentary encroachment, the Judges' independence of the Legislature should be specially safe-guarded. (Conv. Deb., Adel., pp. 944-962.)

In the Melbourne session the tenure was still further secured by providing that the Parliamentary addresses must pray for removal "upon the grounds of proved misbehaviour or incapacity;" thus ensuring that the Judge should be heard in defence, and that the charge against him should be alleged in the address. (Conv. Deb., Melb., pp. 308-318.) Drafting amendments were made before the first Report and after the fourth Report.

§ 293. "Shall be Appointed."

The appointment of Justices is an Executive Act, to be performed by the Governor-General with the advice of the Federal Executive Council. No particular mode of appointment by the Governor-General in Council is prescribed; but the usual, if not universal, mode of appointing colonial Judges is by letters patent under the royal sign manual. (Todd, Parl. Govt. in Col., p. 829.) The sub-section dealing with appointment makes no provision as to tenure; but sub-section 2, prescribing the only mode of removal, shows that the tenure is during "good behaviour," with special restrictions as to the mode by which misbehaviour or incapacity is to be proved and adjudicated on. "The legal effect of the grant of an office during 'good behaviour' is the creation of an estate for life in the office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But, like any other conditional estate, it may be forfeited by a breach of the condition annexed to it—that is to say, by misbehaviour." (Todd, Parl. Govt. in England, p. 857.) This liability to forfeiture is, of course, subject to the provisions as to proof and procedure in the next sub-section. It seems that this section can only be construed as vesting in the Governor-General in Council the appointment of Justices to whom an ascertained salary is payable by law at the time of their appointment. (Buckley *v.* Edwards [1892], App. Ca. 387.) That was a case decided under the Supreme Court Judges Act, 1858 (N.Z.). Sec. 2 of that Act provided that the Supreme Court of New Zealand should consist of a Chief Justice, "and of such other Judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint." Sec. 6 provided that "a salary equal at least in amount to that which, at the time of the appointment of any Judge, shall be then payable by law, shall be paid to such Judge so long as his patent or commission shall continue and remain in force." The Constitution Act of New Zealand contained a provision that it should not be lawful for the General Assembly to diminish the salary of any Judge during his continuance in office. Lord Herschell, in delivering the judgment of the Privy Council, quoted this provision in the Constitution, and said (p. 394):—"It is manifest that this limitation of the legislative power of the General Assembly was designed to secure the independence of the Judges. It was not to be in the power of the colonial Parliament to affect the salary of any judge to his prejudice during his continuance in office. But if the Executive could appoint a judge without any salary, and he needed to come to Parliament each year for remuneration for his services, the proviso would be rendered practically ineffectual, and the end sought to be gained would be defeated. It may well be doubted whether this proviso does not by implication declare that no judge shall thereafter be appointed save with a salary provided by law, to which he shall be entitled during his continuance in office, and his right to which could only be affected by that action of the New Zealand legislature which is excluded by the Imperial Act." Apart from this, it was held that a reading of the whole of the New Zealand Act showed that the legislature did not contemplate the

appointment of a judge to whom there was no salary payable by law. The principle of the decision, as well as the strong dictum of Lord Herschell quoted above, seem to be entirely applicable to the appointment of justices under this Constitution.

§ 294. "Shall not be Removed."

These words exclude all modes of removal other than the one mentioned. Ordinarily a colonial judge may be removed by the Governor and Council of the colony for misbehaviour, subject to a right of appeal to the Privy Council; it being provided by the Imperial Statute 22 Geo. III. c. 75, that if any person holding an office by patent from the Crown shall be wilfully absent without reasonable cause, "or shall neglect the duty of such office, or otherwise misbehave therein," the Governor and Council may remove him; but if he thinks himself aggrieved, he may appeal to His Majesty in Council. The Judicial Committee of the Privy Council has repeatedly decided that this law applies to colonial judges. (*Ex parte* Robertson, *re* Gov. Gen. of N.S.W., 11 Moore P.C. 295; Todd, Parl. Gov. in Col., 46, 829, 837.) But the express words of the Constitution clearly make this statute inapplicable to Justices of the Federal Courts. Again, under the Imperial Statute 3 and 4 Will. IV. c. 41, s. 4, it is ordinarily competent for the Crown to refer to the Judicial Committee a memorial from the legislature of a colony, complaining of the judicial conduct of a judge, and thereupon the judge may be removed by Order in Council (Todd, Parl. Gov. in Col., p. 831); but this procedure also is clearly inapplicable to the Commonwealth. So also the modes of procedure by writ of *scire facias* to repeal the patent, or by criminal information at the suit of the Attorney-General—which are merely alternative ways of establishing misbehaviour (Todd, Parl. Gov. in England, ii. 859)—are excluded.

§ 295. "Except by the Governor-General in Council."

The Constitutions of the Australian colonies provide for removal by "Her Majesty;" but this Constitution follows the B.N.A. Act, which provides (sec. 99) for removal "by the Governor-General." It is argued in Canada (see Todd, Parl. Gov. in Col., 2nd Ed., p. 835) that as the appointment of a Judge begins with the Governor-General (not with the sovereign) it also ends with the Governor-General, and that a right of appeal to the Crown in Council is excluded. This contention seems greatly strengthened, under this Constitution, by the use of the words "Governor-General in Council," which make the decision that of the Federal Executive. There is, however, no authority directly in point. The cases in which the orders of amotion made by Governors have been referred to the Privy Council were under the Act 22 Geo. III. c. 75, which makes special provision for appeal. By the Constitutions of the Australian colonies, which provide that the Houses of Parliament of the colony may pass an address to "Her Majesty" for the removal of a Judge, the Governor and Executive of the colony give no decision at all. The decision in such a case is entrusted to the Queen, acting on the advice of her Imperial Ministers, and it seems that the dismissal of a Judge is not regarded as a mere ministerial act, but as one involving a grave responsibility, which Her Majesty will not be advised to incur without satisfactory evidence that the dismissal is proper. (Todd, Parl. Gov. in Col., p. 613.) There is then no appeal to the Queen in Council; though the Queen may (as in the case of Judge Boothby, of South Australia) seek the advice of the Judicial Committee before deciding. (Todd, Parl. Gov. in Eng., ii., 899, 906.) Here, however, the responsibility is thrown on the Federal Executive, and in the absence of any provision for an appeal, it would appear that its decision is final. The case in fact appears to be closely analogous to the removal of a British Judge by the Crown on addresses from the Imperial Parliament.

As to the question whether the Governor-General in Council, to whom the power of amotion on address is given, is entrusted with any constitutional discretion as to the exercise of that power, see note on Responsibility of Ministers, § 297, *infra*.

§ 296. "On an Address from Both Houses."

The provision as to the address differs from those of the Act of Settlement, the British North America Act, and the Australian Constitutions, by the requirement that the Address must pray for removal "on the grounds of proved misbehaviour or incapacity." As to the English power, Todd says (Parl. Gov. in Eng., ii., 860):—"This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is in fact a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof. In entering upon an investigation of this kind, Parliament is limited by no restraints, except such as may be self-imposed." These words are quite inapplicable to the provisions of this Constitution. Parliament is "limited by restraints" which require the proof of definite charges; the liability to removal is not "a qualification of, or exception from, the words creating a tenure," but only arises when the conditions of the tenure are broken; and though the procedure and mode of proof are left entirely to the Parliament, it would seem that, inasmuch as proof is expressly required, the duty of Parliament is practically indistinguishable from a strictly judicial duty. The importance of this distinction is, however, much diminished by the fact that it is recognised that the procedure under the Act of Settlement ought to be conducted on strictly judicial lines. The matter is discussed, and the proper procedure indicated, by Todd (Parl. Gov. in Eng., ii., 860-875), where it is laid down that "no address for the removal of a Judge ought to be adopted by either House of Parliament, except after the fullest and fairest enquiry into the matter of complaint, by the whole House, or a Committee of the whole House, at the Bar; notwithstanding that the same may have already undergone a thorough investigation before other tribunals"—such as a Royal Commission or a Select Committee.

The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour, or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition—that of misbehaviour or incapacity—and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

From Both Houses.—Todd (Parl. Gov. in Eng., ii. 872) lays it down as "evident" that while it is equally competent for either House to receive complaints and even to institute enquiries as to the conduct of Judges, yet "a joint address under the statute (*i.e.* the Act of Settlement) ought properly to originate in the House of Commons, as being peculiarly the impeaching body, and pre-eminently 'the grand inquest of the High Court of Parliament.'" The Parliament of the Commonwealth, however, is neither a High Court nor a body possessing power of impeachment; and however desirable it may be that the House of Representatives should take the initiative, if the unfortunate necessity for a joint address under this section should ever arise, the reasons given by Todd have no application.

§ 297. "On the Ground of Proved Misbehaviour or Incapacity."

Misbehaviour or Incapacity.—Misbehaviour means misbehaviour in the grantee's official capacity. "*Quamdiu se bene gesserit* must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life." (Coke, 4 Inst. 117.) "Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise." (Todd, Parl. Gov. in Eng., ii. 857, and authorities cited.)

"Incapacity" extends to incapacity from mental or bodily infirmity, which has always been held to justify the termination of an office held during good behaviour. (See notes, § 294, *supra;* and Todd, Parl. Gov. in Eng., ii. 857.) The addition of the word does not therefore alter the nature of the tenure of good behaviour, but merely defines it more accurately.

No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full opportunities of defence, and the proof established by evidence taken at the Bar of each House.

Responsibility of Ministers.—The question then arises whether the Address from both Houses practically determines the removal, or whether the Governor-General in Council must exercise a constitutional discretion and incur the final responsibility of action. In England, it is said that an address from the two Houses of the Imperial Parliament ought to recapitulate the acts of misconduct which have occasioned the adoption thereof, "in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of Parliament." (Todd, Parl. Gov. in Col., 2nd ed., p. 613). That discretion would, of course, be exercised, like every other executive act, upon the advice of responsible Ministers; so that in England it seems to be recognized that the Executive, notwithstanding the Address, is not relieved of the responsibility of satisfying itself in the matter.

Under this Constitution, however, the procedure differs in two respects. In the first place, the power of removal, upon address, is given, not to the Governor-General, but to the Governor-General in Council; and in the second place, the Address itself can only be passed on the ground of a proved breach of the legal tenure of the office.

The words "in Council," so far from establishing any difference between the English and Australian systems, seem rather to establish an identity. They indicate that the Governor-General acts in this regard, not as the servant of the Queen, but as the constitutional ruler of Australia; and that the responsibility of his action rests upon the shoulders of his advisers. The real question, therefore, is whether the Executive Council must bear the responsibility themselves, or whether they can rely solely upon the address as the justification of their executive act, and thus leave the whole responsibility with the Houses of Parliament—the body to whom the Constitution entrusts the judicial duty of establishing the proof of misbehaviour or incapacity.

The Letellier case, in Canada, throws some light on this question. M. Letellier was Lieutenant-Governor of the Province of Quebec, and his action in dismissing his Ministers in 1878 led to resolutions in both Houses of the Dominion Parliament condemning his action. By sec. 59 of the British North America Act, a Lieutenant-Governor holds office during the pleasure of the Governor-General, but is not removable within five years after his appointment, except for cause assigned. The Dominion Ministry advised the Governor-General to remove M. Letellier; and on the Governor-General demurring to this policy, the Premier informed him "that it was not at all necessary, in order to justify their advice, to go behind the vote of Parliament; even if their opinion had been adverse to that arrived at by Parliament, it seems clear that they are bound to respect that decision, and to act upon it, as they have done, by advising the removal." Ultimately the Governor-General, on the suggestion of the Secretary for State, asked the Ministers to review their action, and to satisfy themselves whether it was "necessary for the advantage, good government, or contentment of the Province that so serious a step should be taken as the removal of the Lieutenant-Governor from office." After "anxious consideration," they adhered to their advice, and M. Letellier was removed.

With respect to the contention of Ministers in that case that it was unnecessary to go behind the vote of Parliament, Todd observes:—

"This statement involves a complete abnegation of ministerial responsibility, and a surrender of the safeguards over individual rights which ministerial responsibility is intended to afford. We have elsewhere shown that 'any direct interference by resolution of parliament in the details of government is inconsistent with and subversive of the kingly authority, and is a departure from the fundamental principle of the British Constitution which vests all executive authority in the sovereign, while it ensures complete responsibility for the exercise of every act of sovereignty.' And that 'no resolution of either house of parliament which attempts to adjudicate in any case that is within the province of the government to determine has of itself any force or effect.' Even where parliament has been invested by statute with the direct right of initiating a criminatory proceeding for the removal of a high public functionary, as where a judge is declared to be removable upon an address from the two houses of the Imperial Parliament, constitutional practice requires that, in any such address, 'the acts of misconduct which have occasioned the adoption thereof ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament.'" (Todd, Parl. Gov. in Col., 2nd ed., pp. 612-3.)

M. Letellier's case illustrates the general principles of Ministerial responsibility; and, on the authority of Todd, that principle extends to the removal of a Judge after the semi-judicial procedure by Address under the Act of Settlement. This Constitution, however, goes much further than the Act of Settlement by making the decision of the two Houses substantially a judicial one; and it is certainly open to argument that this circumstance goes far to transfer the real responsibility from the Executive Council to the Houses of Parliament.

At the same time, it cannot be ignored that the act of removal is an executive one, and is entrusted by the Constitution to the Executive department—that is, to the Governor-General in Council. It is hard to conceive of a case in which an Address passed by both Houses in the same session, alleging that misbehaviour or incapacity was proved, would not be concurred in by the Executive Council; but if such a case should arise, the members of the Executive Council are the keepers of their own consciences, and the advice which they give to the Governor-General cannot be dictated to them by the Houses of Parliament. For whatever action they take or refuse to take they will be responsible in the ordinary way both to the Parliament and to the people.

Suspension.—The Constitution makes no mention of any power to suspend Justices. It may be argued that the power of amotion carries with it the lesser power of suspension, and that a Justice may be suspended by the same procedure by which he may be removed. (See Todd, Parl. Gov. in Eng., ii. 890-898.) But a more serious question is whether the Governor-General in Council, without a joint address from both Houses alleging "proved misbehaviour or incapacity," may in any case suspend a Justice of a Federal Court. On the one hand, the Constitution does not expressly prohibit suspension, and "at common law the grantor of an office has the power to suspend the grantee from his duties, though not to affect his salary or emoluments." (See opinion of Att. Gen. of Vic., cited Todd, Parl. Gov. in Eng., ii. 893; Slingsby's case, 3 Swanston 178.) On the other hand, the English Crown law officers, in the Queensland case cited in Todd, Parl. Gov. in Eng., ii. 896, deny the right of a Governor (even where he possesses power of amotion under 22 Geo. III. c. 75) to suspend a Judge holding office during good behaviour. It would seem that suspension is a temporary removal, and that as the Governor-General in Council has no power of his own motion to remove, he has no power to suspend. Certainly such a power would be open to dangerous abuses, and might endanger the independence of the Bench as a constitutional bulwark against Parliamentary encroachment.

Reasons for Security of Judicial Tenure.—The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who

interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. "Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained. . . . . Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge." (Todd, Parl. Gov. in Eng., i. 574.)

§ 298. "The Remuneration shall not be Diminished."

It has been held in the United States that Congress cannot, under the Constitution, levy a tax on the salary of a judicial officer of a State. (Buffington *v.* Day, 11 Wall. 113.) It would seem that a tax on the salary of the Justices of the Federal Courts would be equally unconstitutional, as being a diminution of their salary.

Appellate jurisdiction of High Court.

73. The High Court shall have jurisdiction[299], with such exceptions and subject to such regulations[300] as the Parliament prescribes, to hear and determine appeals[301] from all judgments, decrees, orders, and sentences[302]—

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court[303]:

(ii.) Of any other federal court, or court exercising federal jurisdiction[304]; or of the Supreme Court of any State[305], or of any other court of any State[306] from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only[307]:

and the judgment of the High Court in all such cases shall be final and conclusive[308].

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Common-

wealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals[309] to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

> UNITED STATES.—The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority [to all cases affecting ambassadors, other public Ministers, and consuls]; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies [between two or more States; between a State and citizens of another State]; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between [a State, or] the citizens thereof, and foreign States, citizens, or subjects.
>
> [In all cases affecting ambassadors, other public Ministers, or consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.] In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.—Const., Art. III., sec. 2.

HISTORICAL NOTE.—A General Court of Appeal for Australia was included in the earliest schemes of Federation, from 1849 downwards (see pp. 85, 91, 94, *supra*). The Federal Council Act of 1885, however, did not provide for the establishment of a federal Court of Appeal.

In 1870 a Royal Commission was appointed by the Government of Victoria to consider and report upon the expediency of inviting the co-operation of the Australian colonies to provide for intercolonial legislation on various matters and "to establish a court of appeal." The Commission consisted of Messrs. J. J. Casey (Chairman), Francis Murphy, Jas. A. McPherson, C. Gavan Duffy, J. Macgregor, G. B. Kerferd, G. P. Smith, T. H. Fellows, and George Higinbotham. In April, 1871, the Commission brought up a first Report, which was signed by only seven of the Commissioners—Mr. Fellows being out of the colony, and Mr. Higinbotham having refused to act. The part of this report which deals with the establishment of a court of appeal contains the following passages :—

"Considerations of grave importance suggest the expediency, if not the necessity, that a Court of Appeal, formed of Colonial judges, should be established for the Australasian colonies. The cost and delay occasioned by appeals to the Privy Council would be removed. Judges conversant with colonial life, manners, and laws would adjudicate on matters presenting peculiar and distinct features—the result of colonial habits, industries, and trade. The decisions of the various Supreme Courts of the colonies upon purely colonial affairs would thereby be brought into harmony, and uniformity of law be thus encouraged, to the great advantage of commerce. The first effective step towards the union and consolidation of the colonies would thus, it is thought, be consummated. We recommend that a Court of Appeal for Australasia be formed, consisting of one judge from each colony, and that the Court should sit in each colony successively, or at such places as may be determined upon as occasion required; and that the quorum be regulated in proportion to the number of colonies that appointed judges."

"Another question arises as to how far the Court of Appeal is to be one of final determination, excluding the appeal to Her Majesty in Council. We deem it advisable to leave to the Legislature of each colony to determine that question for itself, by empowering the colonies to enact suitable laws providing the cases in and the terms upon which an appeal may be had to the Queen." (Parl. Papers [Vic.], 1871, vol. ii. p. 711.)

To the report was appended the draft of an "Australasian Legislation Bill" to be passed by the Imperial Parliament, providing for intercolonial legislation on several subjects, and for the establishment of a Court of Appeal on the lines indicated. The part of the report dealing with the Court of Appeal was submitted by Lord Kimberley (Secretary of State for the Colonies) to the Lord President of the Privy Council. The reply of the President is contained in a letter from the Registrar of the Privy Council, dated 20th July, 1871, which, after dealing with the Commission's criticisms of the existing appellate system, concludes as follows :—

"The appellate jurisdiction of Her Majesty in Council exists for the benefit of the colonies, and not for that of the mother country; but it is impossible to overlook the fact that this jurisdiction is a part of the prerogative which has been exercised for the benefit of the colonies from the date of the earliest settlements of this country, and that it is still a powerful link between the colonies and the Crown of Great Britain. It secures to every subject of Her Majesty throughout the Empire his right to claim redress from the Throne; it provides a remedy in certain cases not falling within the jurisdiction of ordinary Courts of Justice; it removes causes from the influence of local prepossessions; it affords the means of maintaining the uniformity of the law of England in those colonies which derive the great body of their law from Great Britain; and it enables suitors, if they think fit, to obtain a decision in the last resort from the highest judicial authority and legal capacity existing in the metropolis. . .

"The power of establishing or remodelling the Colonial Courts of Justice is vested by the 28 and 29 Victoria in the colonial legislatures; and it is undoubtedly desirable that the colonial Courts of Justice should be so constituted as to inspire confidence in their decisions, and to give rise to very few ulterior appeals. That is in fact the case with the Superior Courts of Westminster Hall; and the small number of appeals from the Australian courts is the best testimony to the excellence of those courts also. But the controlling power of the Highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any Judge in the Empire, because he knows that his proceedings may be made the subject of appeal to it.

"But it by no means follows as a necessary consequence of the powers vested in the colonial Legislatures by the 28 and 29 Victoria that laws should be enacted which would control the exercise of the prerogative of the Crown in the exercise of its Supreme Appellate Jurisdiction."

Sydney Convention, 1891.—The clause as introduced and passed without discussion in 1891 was substantially identical with this section, with the exception of the provision for an appeal from the Inter-State Commission—a body not provided for by the Bill of 1891.

Adelaide Session, 1897.—At the Adelaide session the clause was introduced in practically the same form, with two additions. After "appeals," the words "both as to law and fact" were inserted; and a proviso was added that "no fact tried by a jury shall be otherwise re-examined in the High Court than according to the rules of the common law." (See U.S. Constitution, Amend. vii.) But in Committee Mr. Wise, who was responsible for these additions, moved their omission as being unnecessary, and they were struck out. (Conv. Deb., Adel., pp. 967-8.)

Melbourne Session, 1898.—(See Debates, pp. 322-47, 1885-94, 2276-2325, 2419-22, 2453-6. A great part of the debate on this section turned on the question of appeals to the Privy Council; for which see Historical Note to next section.) The general key to the long and complicated debates on this and the following section, and to the numerous amendments suggested, made, and reconsidered, may be found in a short statement of the dilemma that had to be grappled with. Everyone wanted a federal court of appeal; everyone did not wish to abolish the appeal to the Privy Council; and yet no one wished to multiply appeals. The cumulative right of appeal, first to the High Court and then to the Privy Council, would increase the delay and the cost of litigation. The alternative right of appeal, either to the High Court or the Privy Council, would leave two final tribunals. The opinions of the Convention wavered as one or other aspect of this difficulty became more prominent.

A suggestion of the Parliament of New South Wales, that the High Court should only have jurisdiction to hear appeals "where the parties consent," was negatived, as practically destroying the appellate jurisdiction of the Court; though in the course of the debate, which discussed the relative merits of the High Court and the Privy Council, opinions in favour of an alternative right were expressed. (Conv. Deb., Melb., pp. 322-31; and see Historical Note to next section.)

The omission of the power of Parliament to make "exceptions" to the appellate jurisdiction of the High Court was twice proposed: first by Mr. Glynn (Debates, Melb., pp. 331-2), and afterwards by Mr. Barton (pp. 1885-94), on the ground that it gave

Parliament too wide and absolute a discretion to cut down the right of appeal. On the other hand, it was argued that to take away the power of exception would go too far, by giving an absolute right of appeal in every trumpery case; and the amendment was accordingly negatived on both occasions. Finally, Mr. Glynn proposed and carried a compromise to the effect that nothing in the section should be construed to prevent the High Court from hearing appeals from the Supreme Court of a State in cases where there now exists a right of appeal from such Supreme Court to the Privy Council. (Debates, pp. 2323-5.) This was ultimately redrafted into the second paragraph of the clause.

Before the Bill was reported a first time, the Drafting Committee, in accordance with an understanding with the Convention, added an appellate jurisdiction from judgments "of the Inter-State Commission." This caused considerable debate in Committee (pp. 2276-2325). Sir George Turner and Mr. Isaacs, who thought that the questions to be decided by the Commission were political rather than judicial, complained that this gave the control of Inter-State Commerce entirely to the High Court, which was not a tribunal with a suitable knowledge of the questions which would arise. On the other hand it was pointed out that it would not do to make the Commission an irresponsible tribunal, altogether above the Constitution. Mr. Glynn maintained that in the United States the Inter-State Commission was administrative only, not judicial, and that it ought to be the same here. Sir George Turner's amendment to omit the words was negatived; but with a view to meeting his objections the appeal was limited to "questions of law only."

After the referendum of 1898, both Houses of the New South Wales Parliament included among their suggested amendments a proposal that "the mode of appeal from the Supreme Courts of the States should be made uniform, namely, the appeal should either be to the Privy Council or to the High Court, but not, as at present, indiscriminately to either." The Premier's Conference of 1899, however, declined to recommend any such amendment. (See pp, 217, 220, *supra*).

Imperial Parliament, 1900.—In the Bill as introduced into the Imperial Parliament, when Clause 74 was omitted, the last paragraph of Clause 73 was detached and placed as new Clause 74. In a schedule of amendments circulated at the time of the second reading, Mr. Chamberlain proposed to insert, after "final and conclusive," the words "unless the Queen grants special leave to appeal in accordance with section 74;" to restore the last paragraph; and to insert a new Clause 74 allowing an appeal, in questions as to the limits of constitutional powers, by consent of the Executive Governments concerned. (See Hist. Note to sec. 74.) In Committee, however, as part of the final arrangement, this clause was restored to the shape in which it was passed by the Convention.

§ 299. "Shall Have Jurisdiction."

"Jurisdiction" is a content of the judicial power; it is in fact the power of a Court to entertain an action, suit, or other proceeding.

This section confers upon the High Court a general appellate jurisdiction in all matters decided by the State Courts of last resort, by other federal courts, by Judges of the High Court itself in the exercise of the original jurisdiction of the Court, and (on matters of law only) by the Inter-State Commission. The original jurisdiction of the High Court is limited to matters in which the subject matter of the suit, or the character of the parties, fall under certain specified heads; but the appellate jurisdiction has no such limits. It extends (subject to the excepting and regulating power of the Parliament) not only to all decisions of courts of original federal jurisdiction, but also to all decisions of the Supreme Courts of the States, irrespective of whether the subject-matter of the suit, or the character of the parties, would have brought it within the original jurisdiction of the federal courts. In other words (see § 288, *supra*) the High Court is not merely a *federal*, but also a *national* court of appeal; it occupies the

provincial as well as the federal sphere, and is the apex of the judicial systems of the States, as well as of the judicial system of the Commonwealth.

The jurisdiction of the High Court as a court of appeal from the State Courts is, however, not exclusive. The Constitution grants a new right of appeal from the State Courts to the High Court; but it does not take away the existing right of appeal from the State Courts to the Privy Council, which therefore remains unimpaired (see Note, § 305, *infra*). Parties to cases decided by the Supreme Court of a State have therefore an alternative right of appeal either to the Privy Council direct or to the High Court.

A similar alternative right of appeal has for some time existed in New South Wales —and formerly existed in Victoria also—from a single judge, sitting in the equitable jurisdiction of the Supreme Court, either to the Supreme Court in Banco or direct to the Queen in Council. (See Equity Act, 1880 [N.S.W.], sees. 70, 79; Dean *v.* Dawson, 9 N.S.W. L.R. Eq. 27; 15 Vic. No. 10 [Vic.]; 19 Vic. No. 13 [Vic.], sec. 5; Garden Gully *v.* McLister, 1 App. Ca. 39; Davis *v.* Reg., 1 V.L.R. Eq. 33; Woolley *v.* Ironstone Hill Lead Co., 1 V.L.R. Eq. 237.) Under the Supreme Court Act, 1890 (Vic.) this right of appeal from a single judge of the Supreme Court in Victoria does not now exist. (Australian Smelting Co. *v.* British Broken Hill Propr. Co., 23 V.L.R. 643; 20 A.L.T. 46).

§ 300. "With Such Exceptions and Subject to Such Regulations."

Exceptions and Regulations.—The power to prescribe "exceptions" is the power to limit the jurisdiction by excluding specified cases or classes of cases from it. The power to prescribe "regulations" is the power to regulate the mode in which the jurisdiction shall be exercised. These words give the Parliament power to prescribe both exceptions and regulations. Apart altogether from this section, a power to prescribe regulations is clearly conferred by section 51—xxxix., which empowers the Parliament to make laws with respect to "Matters incidental to the execution of any power vested by this Constitution in . . . the Federal Judicature."

The whole appellate jurisdiction is conferred by the Constitution itself, without the need of any intervention by the Parliament. In the absence of any statute prescribing exceptions or regulations, the jurisdiction exists without exception or regulation. This construction, which accords with principle, is now settled with regard to similar words in the United States Constitution. (Durousseau *v.* United States, 6 Cranch 307; Kent, i. 325; Story, § 1773.) In an earlier decision, however (Wiscart *v.* Dauchy, 3 Dallas, 321), the Supreme Court considered that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the Constitution in a qualified manner. "The Supreme Court was to have appellate jurisdiction, 'with such exceptions and under such regulations as Congress should make;' and if Congress had not provided any rule to regulate the proceedings on appeal, the Court could not exercise an appellate jurisdiction." (Kent, i. 324.) The early Judiciary Acts proceeded on this mistaken principle, and purported to confer jurisdiction affirmatively; but those Acts are now construed not as giving jurisdiction, but as making exceptions by implying a negation of jurisdiction in every case where jurisdiction does not purport to be affirmatively given.

Limitation of Excepting and Regulating Power.—Except as regards appeals from the Supreme Courts of the States in the matters defined in the second paragraph of the section, the power to except and regulate is—as it is in the United States—absolute and unlimited.

"This power of the Legislature over the judiciary is a most serious one. It places the appellate power of the court very nearly at the mercy of the legislature. The legislature has made use of this power in the passage of the several Judiciary Acts, and I do not know that it can be said to have abused it. It seems to me, however, an unnecessary surrender of the independence of the courts to require that things which

can be better accomplished by the rules of court shall wait upon the pleasure, or. possibly, caprice of the legislature." (Burgess, Pol. Sci. ii. 331.)

"The Constitution, further, expressly confers upon the Congress the power to regulate the appeal and removal of causes from the Courts of the States, and from the inferior courts of the general government, to the Snpreme Court. This is also a discretionary power in the Congress. There is no doubt that Congress is under a stronger moral obligation to act when its action is necessary for the completion and regulation of the government machinery than when it has to deal with questions of policy merely, or even of individual rights; but it is placed under no stronger legal obligations. By inaction it may thus defeat many of the fundamental purposes of the Constitution without any redress, except such as may be secured at the elections." (Burgess, Pol. Sci. ii. 158.)

The Convention (see Historical Note, *supra*) took the view that the Parliament ought not to be able to deprive the High Court of an appellate jurisdiction equal to that now exercised by the Privy Council; that no exception or regulation should "prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council."

The strict language of the Constitution seems to refer rather to the right of the High Court to hear and determine appeals, than to the right of the party to have his appeal heard. The Constitution does not expressly forbid the Parliament to prescribe certain exceptions, but declares that exceptions prescribed shall not prevent the High Court from exercising jurisdiction. It may perhaps be argued that an exception of this kind, if prescribed, might be effective to cut down a party's absolute right of appeal, though it would clearly be void so far as it purported to cut down the right of the High Court to hear the appeal, if it thought fit. And it might also be argued that this construction would not be inconsistent with the object of the provision, which aims, not at securing an absolute right of appeal, but at making the jurisdiction of the High Court, within defined limits, independent of Parliamentary interference. It does not seem, however, that this distinction was present to the minds of the framers of the Constitution.

The reference to matters "in which at the time of the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council" makes it necessary to ascertain and define those matters.

It is conceived that the provision refers only to those cases in which, at the establishment of the Commonwealth, an appeal may be brought *as a matter of right*. The Queen has a prerogative right (see § 310, *infra*) to review the decisions of all colonial courts, civil and criminal, unless this prerogative has been annulled by charter or statute; but to construe the above provision of the Constitution as extending to this prerogative right of appeal would make it include every decision of the Supreme Courts of the States, and would therefore make the words "in any matter in which . . . an appeal lies," &c., mere surplusage.

"An appeal cannot be brought as a matter of right unless the value of the matter actually in dispute in the appeal be such as has been fixed by law for the particular tribunal from which the appeal is brought." (Macpherson, Privy Council, p. 1.) The appealable amount for appeals from the Supreme Courts has been fixed by Orders in Council made at different times.

From the Supreme Court of New South Wales, by Order in Council of 13th November, 1850, any party may appeal to the Queen in Council from any final judgment, decree, order, or sentence of the Supreme Court, "in case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter in issue above the amount or value of £500 sterling, or in case such judgment, decree, order, or sentence shall involve directly or indirectly any claim, demand, or question, to or respecting property or any civil right, amounting to or of the value of £500 sterling.."

The same appealable amount is fixed with regard to the Supreme Court of Victoria by Order in Council of 9th June, 1860 ; with regard to the Supreme Court of Queensland by Order in Council of 30th June, 1860 ; with regard to the Supreme Court of South Australia by Order in Council of 10th May, 1860 ; with regard to the Supreme Court of Western Australia by Order in Council of 11th October, 1861 ; with regard to the Supreme Court of New Zealand by Order in Council of 9th June, 1860. With regard to the Supreme Court of Tasmania the appealable amount is, by Order in Council of 4th March, 1851, fixed in similar terms at £1000 sterling. (See, for particulars of these several Orders in Council, Macpherson, Privy Council, Appendix.)

To cases within these Orders in Council, therefore, the power to make exceptions, and so exclude an appeal from the Supreme Court of a State to the High Court, will not apply. That is to say, the Federal Parliament cannot exclude appeals from final judgments of the Supreme Courts of the States for matters in issue of the value of £500, or where any property or civil right of the value of £500 is involved (or, in the case of Tasmania, £1000). But the Parliament may exclude or allow an appeal as to all interlocutory orders, or as to final judgments where the amount involved is less than the appealable amount, or in criminal and other cases where no property, or civil right having a money value, is involved.

The limitation on the power of Parliament to prescribe exceptions and regulations applies only to the specified appeals from the Supreme Courts of States. Consequently the excepting power is unlimited with regard to appeals (1) from Justices exercising the original jurisdiction of the High Court ; (2) from other federal courts, or courts exercising federal jurisdiction ; (3) from State Courts (other than the Supreme Courts) from which an appeal lies to the Queen in Council ; (4) from the Inter-State Commission ; and (5) from the Supreme Courts of the States, in matters in which, at the establishment of the Constitution, an appeal did not lie to the Queen in Council. With regard to such appeals the appellate jurisdiction is, in the words of Burgess, "very much at the mercy of the Legislature."

§ 301. "To Hear and Determine Appeals."

An appeal is a proceeding taken to test the decision of a court, and rectify it if erroneous, by submitting it to a higher Court. The use of the word in this sense is comparatively modern. In English law an appeal formerly meant an "appeal of felony," or criminal accusation (Norman-Fr. *appel*, from *appeler*, to accuse), whilst the terms used for what is now known as appellate jurisdiction were "error" or "rehearing" as the case might be. The modern use of the word "appeal" seems to have been introduced into the temporal courts from the ecclesiastical courts, and to be derived directly from the Latin *appellare*. (See Sweet, Law Dictionary ; Wharton, Law Lexicon, *subt it.* "Appeal.")

The word is used without limitation of any kind, and leaves the whole question of the mode of appeal and the procedure on appeal to be regulated by the Parliament. It clearly includes appeals on matters of fact as well as on matters of law. This would be clear from general usage in any case, but is placed beyond doubt by subs. iii., which with regard to appeals from the Inter-State Commission imposes the limitation that the appeal shall be "as to questions of law only," implying that the appeals mentioned in the other sub-sections may be as to questions of fact as well as law.

The essential attribute of an appeal is that it is a judicial proceeding for the purpose of revising a judicial proceeding.

"The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form in which the Legislature may choose to

prescribe; but still, the substance must exist before the form can be applied to it. To operate at all, then, under the Constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity. A power, therefore, conferred by Congress on the Supreme Court, to issue a mandamus to public officers of the United States generally, is not warranted by the Constitution; for it is in effect, under such circumstances, an exercise of original jurisdiction. But where the object is to revise a judicial proceeding, the mode is wholly immaterial; and a writ of *habeas corpus*, or mandamus, a writ of error, or an appeal, may be used, as the Legislature may prescribe.

"The most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin, and removes a cause, entirely subjecting the fact, as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter in suits at common law tried by a jury." (Story, Comm. §§ 1761-2.)

§ 302. "From all Judgments, Decrees, Orders, and Sentences."

These four words, "judgments, decrees, orders, and sentences," are taken from the Imperial Act, 7 and 8 Vic. c. 69, sec. 1 (which extends the right of appealing to the Privy Council), and from the Orders in Council made thereunder. They are all words which may be used in a general sense, to overlap one another, or in a more limited sense, in contrast to one another. Their cumulative use in this Constitution makes it unnecessary, as a matter of constitutional interpretation, to construe them distributively; but in order to ascertain the combined scope of the words it will be convenient to examine their individual meanings.

"Judgment," in its widest sense, means any judicial determination, or decision of a court. Under the former practice of the English Superior Courts, the word was usually applied to decisions of the Common Law Courts, the word "decree" being generally used in the Courts of Chancery. As contrasted with an "order," or direction on matters outside the record, a judgment is a decision pronounced on matters contained in the record. (Stroud, Judicial Dictionary, *sub. tit.* "Judgment" and "Order.") In criminal proceedings, "judgment" means the sentence of the Court on the verdict, or on the prisoner's plea of guilty. Judgments may be either *interlocutory—i.e.*, given upon some intermediate proceeding, and not finally determining or completing the suit or action; or *final—i.e.*, putting an end to the suit or action by awarding or refusing to award redress.

"Decree" is the word generally used as equivalent to "judgment" in courts of equitable jurisdiction, and other jurisdictions where the procedure of courts of equity is adopted. A decree, like a judgment, may be either final or interlocutory.

"Order," generally speaking, means, any direction or command of a court; but it is commonly used, in opposition to "judgment" or "decree," to describe orders on interlocutory applications.

"Sentence," in its widest sense, means any judicial determination, but is most commonly used in connection with criminal proceedings, to denote the judgment of the court in a criminal trial upon the verdict of the jury or upon the prisoner's plea of guilty. For further definitions of all these terms, see Wharton's Law Lexicon, Stroud's Judicial Dictionary, and Sweet's Law Dictionary.

The four words taken together are clearly wide enough to include every judicial decision, final or interlocutory, in every jurisdiction, civil or criminal.

§ 303. "Of any Justice or Justices Exercising the Original Jurisdiction of the High Court."

Under sec. 79 the federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes, and presumably most of the original jurisdiction of the High Court will be made exercisable by a single Justice, sitting with or without a jury. (See Note, Juries, § 291, *supra*.) But whether the original jurisdiction is exercised by one Justice or more, there will be—subject to the excepting and regulating power of Parliament—an appeal to the High Court in its appellate jurisdiction. The excepting and regulating power in this respect (see Note, § 300, *supra*) is unlimited; so that Parliament may make it competent for the High Court to deal finally with any class of matters in the first instance.

§ 304. "Of any other Federal Court, or Court Exercising Federal Jurisdiction."

"Federal Courts" (see sec. 71) are those created by the Parliament; while "courts exercising federal jurisdiction" comprise those State courts, not created by the Parliament, which the Parliament has invested with federal jurisdiction.

Appeals from these courts are subject to the unlimited excepting and regulating power of the Parliament. (See Note, § 300, *supra*.)

§ 305. "Of the Supreme Court of any State."

These are the words which make the High Court not merely a federal court of appeal, but a national court of appeal of general and unlimited jurisdiction. Appeals from any Justice or Justices of the High Court itself in its original jurisdiction, and from other federal courts or courts of federal jurisdiction, can, of necessity, only arise in the specific cases where original jurisdiction is granted by the Constitution, or may be conferred by the Parliament; but appeals from the Supreme Courts of the States extend to all cases, without regard to the subject matter or the character of the parties.

The excepting and regulating power of Parliament extends to appeals from the Supreme Courts of the States, but subject to a special limitation (see Note, § 300, *supra*) which gives the High Court a constitutional right to entertain appeals in all cases where there is now an appeal as of right to the Queen in Council. Thus the position of the High Court, not only as the "guardian of the Constitution," but as a general court of appeal for Australia, is constitutionally secured.

This section confers a new right of appeal, and a new jurisdiction, but it does not take away the existing right of appeal from the Supreme Courts of the States direct to the Privy Council. The latter right therefore remains in force; and accordingly the High Court, though a general court of appeal for Australia, is not the sole court of appeal. (See Note, § 299, *supra*.)

The words "judgments" &c. "of the Supreme Court of any State" are not necessarily restricted to judgments of the "Full Court," or Court sitting Banco; they may apply to orders of the Court made by a single Judge. There may thus be in some cases an alternative right of appeal from the decision of a Judge in a Court of first instance either to the "Full Court" of the State or direct to the High Court. A similar alternative appeal existed, before the establishment of the Constitution, from a Judge of the Supreme Court of N.S.W. or Victoria, sitting in Equity, either to the "Full Court" or to the Privy Council. (See Note, § 299, *supra*.)

§ 306. "Or of Any Other Court of Any State," &c.

The only court, other than the Supreme Court of a State, from which at the establishment of the Constitution an appeal lies to the Privy Council, seems to be the "Local Court of Appeal" in South Australia—an anomalous tribunal to which an

appeal lies from the Supreme Court of South Australia, and from which an appeal lies to the Privy Council. This Court was established by Act No. 31 of 1855-6, sec. 14, and consists of the Governor and all the members of the Executive Council except the Attorney-General. It has practically fallen into desuetude, but as it still exists, the right of appeal from it to the Privy Council was preserved.

"I propose this amendment merely because of the condition of things in our own colony, in which there is another Court of Appeal from which an appeal now lies to the Privy Council, an intermediate Court of Appeal which is seldom availed of, but which exists." (Mr. Symon, Conv. Deb., Melb., p. 332.)

The Imperial Act 7 and 8 Vic. c. 69 provides (sec. 1) "That it shall be competent for Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of error or a court of appeal within such colony or possession."

The orders made under this Act with respect to Australian colonies seem all to have been limited to appeals "from any final judgment, decree, order, or sentence of the Supreme Court" of a colony (see § 300, *supra*).

§ 307. "Of the Inter-State Commission, but as to Questions of Law Only."

The Inter-State Commission is to have "such powers of adjudication and administration as the Parliament deems necessary" for executing and maintaining the constitutional provisions and federal laws relating to trade and commerce. (See Notes to sec. 101.) So far as it is invested with powers of adjudication it will be in effect a part of the federal judiciary; and to prevent any exception being made to that uniform interpretation of the law which it is the aim of the Constitution to ensure, an appeal from its decisions on questions of law is given to the High Court. On the other hand, the questions of fact which it will have to investigate are left to the final decision of the Commission.

Law and Fact.—The precise definition of "questions of law," and of its antithesis "questions of fact," is not easy; for though the distinction between the two is broad and fundamental, there is a region of "mixed questions" which partake of the nature of both. Broadly speaking, a question of law is the question whether there is a rule of law which governs certain ascertained circumstances; a question of fact is the question whether, in any particular case, those circumstances exist. (See Sweet, Dictionary of Law, *sub. tit.* "Fact.") The distinction, in English law, has been chiefly worked out in defining the respective functions of the judge and the jury; the recognized principle being that questions of law are to be decided by the judge, questions of fact by the jury. In the case of the Inter-State Commission the position is somewhat different; the Commission is itself both Judge and Jury in the first instance; but its decisions as a jury are final, whilst its decisions as a judge are subject to review. It is conceived, however, that this difference is immaterial, so far as the distinction between "law" and "fact" is concerned, and that the phrase "question of law" in this section has precisely the same signification as it has in the general law of evidence. For general discussions on this subject, see Taylor on Evidence, § 26; Best on Evidence, §§ 80-82.

The *admissibility* of evidence is a question of law. (Taylor, § 23; Best, § 80.) How far the Inter-State Commission, sitting as a judicial tribunal, will be bound by the strict rules of evidence, is a matter of procedure to be determined by the Federal Parliament; but, whatever rules of evidence may be prescribed, it would seem that an infringement of those rules, by the wrongful acceptance of inadmissible evidence, or rejection of admissible evidence, would be a good ground of appeal.

On the other hand, the *weight* or *value* of evidence is a question, not of law, but of fact. (Taylor, § 25 A ; Best, § 80.) Where there is a conflict of evidence, it is the duty of the jury to balance the evidence of the opposing witnesses, and to decide what the facts of the case really are. The restriction of the right of appeal to "questions of law only" prevents any decision of the Commission from being reviewed on the ground that it is against the weight of evidence.

The question whether there is *any* evidence on which a verdict can *properly* be given in favour of the party on whom the burden of proof lies—or, as it is sometimes put, upon which a jury could *as reasonable men* find such a verdict—is a question of law. (Taylor, § 25 A ; Best, § 82.) "Whether there be *any* evidence, is a question for the Judge. Whether *sufficient* evidence, is for the jury." (Per Bullen, J., Carpenter's Co. *v.* Hayward, 1 Dougl. 375.) These propositions are perfectly consistent, though their application may be difficult. The determination whether there is *any evidence* upon which a verdict could reasonably be founded does not involve a balancing of the *weight* of evidence ; on the contrary, it assumes that full weight must be given to the evidence of the party—that the facts alleged by him are true ; and it is for the court, and not the jury, to say whether, on that assumption, there is reasonable justification for a finding.

"As the decisions of tribunals on questions of fact ought to be based on reasonable evidence, and when the facts are undisputed, the decision as to what is reasonable is matter of law, and consequently within the province of the court—it follows that it is the duty of the court to determine whether, assuming all the facts proved by the party on whom the burden of proof lies to be true, there is any evidence on which the jury could properly—*i.e.*, without acting unreasonably in the eye of the law—decide in his favour." (Best, § 82.)

The most important application of these principles is in connection with the duty cast on the Inter-State Commission (sec. 102) of deciding whether the facts which may be proved before it constitute a "preference or discrimination," or whether a preference or discrimination is "undue and unreasonable, or unjust to any State," or whether "due regard" has been had to the financial responsibilties of a State. All these are "mixed cases," which it is rather hard—apart from authority—to classify as either questions of law or questions of fact.

"If the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it is difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or jury, and specious arguments will not be wanting in favour of the claims of either party. On the one hand, it may be said that these terms are as capable of judicial interpretation as the words 'conversion' or 'asportation,' which must be clearly explained by the Judge ; while on the other hand it may be urged that they seem rather addressed to the practical experience of practical men, than to the legal knowledge of the lawyer ; that, being terms of degree, their meaning is subject to indefinite fluctuation, according to the varying circumstances of each particular case, and that consequently they defy all attempts to compress them within exact *a priori* definitions." (Taylor on Ev. § 26.)

The authorities as to whether the reasonableness of conduct, under any given circumstances, is a question for the court or the jury, are somewhat conflicting ; but the guiding principle seems to be that if the question is one on which the court is likely to be more competent than the jury to form an opinion, it will be treated as a question of law ; and *vice versa*. Thus in an action for malicious prosecution, the question whether, on the fact proved, there was *probable cause* for prosecution is a question for the judge—who is assumed to be a more competent judge of the question than a jury. So, as we have seen, the question whether there is *reasonable evidence* is a question for the judge. On the other hand, in most actions, the *reasonableness* of the belief on which the defendant has acted is a question for the jury. Questions of *reasonable time*—except in cases, such as the dishonour of a bill, where precise rules have been adopted as to what is reasonable—are usually left to the jury ; as are also questions of reasonable skill or care, due diligence, and gross negligence. (Taylor on Evidence, §§ 26-38.)

Whether "reasonableness" is a question of law or a question of fact seems therefore to depend on the assumed competence of the tribunals to which questions of law and fact are respectively assigned. It may be said that this is a somewhat arbitrary and unscientific test of classification; but it must be remembered that all classifications are more or less arbitrary; and this classification has at least the merit of endeavouring to assign each question to the most suitable tribunal.

Applying these principles to the Inter-State Commission, it is necessary to take into consideration the special character of that body, and the purposes for which it is constituted. The function of the Commission, in its judicial capacity, is to decide upon a class of questions involving the consideration of an intricate multitude of facts, and upon which a body of commercial experts are able to form a better opinion than a Bench of judges. Accordingly it is contemplated that the Inter-State Commission will consist of competent experts in the questions which will arise. It is a jury, but a jury of a very special character; a jury who are also judges—who are selected on account of their competence, and are secured in their tenure of a responsible position. The spirit as well as the letter of the Constitution would seem to indicate that the question whether a preference or discrimination is "undue and unreasonable, or unjust to any State"—or whether "due regard" has been had to the financial responsibilities of a State—are questions on which the decision of the Commission is absolutely final.

This conclusion is supported by decisions under the English Railway and Canal Traffic Acts, and the American Inter-State Commerce Act (see Notes, secs. 101, 102). The English Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25, s. 17), provides an appeal from the Railway and Canal Commission to the Court of Appeal, "but not on any question of fact or *locus standi*." In Phipps *v.* London and N.W.R. Co. (1892) 2 Q B. 229, it was held that the question whether a preference was undue or unreasonable was a question of fact for the Commission. (See also Palmer *v.* London and S.W.R. Co., L.R. 1 C.P. 593; Denaby Main Colliery Co. *v.* Manchester, &c., R. Co., 14 Q.B.D. 209, per Selborne, L.C.) "As there is nothing in the (Inter-State Commerce) Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact." (Texas and Pac. R. Co. *v.* Inter-State Commerce Commission, 162 U.S. at p. 219. And see Inter-State Commerce Commission *v.* Alabama Midland R., 168 U.S. 145; and notes to sec. 102, *infra*.)

In two particular cases the judgment of the Commission is expressly made final. If the Commission decides that a rate is *not* undue, unreasonable, or unjust (sec. 102), that settles the question finally; and if the Commission decides that any railway rate of a State is "necessary for the development of the territory of the State," nothing in the Constitution can render the rate unlawful. It does not appear, however, that the mention of these two cases raises any presumption that an appeal lies in other cases not mentioned. These two provisions were inserted, not so much to prevent an appeal to the High Court, as to provide a tribunal independent of the Parliament; their object was to guard against the decision of a judicial question by a political body. They are so absolute in terms that they clearly make the opinion of the Commission, in these cases, final; but they do not seem to raise any presumption which would affect the interpretation of the words "questions of law."

But although the questions of what is unreasonable, what is unjust, what is undue, are for the Inter-State Commission alone, the interpretation of such words as "preference" and "discrimination"—like the interpretation of any other words in the Constitution—involves a question of law. The question whether the proved facts constitute a preference or discrimination, within the meaning of the Constitution, would seem to be wholly a question of law; though, if a preference or discrimination were held to exist, its reasonableness or unreasonableness would be a question of fact.

"Questions of law" include questions arising not only upon the laws of the Commonwealth, but upon the laws of the States. It may be that in the Courts of a State (and even on appeal from the Courts of that State) the laws of another State may

have to be proved as matters of fact (see Notes to sec. 118); but it is clear that the Inter-State Commission, having the duty not only of executing—and in the first instance interpreting—the Constitution and the laws of the Commonwealth, but also of adjudicating upon the "laws and regulations" of the States, must act as judicial interpreters of the latter as well as of the former. On the same principle it has been decided in the United States that the federal courts, in the exercise of their original jurisdiction, take judicial notice, without proof, of the laws of all the States. (Chicago and Alton R. Co. *v.* Wiggins Ferry Co., 119 U.S. 615.)

§ 308. "Final and Conclusive."

The words "final and conclusive" mean, primarily and generally, that there is no appeal. (Waterhouse *v.* Gilbert, 15 Q.B.D. 569; Bryant *v.* Reading, 17 Q.B.D. 128; Lyon *v.* Morris, 19 Q.B.D. 139.)

A right of appeal may mean one of two things: the right of a party to claim an appeal to a higher court; or the right of a higher court to grant leave to appeal. In the case of the High Court, the only higher court of which there is any question is the Queen in Council; so that the discussion of rights of appeal from the High Court resolves itself into (1) the right of a party to claim an appeal to the Queen in Council; (2) the prerogative right of the Queen to grant leave of appeal to herself in Council.

Appeal as of Right.—An appeal as of right can only be created by statute; and the words of this section expressly negative the existence of such an appeal.

"The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court and an extension of the jurisdiction of another." (Per Westbury, L.C., Att.-Gen. *v.* Sillem, 10 H.L.C., p. 720. See also Mayor of Montreal *v.* Brown, 2 App. Ca. 174, 184.

It has been held by the Privy Council in Canadian cases that the words "final and conclusive," or the word "final" only, are apt words, even in a Canadian statute, to take away an appeal "as of right" to the Queen in Council, and to prevent the Court of Appeal in Canada from granting leave to prosecute such appeal. In Cushing *v.* Dupuy (5 App. Ca. 409), it was held that a provision in a Dominion Act that the judgment of the Court of Appeal in matters of insolvency should be "final," excluded appeals "as of right" to the Privy Council, though it did not take away the Queen's prerogative right to grant leave of appeal. Sir Montague E. Smith, in the course of delivering the judgment of the Privy Council, said (at p. 416):—

"Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word 'final' would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38 Vic. c. 11. Their Lordships think that the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word 'final' has been before used in colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (See the Lower Canada Statute, 34 Geo. III., c. 30.) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal." (See also Johnston *v.* Minister of St. Andrew's Church, Montreal, 3 App. Ca. 159.)

Appeal as of Grace.—The law however is clear that the Queen's prerogative to entertain appeals from colonial courts (see Note, § 310, *infra*) cannot be taken away without express words. Cuvillier *v.* Aylwin, 2 Knapp 72, which seems an authority to

the contrary effect, was questioned in *Re* Louis Marois, 15 Moore P.C. 189, and may be considered as overruled on that point. The true principle was laid down clearly in an Indian case, Modee Kaikhooscrow Hormusjee *v.* Cooverbhaee, 6 Moo. Ind. App. 448, and is now well established (see Theberge *v.* Laudry, 2 App. Ca. 102; Johnston *v.* Minister of St. Andrew's Church, Montreal, 3 App. Ca. 159). The authorities are reviewed in Cushing *v.* Dupuy, 5 App. Ca. 409 (cited above) when Sir Montague E. Smith, delivering the judgment of the Privy Council. after holding that the appeal as of right was taken away, went on to say (p. 416):—"The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative, since the 28th section of the Insolvency Act does not profess to touch it; and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment."

The Canadian Act establishing the Supreme Court (38 Vic. c 2, sec. 47) provides that its judgments shall be "final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative." In Johnston *v.* Ministers of St. Andrew's Church, Montreal, 3 App. Ca. 159, no attempt was made to argue that the saving words preserved anything more than the appeal as of grace.

§ 309. "The Conditions of and Restrictions on Appeals."

By "conditions of appeals" seems to be meant the conditions or requirements which have to be satisfied before an appeal is admitted, the terms on which leave will be given. and the terms on which its prosecution will be allowed; by "restrictions on appeals," the limitations as to the judgments from which an appeal will lie, the appealable amount, the time for appealing, and so forth. Both expressions, from different points of view, must at least be construed to extend to so much of the rules and practice of the several Supreme Courts and of the Privy Council as go to the questions whether leave to appeal can be given, on what terms it ought to be given, and subject to what conditions it ought to be prosecuted. How far the words incorporate the rest of the existing practice and procedure of Privy Council appeals may be a matter of some doubt; but it would certainly be prudent on the part of litigants to conform to that practice in every possible way.

The effect of the provision is practically to adopt, as a piece of preliminary federal legislation, separate codes of rules to govern appeals to the High Court from each State. As a matter of fact, these separate codes are to a great extent identical, so that there will from the outset be a considerable degree of uniformity; but complete uniformity can only be secured by federal legislation.

The Parliament has power, under this section, to prescribe exceptions to, and regulations for. the right of appeal. By virtue of the words "until the Parliament otherwise provides," it has also (sec. 51—xxxvi.) power to legislate as to "conditions of and restrictions on appeals;" but the latter power seems to be wholly included in the former. The Parliament also has (sec. 51—xxxix.) power to legislate on matters incidental to the execution of any part of the judicial power. It therefore has full power to regulate the right of appeal, both by direct legislation, and by empowering the Judges of the High Court to frame rules of practice and procedure.

In the meantime, appeals from the Supreme Court of any State to the High Court will be subject, under this section, to the same "conditions and restrictions" as appeals from such Court to the Privy Council. For information as to these, the reader is referred to Macpherson's Practice of the Privy Council, and to the text-books on the practice of the Supreme Courts in the several colonies.

Appeal to Queen in Council[310].

74. No appeal shall be permitted[311] to the Queen in Council from a decision of the High Court[312] upon any question, howsoever arising[313], as to the limits *inter se* of the Constitutional powers[314] of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify[315] that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative[316] to grant special leave of appeal from the High Court to Her Majesty in Council[317]. The Parliament may make laws limiting the matters in which such leave may be asked[318], but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure[319].

CANADA.—The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative.—Dominion Statute, 38 Vic. c. 2, sec. 47 (establishing Supreme Court).

HISTORICAL NOTE.—The Commonwealth Bill of 1891 provided that the Federal Parliament might require that any appeals which have hitherto been allowed from the State Courts to the Queen in Council should be brought to the Federal Supreme Court. The judgment of the Supreme Court was to be final, but the Queen was to have some power to grant leave of appeal to herself "in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's dominions, are concerned." The limitation of the prerogative right to grant leave of appeal was objected to by Mr. Wrixon, who moved the omission of the words, but the amendment was negatived on division. (Conv. Deb., Syd., 1891, pp. 785-7 [and see Historical Note, sec. 73].)

Adelaide Session, 1897 (Debates, pp. 968-89, 1202).—The clause as framed at the Adelaide Convention prohibited any appeal to the Privy Council, either from the State Courts or the federal Courts, "except that the Queen may, in any matter in which the public interests of the Commonwealth, or of any State, or of any other part of Her Dominions, are concerned, grant leave of appeal to the Queen in Council from the High Court." This meant that appeals from the State Courts direct to the Privy Council were to be abolished altogether; that there was to be no appeal "as of right" from the High Court to the Privy Council; and that the Queen's right to grant leave of appeal was to be limited to the cases specified.

A proposal by Sir George Turner to omit the words "in any matter in which the public interests, &c. . . . are concerned," and so leave a right to grant leave of appeal in all cases, was negatived by 17 votes to 14. A general debate on the clause followed. Sir Edward Braddon and Sir Joseph Abbott appealed strongly for the retention of an appeal to the Privy Council, on the grounds that this was one of the last links with the Empire, that it represented the right of the people of Australia to approach the throne, and that the decisions of the Privy Council would command greater respect than those of the High Court. On the other hand, Mr. Symon and Sir John Downer led the argument in favour of a final federal court of appeal. The clause was eventually carried by 22 votes to 12.

Melbourne Session, 1898 (Debates, pp. 333-48, 2286-2341, 2415-9; 2453-6).—A suggestion by the Legislative Councils of New South Wales and Victoria to omit (in the preceding section) the words making the judgment of the High Court "final and conclusive" was negatived (Debates, p. 333). No one attempted to argue that there should be an appeal from the High Court to the Privy Council "as a matter of right," and the retention of these words embodied the decision of the Convention that—whatever right might be reserved to the Queen (*i.e.*, the Privy Council), to grant leave of of appeal "as of grace"—the parties should have no absolute right of appeal.

Sir George Turner, however, while not wishing to make the right of appeal to the Privy Council absolute, wished to vest in the High Court itself, as well as in the Queen in Council, a power to grant leave of appeal; and accordingly he moved to add, after "final and conclusive," the words "saving in cases where an appeal may be allowed either by the Queen in Council or the High Court." Mr. Wise proposed to amend this suggestion so as to read "saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative"—thus placing the prerogative right of granting leave to appeal on the basis of the Canadian Act of 1875. Mr. Symon opposed this, and wished to take away the prerogative right altogether, on the ground that the Privy Council, as a court of appeal for the colonies, was "an anachronism and an absurdity."

Mr. Wise's amendment of Sir George Turner's proposal was agreed to, but when the amended proposal was put to the vote it was easily defeated (pp. 333-47). All these proceedings took place in connection with the words "final and conclusive" in the preceding clause. The "Appeals to Privy Council" clause was immediately afterwards passed without amendment; so that the result was that at this stage the question of appeal was left precisely as it had been at Adelaide. (Conv. Deb., Melb., pp. 333-48.)

The whole question came up again on recommittal after the second report (pp. 2286-2341). Sir Joseph Abbott moved again that after "final and conclusive" (in the preceding section) should be added the words "saving any right that Her Majesty may be pleased to exercise by virtue of Her royal prerogative." The whole question of appeal to the Privy Council was debated over again, the argument in its favour being now supported by a number of petitions from various Chambers of Commerce and Manufactures, and other associations representing mercantile interests. Mr. Symon again led the opposition to the amendment, while Mr. Carruthers supported it. Mr. O'Connor pointed out that the question was not that of *abolishing* appeals to the Privy Council, because the following clause expressly allowed them in certain cases; it was a question of limiting them. He could see no consistency in the limitation as it stood, because it allowed an appeal to the Privy Council in the very cases which were specially of a kind to be finally decided in Australia—cases, namely, in which the interpretation of the Constitution was involved; and he announced himself ready to support a proposition to the effect that no appeal to the Privy Council should be allowed in those cases; a suggestion which Mr. Kingston also heartily approved. (For an earlier suggestion to the same effect, see a paper read by Mr. R. R. Garran before the Australasian Association for the Advancement of Science, Proceedings, 1895, p. 694.) Eventually, Sir Joseph Abbott's amendment was carried by a majority of one. A

proviso was then added, on Mr. Symon's motion, "that the right saved is that of granting leave to appeal, and shall continue only until Parliament otherwise provides."

The above debate was on the preceding section. On the consideration of this section ("Appeals to Queen in Council") Sir Joseph Abbott moved the omission of the limiting words "in which the public interests . . . . are concerned." This was agreed to without division; and then Mr. Symon proposed to insert, in place of the words omitted, "not involving the interpretation of the Constitution of the Commonwealth or of a State." This, at Mr. Barton's suggestion, was amended by adding the words "or in any matter involving the interests of any other part of Her Majesty's dominions;" the intention being to allow an appeal in every case in which some other part of the British dominions was concerned, notwithstanding that the interpretation of the Constitution of the Commonwealth or of a State might be involved. After debate, Mr. Symon's amendment, as amended, was carried by a majority of four. (Conv. Deb., Melb., pp. 2325-35.)

Mr. Symon next moved an amendment providing "that no appellant to the High Court shall afterwards appeal to the Privy Council in the matter of the same appeal," the intention being that when an appellant had elected to go to the High Court instead of to the Privy Council direct, he should be bound by its decision; though the respondent, who had had no right of election, might appeal from the decision. There was a strong feeling in the Convention that some such provision would be desirable; but finally, on the suggestion that the Drafting Committee should endeavour to carry out this idea, Mr. Symon withdrew his amendment. No such provision, however, was afterwards incorporated in the Bill. (Conv. Deb., Melb., pp. 2336-41.)

On recommittal after the third report, Mr. Barton brought up the redraft of the Drafting Committee. Mr. Glynn then moved a further amendment in order to prevent appeals direct from a State Court to the Privy Council, to preserve the prerogative right of appeal to the Privy Council in all cases—whether constitutional or not—and to prevent that right from being cut down by the Parliament. This was negatived on division by a majority of three. (Conv. Deb., Melb., pp. 2415-22.) Some final drafting amendments were made after the fourth report.

Imperial Parliament.—In the Bill as introduced into the Imperial Parliament, clause 74 was omitted altogether, and in covering clause 5 were inserted words preserving the prerogative of appeal with respect to all decisions of the High Court and of the Supreme Courts of the States. (See pp. 242, 346, *supra.*)

To meet the protests of the Delegates, Mr. Chamberlain afterwards proposed a new clause allowing an appeal from decisions of the High Court on questions as to "the limits *inter se* of the constitutional powers" of the Commonwealth and the States, or of any two or more States. (See p. 245, *supra.*) To meet criticisms from the Delegates and from Australia, this clause was subsequently redrafted. (See p. 247, *supra.*) Finally, the clause as it now stands was suggested by Mr. Chamberlain, and agreed to by the Governments of the colonies; and in Committee the Bill was amended accordingly. (See pp. 247-9, *supra.*)

§ 310. "Appeal to Queen in Council."

The Prerogative Right.—The preceding section negatives any right of litigants in the High Court to claim an appeal to the Queen in Council "as a matter of right," and what is dealt with in this section is the prerogative right of the Crown, through the Judicial Committee of the Privy Council, to grant "special leave of appeal," as a matter of grace.

"The Queen has authority, by virtue of her prerogative, to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority." (Falkland Islands Co. *v.* Queen, 1 Moo. P.C.N.S. 312; and see Reg. *v.* Bertrand, L.R. 1 P.C. 520; Macpherson, P.C. Practice, p. 60; Todd, Parl. Gov. in Colonies, p. 220.)

The ancient right of the King, as the fountain of justice, to dispense justice in his Council survived even after the establishment of Courts of Common Law. (See Anson, Law of Constitution, ii. 86.) In 1640 the Long Parliament, by the Act 16 Car. I c. 10, which abolished the Star Chamber, enacted that neither the King nor his Privy Council should have jurisdiction over any man's estate, but that "the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." But the King in Council, though his original jurisdiction within England was taken away, was still the resort of suitors in the dependencies, and continued to hear petitions from the plantations. The result was that down to 1833 all petitions from beyond the seas were dealt with "by an open Committee of the Privy Council, which advised the Crown as the order to be made in each case." (Anson, Law of Const. ii. 442.)

The Judicial Committee.—In 1833, by the Act 3 and 4 Wm. IV. c. 41, the Judicial Committee of the Privy Council was constituted, and it was enacted (sec. 3) that "all appeals or complaints in the nature of appeals which either by virtue of this Act or of any law statute or custom may be brought before His Majesty or His Majesty in Council" from the decision of any Court or Judge should thenceforth be referred to the Judicial Committee. It was also enacted (sec. 4) that His Majesty might refer to the Judicial Committee "any such other matters whatsoever as His Majesty shall think fit." The Judicial Committee was also given various necessary powers of a Court of Justice, with regard to the examination of witnesses, compelling their attendance, making rules of practice, and so forth.

The composition of the Judicial Committee has been the subject of statutory change from time to time. It now consists of the Lord President, such Privy Councillors as hold or have held "high judicial office" (defined to mean the office of Lord Chancellor, of a paid Judge of the Judicial Committee, or of a Judge of one of the Superior Courts of Great Britain and Ireland), the Lords Justices of Appeal, and two other persons being Privy Councillors whom the Queen may appoint. There may also be one or two paid members, who have held judicial office in the East Indies. (See Appellate Jurisdiction Acts, 1876 and 1887, 39 and 40 Vic. c. 59; 50 and 51 Vic. c. 70; Judicial Committee Act, 1881, 44 and 45 Vic. c. 3.) It is now provided by the Judicial Committee Amendment Act, 1895 (58 and 59 Vic. c. 44), that if any person being or having been Chief Justice or a Judge of the Supreme Court of Canada, or of a Supreme Court in any province of Canada, or of any of the Australasian Colonies, or of Cape Colony or Natal, or of any other Superior Court in the Queen's Dominions which might be named by Order in Council, is a member of the Privy Council, he shall be a member of the Judicial Committee; but such colonial members of the Judicial Committee must not exceed five.

Although the Acts relating to the Judicial Committee require the Queen's prerogative right of admitting appeals to be exercised through a particular court, of definite statutory composition, they do not limit the *extent* of that prerogative right. It is however capable of being limited to any extent, or of being abolished altogether, by the sovereign British Parliament, whose sovereignty extends to the prerogative as to everything else. (See Dicey, Law of the Const., p. 60.) "The prerogative appears to be, both historically and as a matter of actual fact, nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." (*Id.*, p. 352.) To say that the right of granting leave to appeal to the Queen in Council is a "prerogative right" is therefore merely to say that it has not yet been legally taken out of the hands of the Crown.

This prerogative right of the Crown is sometimes spoken of, somewhat inaccurately, as a sacred constitutional right of the individual subject. See for instance a petition presented to the Melbourne Convention (cited Conv. Deb., Melb., p. 2298), where it is spoken of as "this right of approach to the Sovereign which all her other subjects (*i.e.*, other than Australian) possess." Language such as this is due to a confusion of the right of appeal with the general right of petitioning the Crown for the redress of grievances—a right which belongs to every subject in every part of the Empire, and is

not taken away by limiting the right of appeal in matters of litigation. (See Blackstone's Commentaries, i. 143.) The right of appeal to the Privy Council is not in any sense a right of approaching the person of the Sovereign, but merely a right of appealing to one of the Queen's Courts—a Court which is not a Court of Appeal for the whole Empire, but only for the colonies and dependencies of the Empire. See remarks on this subject by Mr. Symon (Conv. Deb., Melb., pp. 2295, seqq). The extent to which a right of appeal to the Queen in Council ought to be retained is purely a question of political expediency.

Limitations Prescribed by Privy Council.—Though the right of the Queen to grant leave to appeal to herself in Council has not hitherto been legally limited, very definite limitations as to the cases in which such leave will be granted have been laid down by the Privy Council itself. Thus in criminal cases, leave will only be granted in special circumstances, where it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. (Reg. *v.* Bertrand, L.R. 1 P.C. 520; *Re* Dillet, 12 App. Ca. 459; *Exp.* Deeming, 1892, App. Ca. 422; Kops *v.* Reg., 1894, App. Ca. 650; *Exp.* Carew, 1897, App. Ca. 719.)

In applications for special leave to appeal to the Queen in Council from decisions of the Supreme Court of Canada, or of the Courts of Appeal in the Provinces, the Privy Council has laid down limitations which had an important influence on the Convention in determining the provisions of this section, and which are further of importance as laying down rules which will undoubtedly guide the Privy Council in the exercise of the right to grant special leave under this Constitution.

In Johnston *v.* Ministers of St. Andrew's Church, Montreal, 3 App. Ca. 159, special leave of appeal from the Supreme Court of Canada was refused in a case where the amount at issue was only £300, and where the issue between the parties related simply to the legal construction and effect of a particular contract, and where no general principle was involved, and no other cases were necessarily affected by the decision complained of. The judgment of Lord Cairns, L.C., concluded as follows:—

"It appears to their Lordships that it would be a departure from the principles which should guide them when advising Her Majesty as to when an appeal should be allowed, to advise that an appeal should be allowed merely for the purpose of testing the accuracy of the construction put upon a particular document, which document, if it affects any number of other cases, can be altered at the will of the party who asks for the exercise of the prerogative in allowing an appeal. Their Lordships, therefore, cannot, either from the magnitude of the particular case, or from the effect which this decision may have on a number of other cases, think that this is a case in which they should advise Her Majesty to allow the appeal which is asked for."

In Valin *v.* Langlois, 5 App. Ca. 115, an important constitutional question was involved as to the validity of a Dominion Act; but special leave to appeal from two concurrent judgments of the Courts in Canada, affirming the validity of the Act, was refused, it appearing that there was no substantial question to be decided, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched. Lord Selborne, delivering the judgment of the Court, said (at p. 117):—

"Their Lordships must remember on what principles an application of this sort should be granted or refused. It has been rendered necessary, by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal; and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted; that it is necessary to show both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question, but the consideration of its importance and the nature of the question tell both ways. On the one hand those considerations would undoubtedly make it right to admit an appeal, if it were shown to their Lordships, *prima facie* at all events, that there was a serious and a substantial question requiring to be determined. On the other hand, the same considerations make

it unfit and inexpedient to throw doubt upon a great question of constitutional law in Canada, and upon a decision in the Court of Appeal there, unless their Lordships are satisfied that there is, *prima facie*, a serious and substantial question requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the Lower Courts were correct. It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character."

In Prince *v.* Gagnon, 8 App. Ca. 103, which was a suit involving a question of a sum of £1000, Lord Fitzgerald, delivering the judgment of the Court, said :—

"Their Lordships, having looked into the case, see that it involves nothing whatever beyond this £1000. There is no grave question of law or of public interest involved in its decision that carries with it any after-consequences, nor is it clear that beyond the litigants there are any parties interested in it. . . . Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

In Montreal *v.* Ecclesiastiques de St. Sulpice, 14 App. Ca. 660, the unwillingness of the Privy Council to grant special leave was still further illustrated. Lord Watson, delivering judgment, referred to the provision of the Canadian Supreme Court Act, that the decision of the Court should be "final and conclusive," saving the Queen's prerogative, and declined to formulate any general rule as to when leave to appeal would be given. "In some cases," he said, "as in Prince *v.* Gagnon [*supra*] their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal." (See, for these and other cases in which special leave was granted or refused, Wheeler, Confed. Law, pp. 440-482 ; Wheeler, Privy Council Law, Part II.)

§ 311. "No Appeal shall be Permitted."

These words are a limitation of the Queen's prerogative right to admit appeals from any colonial court. Such a limitation is within the competence of the Imperial Parliament. (Dicey, Law of the Const., p. 60 ; and Notes, *supra*, § 310.)

The prohibition is directed against appeals by special leave of the Privy Council. Appeals as of right from decisions of the High Court are already taken away by the provision of sec. 73 that the judgment of the High Court shall be "final and conclusive" (see Note, 308, *supra*). The prohibition is limited—

(1) to appeals from decisions *of the High Court* ;

(2) to appeals upon questions as to the limits *inter se* of the constitutional powers—

(*a*) of the Commonwealth and those of any State or States ; or

(*b*) of any two or more States ;

(3) by the qualification that an appeal will lie "if the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

The limited extent of the prohibition against appeals to the Privy Council is confirmed by the concluding paragraph of the section, which expressly saves the royal prerogative to grant special leave of appeal "except as provided in this section." Accordingly the prerogative right of the Queen in Council to grant special leave to appeal from judgments of the State courts is not affected by the Constitution ; and the

right of appeal from the Supreme Courts of the States, under the Orders in Council, in matters over the appealable amount—a right which is derived from statute, not from prerogative—is of course also untouched. (See Notes, §§ 299, 300, *supra*.)

§ 312. "From a Decision of the High Court."

Decision.—For the meaning of the words "decision upon any question," see Note, § 313, *infra*.

Of the High Court.—The section as it stands differs from the Bill as adopted by the Convention in not forbidding appeals from the State Courts to the Privy Council on constitutional questions. The clause as orginally drafted by the Judiciary Committee at the Adelaide session began :—"No appeals shall be allowed to the Queen in Council *from any court of a State*, or from the High Court, or any other federal court, except," &c. As redrafted at the Melbourne session, after the third report, and adopted at the fourth report, it began :—"Notwithstanding anything in the last section, an appeal to the Queen in Council *from a court of a State*, or from the High Court, or from any other federal court, shall not be allowed in any matter," &c. Before the final stage, it was redrafted to read :—"No appeal shall be permitted to the Queen in Council in any matter," &c. There was certainly no intention on the part of the Convention to limit the clause to appeals from the High Court, the general words "no appeals shall be permitted" being understood to include appeals from all courts, State or federal.

In some quarters, however, the cause was understood as referring to appeals from the High Court alone ; and Mr. Chamberlain's first proposed compromise (p. 245, *supra*), providing that no question as to the limits of constitutional powers should be "capable of decision except by the High Court," was objected to by Sir Samuel Griffith, amongst others, on the ground that this was a substantial alteration of the Bill, and a curtailment of a right of appeal from the State Courts to the Privy Council which had been expressly reserved by the Convention. The Chief Justices of all the Australian colonies, being consulted by Mr. Chamberlain, seem to have expressed opinions adverse to any curtailment of the right of appeal from the State courts to the Privy Council ; and as a consequence of these representations the clause as finally passed by the Imperial Parliament left this right untouched.

The Convention, therefore, meant that on constitutional questions the High Court should be the sole, as well as the final, court of appeal ; but under the Constitution as it stands, any judgment of the Supreme Court of a State may, even if it involves constitutional questions, be appealed from to the Privy Council direct ; though, if the appellant chooses to adopt the alternative of appealing to the High Court instead of to the Privy Council, there can be no further appeal to the Privy Council unless the High Court certifies that such an appeal is proper.

This result does not appear to be altogether satisfactory. Whatever view may be taken of the expediency of retaining a right of appeal to the Privy Council in constitutional questions, it would at least seem that the Privy Council ought not to be required to decide any such question without having, for its assistance, the judgment of the highest Court in Australia. As it is, the decision *of the High Court* on a certain class of constitutional questions is final, unless the High Court certifies, for special reasons, that an appeal ought to be allowed to the Privy Council ; but if any such question arises *in a Supreme Court of a State*, an appeal may be had direct to the Privy Council, passing by the High Court altogether. There is thus a lack of unity in the system of interpreting the fundamental law of the Commonwealth. There is also a lack of consistency ; the principle that the interpretation of the Constitution, as between Commonwealth and State, ought to rest with the Australian courts, is affirmed by the provision which makes the decision of the High Court in such cases ordinarily final, and denied by the reservation of the full right of appeal from the State courts to the Privy Council.

This anomaly, however, can, if inconvenience is found to arise, be removed in either of two ways—by the Imperial Government, or by the Federal Parliament. The statutory right of appeal from the State Courts to the Privy Council is defined by the Orders in Council already cited (§ 300, *supra*); and it is competent at any time for the Queen in Council (*i.e.*, the Imperial Government) to promulgate new orders, abolishing this right of appeal in questions as to the limits of constitutional powers. If that course should not commend itself, the Federal Parliament has power to deal with the matter in another way. Under sec. 76, the Parliament may confer original jurisdiction on the High Court in several classes of cases, including "cases arising under this Constitution, or involving its interpretation." Under sec. 77, it can confer a similar jurisdiction on any federal court other than the High Court, and can declare the jurisdiction of *any federal court* (including the High Court), to be exclusive of that belonging to the courts of the States. The Federal Parliament can therefore, by making the federal jurisdiction exclusive in cases arising under the Constitution, ensure that all such cases shall be brought in the first instance into the federal courts, when they will of course be subject to the exclusive appellate jurisdiction of the High Court. That is to say, the Federal Parliament—though it cannot interfere with the right of appeal from the Supreme Courts of the States to the Privy Council—can under sec. 77 reserve to the federal courts exclusive original jurisdiction in cases "arising under the Constitution," and thus prevent such cases being brought in the courts of the States.

§ 313. "Upon any Question, Howsoever Arising."

Decision upon a Question.—The appeals forbidden by this section are appeals "from a *decision* of the High Court *upon any question*" of a certain character. The distinction should be noted between the phrase "decision of the High Court" in this section and the phrase "judgment of the High Court" in sec. 73. A judgment of the court is its order upon a case; a decision of the court is its finding upon a question of law or fact arising in a case A decision upon a question is not of itself a judgment, but is the basis of a judgment; and one judgment may be based on the decision of several questions.

This section, then, forbids not an appeal from a judgment, but an appeal from the decision of a question. Where a judgment is based upon the decision of several questions, one of which is a question as to the limits of constitutional powers, the section does not forbid the Privy Council to grant special leave of appeal from the judgment; what it does is to forbid the Privy Council from disturbing the decision of the High Court *on that particular question*. It may be that, apart from the constitutional question, there are other questions of law or of fact which the Privy Council may hold to have been erroneously decided by the High Court, and which are material to the judgment. The Privy Council has power to deal with the whole matter, except that it cannot disturb the decision of the High Court on the constitutional question unless the High Court has certified that the question ought to be determined by the Privy Council.

American Analogy.—The provision, which denies to the Privy Council the power of "independent interpretation" of the limits of the constitutional powers of the Commonwealth and the States, bears an interesting analogy to the doctrine laid down by the federal courts in the United States, that those courts have no right of "independent interpretation" of State Constitutions and laws unless national rights or authorities are affected.

"The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State Constitutions and laws, where nothing is involved of national authority, or of right under the Constitution, laws, or treaties of the United States; and to accept the State decisions as correct, and to follow them whenever the same questions arise in the national Courts." (Cooley, Const. Lim. p. 13; and see Burgess, Pol. Sci. ii. 328.)

This Constitution draws no such distinction as between the States and the Commonwealth. The fact that the High Court is made a general court of appeal implies a right of "independent interpretation" of State Constitutions and laws. But as between the Empire and the Commonwealth—that is, as between the Privy Council and the High Court—the right of "independent interpretation" is limited in a way somewhat resembling the American doctrine. It is to be noted, however, that the limitation expressed by the United States doctrine is wider, and it includes the *laws* as well as the Constitutions of the States.

Howsoever Arising.—The object of these words is to make it clear that the section refers, not only to questions arising in cases to which the Commonwealth or a State is a party, but also to questions arising in litigation between private individuals. The experience of the United States, as well as of England, shows that the most important constitutional cases have usually arisen in cases between individuals. Thus the great case of Marbury *v.* Madison—the leading American authority as to the right to obtain a mandamus against a federal officer—was brought by a private citizen against the Secretary of State; and the English case of Ashby *v.* White—the leading authority upon the maxim "*ubi jus, ibi remedium*"—was brought by a voter against a returning officer who had refused to allow his vote.

When Mr. Chamberlain's first compromise was suggested (p. 245, *supra*) doubts were expressed by critics in Australia as to whether the clause (which forbade appeals on questions "howsoever arising" as to the limits of constitutional powers, "unless by the consent of the Executive Government or Governments concerned") applied to cases where the parties were private citizens. The clause was clearly intended so to apply, but doubts were supposed to arise from the words "Executive Government or Governments concerned," which might be construed to mean that the Executive Governments must be directly concerned as parties. In the section as it now stands no such doubt exists.

§ 314. "The Limits Inter Se of the Constitutional Powers."

Limits inter se.—The two classes of questions as to which appeals to the Privy Council are forbidden, except by leave of the High Court, are questions as to the limits *inter se*

(*a*) of the constitutional powers of the Commonwealth and those of any State or States; and

(*b*) of the constitutional powers of any two or more States.

Each of these classes refers to two sets or categories of powers, which are placed in mutual opposition to each other by the words "*inter se*." Thus in class (*a*) we have (1) the constitutional powers of the Commonwealth on the one hand, and (2) the constitutional powers of any State or States on the other hand; and the question is as to the limits "between themselves" of these two categories of powers. In class (*b*), we have (1) the constitutional powers of any State or States on the one hand, and (2) the constitutional powers of any other State or States on the other hand; and the question is as to the limits "between themselves" of these two categories of powers. The question in each case is as to the limits "*inter se*" of the two categories; that is to say, as to whether a particular power belongs to the one category or to the other.

The word "limit," taken by itself, is not altogether free from ambiguity; it may mean either (1) the *boundary* of a contained area, or (2) the *extent* of a contained area. But the phrase "limits *inter se*," applied to two mutually opposed categories, can hardly mean anything else than the dividing line between them. Thus the questions referred to in this section are questions as to the distribution of constitutional powers—

(*a*) between the Commonwealth on the one hand, and any State or States on the other; or

(*b*) between any State or States on the one hand, and any other State or States on the other.

In other words, it is not enough, in order to constitute a "question as to the limits *inter se* of constitutional powers," that this is a question as to the *extent* of the powers of the Commonwealth or of a State; there must also be mutual opposition, either between the powers of the Commonwealth and those of a State, or between the powers of one State and those of another. There must be a question, not merely whether one of them has the power, but which of the two has the power. Thus a question as to the extent of the federal power to legislate with respect to trade and commerce, is a question as to the limits *inter se* of the powers of the Commonwealth and the States, because any increase of the power of the Commonwealth in that respect involves a diminution, either actual or potential, of the power of the States. On the other hand, a question as to the extent of the federal power to legislate in respect of fisheries beyond territorial limits is not such a question, because the States have no power in that respect, and the extent of the federal power does not affect the powers of the States in any way whatever.

Before discussing the application of the section as between (*a*) the Commonwealth and the States, and (*b*) two or more States, it will be advisable to analyse the phrase "constitutional powers."

Constitutional Powers.—The word "constitutional" need not refer exclusively to the Constitution of the Commonwealth; it may refer also to the Constitutions of the States. In Clause 74 as adopted by the Convention, the matters as to which an appeal to the Privy Council were forbidden were matters "involving the interpretation of this Constitution or of the Constitution of a State"—with an exception in cases where the public interests of some part of the Queen's dominions outside the Commonwealth were involved. This Constitution, by secs. 106 and 107, expressly saves the Constitutions of the States, and the Constitutional powers of the State Parliament, so far as they are not affected by the Constitution of the Commonwealth. It is conceivable, therefore, that questions may arise as to the limits of the constitutional powers of the States, as defined by their respective Constitutions, as well as the limits of their constitutional powers as defined by the Constitution of the Commonwealth.

The word "powers" is wide enough to include all the powers of government. It includes the legislative power of the Commonwealth (sec. 1), the executive power of the Commonwealth (sec. 61), and the judicial power of the Commonwealth (sec. 71); and also the corresponding legislative, executive, and judicial powers of the States, as defined by their respective Constitutions.

Questions as to Limits of Powers.—We may now proceed to discuss the nature of questions "as to the limits *inter se*" (*a*) of the constitutional powers of the Commonwealth and of the States, and (*b*) of the constitutional powers of two or more States.

(*a*) *As between the Commonwealth and the States.*—Questions "as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States" are questions which arise in connection with the federal distribution of power between the Commonwealth on the one hand and the States on the other. Such questions, it may fairly be assumed, will be numerous and important. One of the most fundamental features of the Constitution is the distribution of the sum-total of *quasi*-sovereign governmental powers—legislative, executive, and judicial—between the Federal Government and the State Governments. The legislative powers given to the Federal Parliament by sections 51 and 52, and in other parts of the Constitution, are necessarily expressed in broad and general terms; and the interpretation of these, and their application to individual cases, is one of the most important and responsible duties which will devolve upon the High Court. In the United States, the various legislative powers of the Union

—and especially the wide power to "regulate trade and commerce with foreign nations, and among the several States"—have received an immense amount of judicial interpretation, the effect of which is to define in detail the exact limits of the powers of the Union on the one hand, and of the States on the other. A similar process of judicial development of the Constitution may be expected to occur in Australia. In the case of nearly every one of the subjects of legislation assigned to the Federal Parliament, cases may arise as to the meaning and extent of the federal power, as to the consequent limitation of the powers of the States, and as to conflicts between Federal and State laws.

Not only in the field of legislation, but also in the fields of administration and adjudication, the system of the federal distribution of power may lead to conflicts of authority and jurisdiction which will become subjects of judicial determination. The exact limits between the executive power of the Commonwealth and those of the several States, and the exact limits of the jurisdiction of the Federal and State courts respectively, will have to be determined by the Courts from time to time, whenever questions arise in the course of litigation as to the meaning or application of the provisions of the Constitution upon these subjects.

(*b*) *As between State and State.*—Questions "as to the limits *inter se* of the constitutional powers of any two or more States" are of a different character, and are likely to be neither so important nor so numerous. In the case of the distribution of power between the Commonwealth and the States, we have to deal with two sets of governing organs, operating upon the same territory and upon the same people, but exercising different sets of powers; and the delimitation of their respective spheres of action is necessarily somewhat difficult and intricate. But in the case of two States, we have two sets of governing organs, exercising similar powers, but operating upon different territories and upon different people. The delimitation in this case is chiefly territorial, and is therefore much simpler. Questions of disputed boundaries, and questions of disputed territorial jurisdiction, would clearly come within the scope of this provision; but it is not quite apparent what other questions could arise as to the limits *inter se* of the constitutional powers of two States. A State might indeed make unconstitutional discriminations against another State or the residents therein (sec. 117); but a question arising out of any such discrimination would hardly be a question of the limits *inter se* of the constitutional powers of both States; it would rather be a question of the constitutional powers of one State and the constitutional rights of the other. A breach by one State of the obligation to give full faith and credit to the laws, public acts or records, or judicial proceedings of another State (sec. 118), might perhaps raise a question as to the limits *inter se* of constitutional powers.

General Scope of the Prohibition.—A consideration of this section shows that the general scope of the questions as to which an appeal to the Privy Council is forbidden is far narrower than under the clause as adopted by the Convention, which forbade such an appeal "in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved." That provision made the High Court the final arbiter of all questions of constitutional interpretation, except where the interests of some other part of the Empire were concerned. But there are many questions of constitutional interpretation, involving no interests outside the Commonwealth, which do not come within the range of the questions defined in this section. The Constitution, besides distributing powers between the Federal and State Governments, grants to the Federal Parliament certain new powers not previously exercised by the Parliaments of the States, and also prescribes the structure of the several departments of the Federal Government, and the mode in which the powers conferred are to be exercised. Questions may arise as to the valid exercise of some of these new powers, or as to the constitution of one of the organs of the Federal Government—such as the Inter-State Commission, or the High Court—or as to the proper procedure for the exercise of an admitted federal power. These would not be questions

as to the limits *inter se* of constitutional powers, and would be subject to the Queen's prerogative right of granting leave to appeal.

The duty of defining the class of questions in which the prerogative of appeal is taken away will devolve chiefly upon the Judicial Committee of the Privy Council, upon applications for special leave. The High Court, upon an application for a certificate under this section, will also have to interpret the section; but it must clearly be governed, in the matter of interpretation, by the decisions of the Privy Council. (See note, § 315, *infra.*)

§ 315. "Unless the High Court shall Certify."

When it is desired to appeal from a decision of the High Court upon a constitutional question of the kind described in this section, special leave to appeal must first be obtained, not, as in other cases, from the Privy Council, but from the High Court itself. This principle of making the right to appeal dependent upon the leave of the court whose decision is appealed against is not novel. For instance, in England, appeals from the county courts and other inferior courts are determined by the Divisional Court, and the decision of the Divisional Court is final unless leave to appeal is given by the Divisional Court. (Supreme Court of Judicature Act, 1873; 36 and 37 Vic. c. 66, sec. 45.)

Discretion to Grant or Refuse.—The High Court has an absolute discretion to grant or refuse a certificate; the only direction given by the Constitution being that the court must be satisfied that for some "special reason" the certificate should be granted. This discretion, however, like every judicial discretion, is not to be exercised capriciously nor arbitrarily, but on judicial grounds and for substantial reasons. (Per Jessel, M.R., *re* Taylor, 4 Ch. D. 160; per Lord Blackburn, Doherty *v.* Allman, 3 App. Ca. 728.) "Discretion is a science or understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections." (Lord Coke, in Rooke's case, 5 Rep. 100a.) "Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular." (Per Lord Mansfield, Rex *v.* Wilkes, 4 Burr. 2539.)

The provision that "the High Court may so certify if satisfied that for any special reason the certificate ought to be granted" not only shows that the court has a discretion, but indicates to some extent the principles which ought to guide the exercise of that discretion. A certificate is not to be granted as a matter of course to every would-be appellant; it is not even to be granted in every case in which the Court can see some show of reason for an appeal; it is only to be granted if the Court is satisfied that for some "special reason" it ought to be granted. The use of these words seem to suggest that the certificate of the High Court, granted for "special reason," is intended to be analogous to the "special leave" of the Privy Council. That is to say, in this particular class of constitutional questions, "special leave" to appeal must be obtained, not as in other cases from the Privy Council, but from the High Court. It seems probable, therefore, that the High Court, in granting or refusing a certificate, will be guided by the principles laid down by the Privy Council in granting or refusing special leave of appeal. (See Notes, § 310, *supra.*)

In this view it appears that this section, whilst technically it impairs a prerogative of the Queen, in reality only alters the channel through which the prerogative is to be exercised. The royal prerogative of granting leave to appeal from colonial courts to the Queen in Council has long ceased to be exercised personally by the Queen, and has been vested in a particular Court of the Empire—the Judicial Committee of the Privy Council. That prerogative, so far as certain kinds of Australian constitutional questions are concerned, is now transferred to another of Her Majesty's Courts—the High Court of Australia. The exercise of a prerogative which only affects the Commonwealth has

been entrusted to the Queen's servants in the Commonwealth. So far from being novel or revolutionary, this is merely an application of a principle which has always guided the development of the self-governing powers of British colonies.

Except as specially authorized by this section, the High Court is not required to grant, and cannot grant, leave to appeal from its own decisions (see Cushing *v.* Dupuy, 5 App. Ca. at p. 416).

Refusal to Grant a Certificate.—In the cases mentioned in this section, if the High Court refuses to grant a certificate, its decision will be absolutely final. In connection with this subject, one interesting possibility may be referred to. The High Court can only grant a certificate when the decision appealed from involves a question of the limits *inter se* of constitutional powers. It is possible that, on an application for a certificate, the High Court may refuse the certificate on the ground that the question at issue is not of the specified kind, and that the proper course is to apply to the Privy Council for special leave. If the appellant then applies to the Privy Council, it is possible that the Privy Council may differ from the High Court, and hold that the question *is* a question of the limits *inter se* of constitutional powers, and that without a certificate from the High Court there can be no appeal. In such a case, though the Privy Council could not set aside the discretionary order of the High Court, the High Court would clearly for the future be bound, as a matter of judicial propriety, to follow the interpretation put upon the section by the Privy Council.

Without Further Leave.—When a certificate has been obtained under this section in respect of a particular "question," an appeal lies to the Privy Council "on the question" without further leave. But if the appellant desires to appeal, not only on the one question, but also on some other question which does not come within the scope of this section, it would seem that he would have to obtain special leave from the Privy Council for such further appeal.

§ 316. "Shall not impair any Right which the Queen may be pleased to Exercise, by virtue of Her Royal Prerogative."

The prerogative cannot be affected without express words, so that even if this declaration had been omitted, it would in effect have been read into the section. It was, however, thought advisable to prevent any possibility of it being contended that the words "final and conclusive" in sec. 73 meant conclusive as against the Queen's right to grant special leave of appeal.

For the nature and extent of the prerogative right, apart from the limitations of this section, see notes, § 310, *supra*. In addition to the specific limitation of the prerogative in the first paragraph, there is a potential limitation in the last words of the section.

Appeals from State Courts to Privy Council.—This Constitution, whilst giving an alternative right of appeal to the High Court, does not interfere with the existing right of appeal direct from the State Courts to the Privy Council (see Notes, § 299, *supra*); and therefore there is still an appeal as of right in those cases which come within the terms of the Orders in Council in force in the respective States. This section makes it clear that there is also an appeal "as of grace" by special leave in every case.

It may be taken for granted, however, that appeals as of grace from the State Courts direct to the Privy Council will not be encouraged, and that special leave for such appeals will rarely be granted—at least in cases in which an appeal lies to the High Court. An Australian Court of Appeal having been established, the Privy Council will assuredly be reluctant to grant special leave to appeal from a State Court until the remedies available in Australia have been exhausted. There seem to be very few cases, since the establishment of the Supreme Court of Canada in 1875, in which special leave to

appeal from a provincial Court has been either given or refused. (Theberge *v.* Laudry, 2 App. Ca. 102 ; Cushing *v.* Dupuy, 5 App. Ca. 409 ; Carter *v.* Molson, 8 App. Ca. 530 ; Allan *v.* Pratt, 13 App. Ca. 780. See Att.-Gen. of Quebec *v.* Murray, cited Wheeler, Confed. Law of Canada, p. 482. See also remarks by Mr. Symon, Conv. Deb., Melb., p. 2455.) These observations, of course, only apply to cases where special leave to appeal to the Privy Council is needed. The appeal as of right from a State Court to the Privy Council is, as already shown, not interfered with by this Constitution.

Where a decision of the Supreme Court of a State is appealable either to the High Court or to the Privy Council, the choice of tribunal lies with the appellant. It is conceivable that one party to a suit might appeal to the High Court, and another to the Privy Council ; but this inconvenience can be remedied by regulation. Even in the absence of regulation, the High Court would presumably have a discretionary power to stay proceedings pending the decision of the Privy Council. In New South Wales, since the Equity Act of 1880, and in Victoria under the Act 19 Vic. No. 13, there has existed a similar alternative right of appeal from the Supreme Court in its Equitable Jurisdiction either to the Full Court or direct to the Privy Council. (See Notes, § 299, *supra.*)

§ 317. "Special Leave of Appeal from the High Court to Her Majesty in Council."

"When a party desires to appeal, but cannot do so as of right, he presents a petition to the Queen in Council for leave to appeal, which ought to disclose in the fullest and frankest manner the circumstances under which the leave is sought, and to contain a statement of the proceedings sufficiently full and precise to enable the Committee to form an opinion : the petition is referred to the Privy Council, who advise the Crown as to the propriety of granting or withholding permission." (Macpherson, P.C. Appeals, p. 22 ; Lyall *v.* Jardine, 7 Moo. P.C. N.S. 116 ; L.R. 3 P.C. 318.)

From the Supreme Courts of the States there is (in cases within the Orders in Council) an appeal as of right ; but from the High Court there is no appeal whatever except by special leave of the Queen in Council, or by a certificate of the High Court under this section. The prerogative right of the Queen in Council to grant special leave is preserved, subject to the limitations in this section. (See Notes, *supra*, § 310 ; *infra*, § 318.)

The leading principles according to which leave will be granted or refused have already been indicated. (Notes, § 310, *supra.*)

§ 318. "The Parliament may make Laws Limiting the Matters in which such Leave may be Asked."

It would seem that apart from this provision, the Federal Parliament, notwithstanding the assent of the Crown, would have been unable to impose any further limitation on the Prerogative ; and there is some doubt whether colonial Legislatures generally have such power. In Cushing *v.* Dupuy, 5 App. Ca. 409, the question of the power of a colonial Legislature to affect prerogative rights was raised, but not decided. In the report of Cuvillier *v.* Aylwin, in Stuart's R., p. 527, there is a note of Brougham's opinion :—"I am clearly of opinion that no such limitation is valid to bar an appeal to the King in Council. I should greatly doubt if any colonial Act, *though allowed* by the Crown, if unconfirmed by Act of Parliament (*i.e.*, of the Imperial Parliament) has power to take from the subject this right. But a colonial Act never allowed, can clearly have no effect." The Canadian Parliament, however, passed in 1888 an Act (51 Vic. c. 43) providing that "notwithstanding any royal prerogative" no appeal should lie to the Privy Council in criminal cases. Exception was taken to this by the Imperial authorities, and though it was not disallowed, it seems to be of doubtful

validity. (See Bourinot, Fed. Gov. in Can. p. 68 n. ; Wheeler, Confed. Law of Can. p. 34.)

When the Commonwealth Bill was before the Imperial Parliament, the Delegates, in their first memorandum (see p. 231, *supra*) contended that the Legislatures of the Australian colonies already had power to limit the prerogative right of granting leave of appeal.

"The concluding sentence of the clause, it is conceived, confers on the Commonwealth a right to do that which each State at present has power to do, subject to reservation of the Bill as affecting the prerogative, in accordance with the ordinary vice-regal instructions. See Instructions to Australian Governors, dated July, 1892, Clause viii., paragraph 7, under which the Governor is to reserve for the signification of the royal pleasure 'any Bill of an extraordinary nature and importance, whereby our Prerogative, or the rights and property of our subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies may be prejudiced.' The framers of the Instructions clearly appear to have considered that the colonies had full rights of legislation in such matters as sec. 7, just quoted, sets forth, subject only to reservation for the royal pleasure ; and then only when previous instructions upon the particular Bill had not been obtained through one of the principal Secretaries of State, or when the Bill did not contain a clause suspending its operation until the signification of the royal pleasure. The last sentence of the clause, therefore, seems merely to confer on the Federation that legislative power which has long been possessed by each of the constituent States." (Memo. of Delegates, House of Com. Paper, May, 1900, p. 16.)

The Imperial Government at first objected to this power, but they ultimately acquiesced in the contention of the Delegates. In moving the second reading of the Bill Mr. Chamberlain said :—

"The delegates pointed out to us that this right is inherent in the powers of every Parliament in Australia. The Parliament of every single State in Australia has, in its general powers to make laws for the peace, order, and good government of the country, the power, if it pleases, to make laws limiting the right of appeal, and that power is subject to the right of Her Majesty to disallow or to have reserved any Bill dealing with the subject. The delegates contended that as their Constitution specifically refers to the subjects which alone can be treated by the Federal Parliament, it was necessary specifically to mention this subject, or else the Federal Parliament would have less power than the Parliaments of the constituent States. The reasonableness of that we fully acknowledged, but we felt that if we specifically gave this power by the Constitution we might be assumed to be giving away the right of reservation with regard to this subject. It appears to us to be quite possible that hereafter we might be accused of breach of faith if, when the Federal Parliament had legislated, we had reserved a Bill under the powers given to us in another section of the Constitution." (*Hans.*, 21 May, 1900, vol. 83, pp. 762-3.)

This provision expressly confers on the Federal Parliament a power in the widest terms to "limit the matters in which such leave may be asked," and thus, it may be argued, practically to abolish altogether the appeal from the High Court to the Privy Council.

It is to be noted, however, that the power of Parliament to limit the prerogative right only applies to "such leave"—*i.e.*, special leave of appeal *from the High Court.* The right of appeal from the Courts of the States to the Privy Council—whether as a matter of right or by special leave—cannot be interfered with by the Federal Parliament.

The essence of this provision was contained in an amendment added at Mr. Symon's instance to the words saving the prerogative. Mr. Symon's words were :—"Provided that the right saved is that of granting special leave of appeal, and shall continue only until Parliament otherwise provides." (Conv. Deb., Melb., p. 2325; Historical Note, *supra.*) In this form it would have given the Federal Parliament an absolute and direct power over the prerogative right to grant leave of appeal. At the final stage the Drafting Committee altered the provision to the form in which it now stands, and a short debate took place on the effect of the words. (Conv. Deb., Melb., pp. 2453-6.) Mr. Glynn suggested that the clause gave the Parliament power to "abolish appeals" from the High Court to the Privy Council. Mr. Barton explained that the provision gave effect, in a more polite form, to the decision of the Convention. "We cannot give

the Parliament direct power to interfere with the prerogative—at least we do not think it would be right to do so—but we give the Parliament a power to limit the matters in which a subject may petition for leave of appeal. In that respect we carry out Mr. Symon's amendment. The right to grant special leave to appeal is only to continue until Parliament otherwise provides." The debate then proceeded as follows:—

MR. SYMON: "The clause as it stands will probably give effect to what has been the intention of the Drafting Committee throughout. I would suggest, however, to Mr. Barton that he should insert some words in clause 74 after the word 'matters.' If I may say so, I think this is a more dexterous, and, to use an expression which we have already heard, more mannerly way of putting the power of the Federal Parliament into the clause than before. I would suggest that after the word 'matters' the following words be inserted: 'If any,' so as to make it clear that the amendment I moved gives this power to the Commonwealth Parliament if they choose to exercise it. They might so limit it as to limit it away altogether. A reader of the clause, who has interest in seeing that the Federal Parliament has this power, might not so readily understand it as it is."

MR. BARTON: "The hon. member means that if Parliament goes on limiting such matters until the end, and there is only one left, it might leave out that one."

MR. SYMON: "I do not say that a lawyer would say that."

MR. BARTON: "I think that would only occur to a lawyer. I think that there is a reasonable construction which a court will have to put upon these words, and that there will be no difficulty."

MR. KINGSTON: "This will have to be considered by lawyers."

MR. BARTON: "Of course. I have no doubt as to the construction."

It appears therefore that the original decision of the Convention was to empower the Parliament to abolish the prerogative right of granting leave to appeal; that this was afterwards passed in "a more mannerly way" by empowering the Parliament, not to forbid the Queen to grant leave, but to limit the matters in which a subject might ask leave; that Mr. Symon wished to make it read "matters, if any"—to make it clear to the lay mind that the power extended to limiting it away altogether; but that Mr. Barton thought there was no doubt about the construction.

The power to "limit the matters" is indeed given in the widest terms; but at the same time the power given is a power to limit, and not to abolish. To limit means "to apply a limit to, or set a limit for; to terminate, circumscribe, or restrict, by a limit or limits." (Webster's Internat. Dict.) A limit necessarily implies a content—an area within the limit. It is conceived that a law of the Federal Parliament, purporting to abolish the right of asking for leave in all matters whatever, would be outside the scope of the Constitution. On the other hand, the power to "limit the matters" in which leave might be asked could undoubtedly, if Parliament thought fit, be exercised to such an extent as to leave very little for the prerogative right to operate upon.

The power to "limit matters" may be compared with the power to "prescribe exemptions" in sec. 73 (see Notes, § 310, *supra*). They both enable a right of appeal to be cut down; but they deal with the subject from opposite standpoints. The power to prescribe exceptions contemplates the definition of the *excluded* area; whilst the power to limit the matters in which leave may be asked seems rather to contemplate the definition of the *included* or circumscribed area.

§ 319. "Shall be Reserved . . for Her Majesty's Pleasure."

By section 58, any proposed law passed by the Houses of the Federal Parliament *may* be reserved by the Governor-General for the Queen's assent. By this section, any proposed law limiting the matters in which special leave to appeal may be asked *must* be so reserved. Even without this express provision, the Governor-General could have safeguarded Imperial interests in this respect by reserving such proposed laws, in the exercise of his discretion, for the signification of Her Majesty's pleasure (see Note,

§ 267 *supra*). Even should that safeguard prove insufficient, and the Bill be assented to by the Governor-General, the Queen could always, within one year, exercise her power of disallowance—the supreme check on the enactment of laws invading the prerogative or affecting Imperial interests (sec. 59). The object of embodying this direction in the Constitution itself was to secure a constitutional recognition of the fact that laws of this kind were matters of special Imperial concern ; so that, even if the right of withholding the royal assent, in matters of ordinary federal legislation, should fall into comparative disuse, these particular laws should stand upon a different footing.

Original jurisdiction of High Court.

75. In all matters[320]—

(i.) Arising under any treaty[321] :

(ii.) Affecting consuls or other representatives of other countries[322] :

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party[323] :

(iv.) Between States, or between residents of different States, or between a State and a resident of another State[324] :

(v.) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth[325] :

the High Court shall have original jurisdiction[326].

United States.—The judicial power shall extend to all cases, in law and equity, arising under [this Constitution, the laws of the United States, and] treaties made, or which shall be made, under this authority ; to all cases affecting ambassadors, other public ministers, and consuls ; [to all cases of admiralty and maritime jurisdiction] ; to controversies to which the United States shall be a party ; to controversies between two or more States ; between a State and citizens of another State ; between citizens of different States ; between citizens of the same State claiming lands under grants of different States ; and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. (Const. Art. iii. sec. 2.)

Historical Note.—The corresponding provision framed and adopted without debate by the 1891 Convention was as follows : –

"In all cases affecting public ministers, consuls, or other representatives of other countries, and in all cases in which the Commonwealth, or any person suing or being sued on behalf of the Commonwealth, or is a party, or in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth, and in all cases of controversies between States, the Supreme Court of Australia shall have original as well as appellate jurisdiction." (These cases, with others, were also recapitulated in a clause defining the jurisdiction which might be given to other federal courts. See Historical Note, sec. 77.)

As framed in the Adelaide session, the clause was divided into sub-clauses ; the word "matters" was used to cover all the sub-clauses, in place of "cases" and

"controversies;" and the sub-clause "arising under any treaty" was added—or rather, transferred from the subjects as to which Parliament had power to give jurisdiction. There was no debate.

At the Melbourne session, part of the debate on the words of this clause occurred on the consideration of a clause defining the "judicial power," in which these sub-sections were repeated. Some debate was raised on the word "matters." Mr. Glynn moved the omission of the sub-clause "arising under any treaty," on the ground that it was outside the proper scope of the judicial power. Mr. Symon explained that the power might be needed, and the sub-clause was agreed to. The sub-clause dealing with "mandamus and prohibition" was struck out, on the ground that it might possibly operate as a limitation, and exclude by implication some other kinds of procedure. (Conv. Deb., Melb., pp. 319-21, 349.) Subsequently, on recommittal after the first report, the matter was re-considered (pp. 1875-85), and Mr. Barton moved the re-insertion of the sub-clause, with the addition of the words "or an injunction." Mr. Glynn and Mr. Kingston feared that this might allow the judiciary to interfere in matters of politics; but Mr. Symon pointed out that the clause only conferred a jurisdiction, not a right. Dr. Quick and Mr. Isaacs, on the other hand, feared that the enumeration of certain writs might be construed to operate as a limitation. The sub-clause was agreed to. The words "or between residents of different States, or between a State and a resident of another State" were also added at this stage. (Conv. Deb., Melb., pp 1875-85.) After the fourth report the section was verbally amended by the Drafting Committee. (Conv. Deb., Melb., p. 2456.)

§ 320. "In all Matters."

All.—One important difference between this section and the corresponding section of the United States Constitution is that the word "all" applies to every sub-section; whereas in the United States Constitution part of the section extends "to all cases" and part "to controversies"—not *all* controversies. Interpretation in the United States has turned on this distinction (see Martin *v.* Hunter's Lessee, 1 Wheat. 304; Story, Comm., § 1748; Kent, Comm., i. 318.)

Matters.—The word "matters" was chosen by the Judiciary Committee at Adelaide as the widest word to embrace every possible kind of judicial procedure that could arise within the ambit of the section. (See Conv. Deb., Melb., pp. 319-20.) The United States Constitution uses two expressions—"cases in law and equity," and "controversies."

"The Supreme Court has defined the phrase, 'case in law or equity,' to mean the submission of a subject to the judicial department by a party who asserts his rights in the form prescribed by law, *i.e.*, 'a suit instituted according to the regular course of judicial proceedings,' and has distinguished cases from controversies by the limitation of the latter term to civil suits. According to this distinction, the Constitution has conferred no criminal jurisdiction upon the United States Courts wherever it denominates the suit a controversy." (Burgess, Pol. Sci., ii. 325.)

The word "matters" is used in the Privy Council Act, 3 and 4 Will. IV. c. 41, which empowers the Judicial Committee (in addition to its functions as a court of appeal from inferior courts of law) to hear or consider "any such other *matters* whatsoever" as the Crown thinks fit to refer to it. "It has, however, been decided that this clause will not justify a reference to the Judicial Committee of anything whatever that could not be properly entertained by, or come before, the Crown in Council. For example, this Committee could not advise upon questions of general or political policy, for that is the especial province of the Cabinet council; neither could it advise in criminal matters, in which, except in certain colonial cases, no appeal to the Privy Council is allowed by law." (Todd, Parl. Gov. in Colonies, pp. 305-6. See Hans. Deb. vol. 209, pp. 977, 984.)

Extra-judicial Opinions.—The important question arises whether any power exists or can exist under the Constitution for the Parliament or the Executive to refer to the

Court, for its opinion, questions not actually arising in the course of any judicial proceeding. The subject of extra-judicial opinions is one of considerable constitutional importance, and reference may be made to English, American, and Canadian constitutional practice.

In England, till the end of the 17th century, it was not uncommon for the King to ascertain the opinions of his Judges on a question before it came judicially before him. (See Broom, Const. Law, pp. 143-6.) This objectionable practice of extra-judicially anticipating judicial decisions in cases pending in the courts was generally condemned by jurists as tending to sap the independence and impartiality of the Bench, and has fallen completely into disuse. The House of Lords, however, when sitting in its judicial capacity, may still submit to the Judges questions bearing on any case *sub judice*; and even when sitting in its legislative capacity, it may constitutionally propound to the Judges abstract questions of law. (Broom, Const. Law, p. 147.) Thus before the passing of Fox's Libel Act, in 1792, a series of questions relating to the existing law of libel were submitted to and answered by the Judges. The Judges will, however, decline to answer a question put by the House of Lords, unless it is confined to the strict legal construction of existing laws. *Re* Westminster Bank, 2 Cl. and F. 191, where the Judges declined to answer a question whether the provisions of a certain Bill then before the House were consistent with the statutory rights of the Bank of England.

In the United States, the strict separation of the judicial from the other departments makes it unconstitutional for the Courts to perform extra-judicial duties.

"By law the President possesses the right to require the written advice and opinions of his cabinet ministers upon all questions connected with their respective departments. But he does not possess a like authority in regard to the judicial department. That branch of the Government can be called upon only to decide controversies brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive." (Story, Comm. § 1571; and see Bryce, Amer. Comm., i. 257.)

"The functions of the Judges of the Courts of the United States are strictly and exclusively judicial. They cannot therefore be called upon to advise the President in any executive measures, or to give extra-judicial interpretations of law, or to act as Commissioners in cases of pensions or other like proceedings." (*Id.* § 1777.)

Thus in Hayburn's Case, 2 Dall. 409 (and see *ibid.* 410-412) an Act assigning ministerial duties to the Circuit Courts was held to be unconstitutional, and it was laid down that Congress cannot constitutionally assign to the judicial power any duties which are not strictly judicial. In Dewhurst *v.* Coulthard, 3 Dall. 409, while an action was pending in a circuit court, the opinion of the Supreme Court was prayed on an agreed statement of facts; but the Court declared that it could not take cognizance of any suit or controversy not brought before it by regular process of law.

The Constitutions of some of the American States expressly provide for extra-judicial opinions on the validity of proposed laws; but in the absence of such provision the State Courts have held that the separation of powers implicitly prohibits advisory opinions. (Amer. and Eng. Encyc. of Law, 2nd Ed., vi. 1067.)

"In a few of the States, indeed, the legislative department has been empowered by the Constitution (*i.e.*, of the State) to call upon the courts for their opinion upon the constitutional validity of a proposed law, in order that, if it be adjudged without warrant, the legislature may abstain from enacting it. But those provisions are not often to be met with, and judicial decisions, especially upon delicate and difficult questions of constitutional law, can seldom be entirely satisfactory when made, as they commonly will be under such calls, without the benefit of argument at the bar, and of that light upon the questions involved which might be afforded by counsel learned in the law, and interested in giving them a thorough investigation." (Cooley, Const. Lim. 40.)

In Canada it is provided by a Dominion statute (54 and 55 Vic. c. 25, s. 4) that "important questions of law or fact touching provincial legislation . . . or touching the constitutionality of any legislation of the Parliament of Canada, or touching any

other matter with reference to which he sees fit to exercise this power," may be referred by the Governor in Council to the Supreme Court for hearing. Persons interested are entitled to be notified and to be heard by counsel, and the Judges must give their reasons; but the opinions of the court are advisory only, although they are appealable to the Privy Council. Ontario has a similar enactment. (See Wheeler, Confed. Law in Canada, pp. 394-5, 401-2, 405-6.)

Under this Constitution it is clear that, as in the United States, the functions of the federal Justices are "strictly and exclusively judicial," and that no duties can be cast upon them of an essentially extra-judicial kind. (See Notes to sec. 81.) They cannot be called upon to advise on questions of a political nature, or as to the constitutionality of proposed legislation. But whether they could be called upon by the Parliament—or by the Executive acting under a law of the Parliament—to deliver opinions on the "strict legal construction of existing laws," is a more difficult question. The answer seems to depend on the scope and meaning of the word "judicial." Would such opinions be judicial, or extra-judicial? The true answer would seem to be that the function of advising on a matter of law, where there is no regular judicial proceeding before the Court to declare the rights of parties, or to enforce remedies, is no part of the duty of a Judge, and is not contemplated in the gift of the judicial power. In England, the advisory duties of the Judges were very exceptional, and only exercised, by virtue of ancient custom, at the request of the House of Lords—itself a judicial as well as a legislative body. In the Australian colonies no such practice is known; whilst the advisory duties which are cast upon the Canadian judges by statute are clearly extra-judicial. The giving of advisory opinions "is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." (Prof. J. B. Thayer, article on the Origin and Scope of the American Doctrine of Constitutional Law, 7 Harvard L. Rev. 129, 153; cited Kent, Comm. I. 296.)

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity for the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." (Per Brewer, J., Chicago and Grand Trunk R. Co. *v.* Wellman, 143 U.S. at p. 345.)

The argument from policy is very strong in support of this view. *Ex parte* interpretations of the law, without the thorough examination of interested parties and their counsel, are apt to be unsatisfactory and unauthoritative. It might indeed happen that the persons interested might be represented and heard upon a reference; but the practice would be, at least, open to serious abuse. The one advantage it would have—that of obtaining a prompt decision upon questions which are in doubt, but which no one is ready to litigate—is more than balanced by other considerations. The Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in a manner, as the law advisers of the Crown—a position which might lead to the undesirable entanglement of the Bench in political matters. Seeing that the Supreme Court is not solely the servant of the Federal Government, but is also the final arbiter between the Commonwealth and the States, it is of the highest constitutional importance that it should interpret the scope of its judicial duties in the strictest possible way.

Nor do the debates of the Convention justify the supposition that it was intended to permit such a practice. In the Bill of 1891 the jurisdiction of the Federal Courts was confined to "cases" and "controversies," as in the United States. The Judiciary Committee at Adelaide substituted the word "matters," with a view, not of extending the scope of the clause to extra-judicial opinions, but of including every kind of judicial

process, whether civil or criminal, and whether there were opposing parties or not. At Melbourne (Debates, 319-20) Mr. Isaacs and Dr. Quick raised this very question. Mr. Symon (Chairman of the Judiciary Committee) replied :—

"We want the very widest word we can procure in order to embrace everything that can possibly arise within the ambit of what are comprised under the sub-section. . . . I think we are using the best word here. The word 'matters' merely indicates the scope within which the judicial power is to be exercised, but no matter can be dealt with until it comes before the authorities in the form of a case or some judicial process which will be regulated by the Judiciary Acts. It does not strike me that the word is too wide."

Mr. Barton added :—"I think the word 'matters' means such matters as can arise for judicial determination." (See also Conv. Deb., Melb., p. 1680.)

§ 321. "Arising Under any Treaty."

Treaty.—A treaty is a compact between two or more independent and sovereign States. The power of making treaties is by English law vested in the Crown as a part of the prerogative. (Stephen's Comm. ii. 491.)

"It is a rule of international law, that none but Supreme and independent sovereign powers are competent to contract treaties with foreign nations. The only exception to this rule is where the right to conclude treaties in its own behalf, with other States or foreign powers, has been expressly delegated to a subordinate government by the Crown and Parliament of the mother country. But responsibility for the exercise of such delegated power continues to rest upon the Imperial authority, to the same extent as for any acts of any other accredited public agents of the Crown." (Todd, Parl. Gov. in Col. p. 247.)

Accordingly, though treaties with foreign powers are uniformly recognized as matters of Imperial concern, concessions have been made to the Dominion of Canada as regards the negotiation of treaties between Her Majesty and the United States on matters specially concerning Canadian interests. (Todd, Parl. Gov. in Col. pp. 268-275.) From 1871-3 claims were put forward by some of the Australian colonies to enter into independent reciprocal treaties with foreign States; but the Imperial Government refused to part with the control of the foreign relations. (See pp. 106-7, 634, *supra*; and Todd, Parl. Gov. in Col. p. 257.)

Similarly the Commonwealth, being a dependent part of the Empire, has no power to make treaties except so far as such power may be expressly delegated to it by the Imperial Government. This Constitution does not itself contain any such delegation of a treaty-making power. The Bill of 1891 contained a power to legislate as to "external affairs *and treaties*," and in the covering clauses it was provided that "all treaties made by the Commonwealth" should be binding. These provisions were repeated in the Adelaide draft of 1897; but afterwards, at Sydney and Melbourne respectively, references to treaties were struck out. (Conv. Deb., Syd., pp. 239-40; Melb., p. 30.) But though no power to make treaties is expressly conferred, there is nothing to prevent the Crown from delegating to the Commonwealth the power of negotiating treaties, on behalf of the Empire, to any extent which may be deemed advisable. (See Note, § 214, p. 634, *supra*.)

The corresponding clause in the Bill of 1891 was limited to treaties "made by the Commonwealth with another country;" but in 1897 these limiting words were not introduced, and the clause therefore applies to all treaties of which Australian courts can take judicial cognizance. The constitutional right of the Crown to make treaties includes the right to make them binding on all parts of the Empire; and although it is a recognized principle that participation in the benefits of a treaty entered into with any nation does not extend to the colonial possessions of such nation when they are not expressly named, yet as a matter of fact the commercial treaties now in force between Great Britain and other countries are in most instances expressly made applicable to the colonies. (Todd, Parl. Gov. in Col. pp. 265-6.)

Municipal Rights Under Treaties.—Treaties themselves are matters of international law, and the primary rights and obligations which arise under them, between the high contracting parties, are matters with which courts of law have nothing to do. As a rule, a treaty does not of itself create legal relations between individuals; and the municipal courts can neither enforce its observance, nor decide whether it has been violated. (Elphinstone *v.* Bedreechund, 1 Knapp, 340.)

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honour of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." (Per Miller, J., Head Money Cases, 112 U.S. at p. 598.)

As the words "arising under any treaty" are adopted from the United States Constitution, and as light is thrown upon their scope by American cases, it is necessary to point to the fundamental distinction between the nature of a treaty under American and English law. The United States Constitution expressly declares that treaties, as well as the Constitution and laws of the union, are the supreme law of the land; and therefore treaties, when they are self-executing, are on a level with federal statutes, and may become the subject of judicial cognizance without direct legislative sanction from Congress. They in fact derive their legislative validity from the Constitution itself.

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is *infra*-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either party engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court." (Per Marshall, C.J., Foster *v.* Neilson, 2 Pet. 314.)

"A treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement." (United States *v.* Rauscher, 119 U.S. 407.)

"A treaty is primarily a contract between two or more independent nations . . . For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment." (Whitney *v.* Robertson, 124 U.S., at p. 194. See also United States *v.* Forty-three gallons of Whiskey, 93 U.S. 188; Chinese Exclusion Case, 130 U.S. 581, 600; Horner *v.* United States, 143 U.S. 570; Fong Yue Ting *v.* United States, 149 U.S. 698.)

In England, on the other hand, a treaty does not of itself have legislative effect, and cannot, it seems, be a subject of judicial cognizance until it has been carried into effect either by the Parliament or—where the Crown either by statute or prerogative has the requisite authority—by the Crown. Thus a treaty of cession does not operate to change the national character of a place until some act of possession has been performed by the Crown. (The *Fama*, 5 Rob. Adm. 106.) Commercial treaties are frequently executed by Act of Parliament which gives them legislative effect; see for instance the Imperial Act 37 Geo. III. c. 97, carrying into effect a treaty between Great Britain and the

United States. Extradition treaties are carried into effect by Orders in Council under the Imperial Extradition Acts, 1870 and 1873; international arrangements as to Copyright by Orders in Council under the International Copyright Acts. (See Note, § 214, *supra.*)

"The responsibility of determining what is the true construction of a treaty, made by Her Majesty with any foreign power, must remain with the Imperial Government, who can alone decide how far Great Britain should insist upon the strict enforcement of treaty rights, whatever opinions may be entertained upon the subject in any colony especially concerned therein." (Todd, Parl. Gov. in Colonies, p. 272.)

"On the other hand, the legislature in any colony is free to determine whether or not to pass laws necessary to give effect to a treaty entered into between the Imperial Government and any foreign power, but in which such colony has a direct interest." (*Ib.* p. 275.)

The power of making laws to give effect to treaties, so far as they concern the Commonwealth, must be deemed to be included in sec. 51—xxix.—"External affairs." The sub-section as originally framed was "External affairs *and treaties*," but at the Melbourne Convention (Debates, p. 30) the last words were struck out—apparently lest they should be construed as involving a claim of power to make treaties. The words "external affairs" are, however, wide enough to confer on the Federal Parliament the legislative power proper to a colonial legislature in respect of treaties. Compare sec. 132 of the B.N.A. Act, which gives the Parliament and Government of Canada "all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire, towards foreign countries, *arising under treaties* between the Empire and such foreign countries." Under that section it was held that the (Imperial) Extradition Act, 1870, applied to Canada, and was not inconsistent with the section; and that the (Canadian) Extradition Act, 1869, must be read with it. (*Exp.* Charles Worms, 22 Lower Can. Jur. 109.)

Cases Arising under Treaties.—When a treaty has been duly carried into effect by legislative or executive authority, legal rights and liabilities may arise under it which may be the subject of judicial cognizance, and the treaty itself may become the subject of judicial interpretation. For instances in which treaties have thus been interpreted by the courts, see cases cited in Phillimore Intern. Law, ii. 125 (2nd Ed.). Also *Exp.* Marks, 15 N.S.W. L.R. 159; 10 W.N. 224; *Exp.* Rouanet, 15 N.S.W. L.R. 269; 11 W.N. 55; National Starch Manuf. Co. *v.* Munn's Patent Maizena Co, 13 N.S.W. L.R. Eq at p. 116.

To give jurisdiction under this section it is not necessary that rights should be *created* by the treaty; it is enough if they are *protected* by the treaty, from whatever course they may spring. (New Orleans *v.* De Armas, 9 Pet. 224.) The fact that the matter in controversy in a suit is a sum received as an award, under the treaty providing for the submission of claims to arbitration, does not "draw in question the validity of the construction of a treaty." (Borgmeyer *v.* Idler, 159 U.S. 408. See Note, § 329 *infra*, "Arising under this Constitution.")

"It has been made a question as to what was *a case* arising under a treaty. In Owings *v.* Norwood's Lessee (5 Cranch. 344) there was an ejectment between two citizens of Maryland, for lands in that State; and the defendant set up an outstanding title in a British subject, which he contended was protected by the British treaty of 1794. . . . The Supreme Court of the United States held that not to be a case within the appellate jurisdiction of the Court, because it was not a case arising under the treaty. The treaty itself was not drawn in question, either directly or incidentally. The title in question did not grow out of the treaty, and as the claim was not under the treaty, the title was not protected by it; and whether the treaty was an obstacle to the recovery, was then a question exclusively for the State Court." (Kent, Comm. i. 325-6.)

§ 322. "Affecting Consuls, or Other Representatives of Other Countries."

Consuls.—The officers mentioned in the corresponding provision of the United States Constitution are "ambassadors, other public ministers, and consuls." The relations of the Commonwealth with foreign powers being not diplomatic, but almost wholly commercial, the words "ambassadors" and "public ministers" were inapplicable. Thus "consuls," who in the American provision are mentioned last in order, are the main subject of this sub-section.

Consuls, unlike ambassadors and other public ministers, are not protected by the law of nations, but are subject, both in civil and criminal cases, to the laws of the country in which they reside. (Kent, Comm. i. 44.)

"Consuls, indeed, have not in strictness a diplomatic character. They are deemed as mere commercial agents, and therefore partake of the ordinary character of such agents, and are subject to the municipal laws of the countries where they reside. Yet, as they are the public agents of the nation to which they belong, and are often entrusted with the performance of very delicate functions of State, and as they might be greatly embarrassed by being subject to the ordinary jurisdiction of inferior tribunals, State and national, it was thought highly expedient to extend the original jurisdiction of the Supreme Court to them also. The propriety of vesting jurisdiction in such cases in some of the national courts seems hardly to have been questioned by the most zealous opponents of the Constitution." (Story, Comm. § 1660.)

The words of the Constitution, coupling consuls with "other representatives of other countries," seem to contemplate that jurisdiction shall only be conferred under this sub-section when the consul or other representative is affected in his official or representative capacity. (See Conv. Deb., Melb., p. 2456.) This construction is in harmony with the position of a consul as a public agent of the country which he represents. So far as his public position is concerned, the special protection of the federal jurisdiction is thrown over him; but where his public position is not affected there is no need to differentiate him from any ordinary citizen.

It would seem that the words of the United States Constitution—"affecting ambassadors, other public ministers, and consuls"—are interpreted differently as extending to the private as well as the public capacity of those dignitaries. Moreover the American Judiciary Acts make the jurisdiction exclusive of the State Courts, so that the dignitaries named can only be sued in the Courts of the Union. "This is not a mere personal privilege; it is a privilege of the foreign Sovereign, that his representative should be sued only in the Courts of the United States, with which Government alone he has relations; and it is not waived by an omission to plead it to the action." (Davis *v.* Packard, 7 Pet. 275. See also Kent, Comm. i. 45.)

"Affecting."—It has been held in the United States that an indictment for offering violence to the person of a public minister is not a case "affecting" the minister.

"It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States and the individual whom they seek to punish; but one in which the Minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it." (Per Washington, U.S. *v.* Ortega, 11 Wheat. at p. 469. See Story, Comm. § 1661; Kent, Comm. i. 39, 315.)

It seems, however, that the words of the Constitution are broad enough to cover cases where the consul or other representative is not a party, but may be affected in interest.

"If a suit be brought against a foreign minister, the Supreme Court [of the United States] alone has original jurisdiction; and this is shown on the record. But suppose a suit to be brought which affects the interests of a foreign minister, or by which the person of his servant, or of his secretary, is arrested. The minister does not, by the

mere arrest of his secretary or his servant, become a party to this suit; but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed; not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and therefore jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties." (Per Marshall, C.J., Osborn *v.* Bank of U.S., 9 Wheat. at p. 854. See Story, Comm. § 1662.)

"The Court has, I think, indicated that the phrase 'affecting ambassadors,' &c., includes all cases where the ambassador, &c., is either party to the suit or is directly affected and bound by the judgment." (Burgess, Pol. Sci. ii. 329.)

Other Representatives.—The phrase "other representatives of other countries" is somewhat vague, but would presumably include all persons officially accredited to the Commonwealth by foreign governments. The expression, "other countries" occurs again in sec. 51—i., where trade and commerce "with other countries" means trade or commerce with persons outside the limits of the Commonwealth; but a representative of a country can hardly mean anything else than an accredited representative of the government of the country. The parallel expression in sec. 51 leads to the inference that the expression "other countries," in this section as in that, includes all countries outside the Commonwealth, whether British or foreign.

Proof of Jurisdiction.—The mode in which the facts which give rise to jurisdiction are to be proved is a matter of procedure, to be regulated by the Parliament. (For U.S. cases, see *Re* Baiz, 135 U.S. 403: *Ex p.* Hitz, 111 U.S. 766; Kent, Comm. i. 39.)

§ 323. "In which the Commonwealth, or a Person Suing or being Sued on Behalf of the Commonwealth, is a Party."

In the United States, the provision that "the judicial power shall extend . . . to controversies in which the United States shall be a party" confers appellate jurisdiction only.

"It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals. And there would not only not be any compulsory power over these courts to perform such functions, but there would not be any means of producing uniformity in their decisions. A sovereign without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens, would be a most extraordinary anomaly. It would prostrate the Union at the feet of the States. It would compel the national government to become a supplicant for justice before the judicature of those who were by other parts of the Constitution placed in subordination to it." (Story, Comm. § 1674.)

This sub-section, like the others, confers a *jurisdiction* only, not a right of action. It does not enable actions to be brought by or against the Commonwealth, but only provides that, where any such action lies, the High Court shall be a competent court of original jurisdiction. (See Conv. Deb., Melb., p. 320; and Notes, § 338, *infra.*) The effect of it is that whenever the Commonwealth has a right to sue—no matter what the subject-matter or character of the suit—it can sue in the High Court; and wherever anybody has a right to sue the Commonwealth, he can sue in the High Court.

The Commonwealth, being a government, possesses corporate powers, and may sue in its corporate name, and may by its consent be sued. (See United States *v.* Maurice, 2 Brock. 109; Ableman *v.* Booth, 21 How. 506.) But the Commonwealth, being the Crown, cannot be sued except by its own consent. (See Kendall *v.* United States, 12 Pet. 524; Hill *v.* United States, 9 How. 386.) It has been held that the doctrine, that the United States cannot be sued unless provision has been made by Congress, is limited to suits against the United States directly and by name; and that this plea cannot be raised by officers or agents of the government when sued for property in their hands as such officers or agents. (United States *v.* Lee, 106 U.S. 196. See Baker, Annot. Const. p. 126.) In Great Britain, and also in the several colonies, the mode of enforcing claims against the Crown is regulated by Statutes. Thus in Great Britain, claims against the Crown in respect of property or contract may be made by petition of right, entitled in the appropriate Court. (Broom's Comm. p. 234.) In most of the Australian colonies, the procedure is by action against a nominal defendant sued on behalf of the Crown; and in some of the colonies the remedy extends to tort as well as contract. (See Notes, § 338, *infra.*)

The power of the Commonwealth to confer rights of suit against itself was the subject of some debate in the Convention, and is dealt with under sec. 78. The jurisdiction extends, not only to cases in which the Commonwealth is a party, but to cases in which "any person suing or being sued on behalf of the Commonwealth" is a party. This is in order to include cases in which the Commonwealth is the real plaintiff or defendant, but is represented in the suit by a nominal party—for instance, where an information is filed by the Attorney-General on behalf of the Crown, or where a nominal defendant is, in accordance with statutory provision, sued on behalf of the government. But jurisdiction is not given by this sub-section unless the Crown is really and directly the party seeking a remedy, or against whom a remedy is sought; it does not arise merely because the Commonwealth has an interest in the case, or because an officer of the Commonwealth, or a political corporation distinct from the general government of the Commonwealth, and not acting directly on its behalf, is a party. (See Story, Comm. § 1686; Osborn *v.* Bank of U.S., 9 Wheat. 855. See also remarks by Mr. Barton, Conv. Deb., Melb., p. 1884.)

Parties.—"It may be laid down, as a rule which admits of no exception, that in all cases under the Constitution of the United States where jurisdiction depends upon the party, it is the party named on the record." (Story, Comm. § 1688; Kent, Comm. i. 350; and see Notes, § 324, *infra.*) This principle seems equally applicable to this Constitution; from which it would seem that, in order that jurisdiction may be given under this sub-section, either the Commonwealth must be a party on the record, or it must appear from the record that one of the parties is suing or being sued "on behalf of the Commonwealth."

§ 324. "Between States, or between Residents of Different States, or between a State and a Resident of Another State."

The original jurisdiction of the High Court extends to "*all matters* between States," &c.—words which are wide enough to include controversies of all kinds between a State or a resident of a State on the one hand, and another State or a resident of another State on the other hand. In cases of this class "the jurisdiction depends entirely on the character of the parties. . . . If these be the parties, it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the courts of the union." (Per Marshall, C.J., Cohens *v.* Virginia, 6 Wheat. at p. 378.)

Comparison with United States.—The whole of this provision is adapted with important modifications from the Constitution of the United States; and for a proper

application of the American authorities it is necessary to examine the points of difference between the words of the two Constitutions.

The provision in the Constitution of the United States is a gift of "judicial power," and in 1793 it was held (Chisholm *v.* Georgia, 2 Dall. 419) that it enabled a State to be sued in *assumpsit* by a citizen of another State. This decision gave such intense dissatisfaction that the eleventh amendment was passed declaring that the judicial power should not be construed to extend to any suit brought against a State by citizens of another State, or by aliens. Notwithstanding this amendment, however, a State can still be sued by another State of the Union, though enjoying immunity from being sued by citizens of such other State. The result of this distinction was that attempts were made by States, whose citizens had claims against another State, to prosecute these claims on behalf of their citizens; but these attempts were defeated, it being held that a State could not in this way *create* a controversy with another State. (New Hampshire *v.* Louisiana, New York *v.* Louisiana, 108 U.S. 76) The provisions of this Constitution, however, make no distinction between a plaintiff State and a plaintiff resident of that State.

Again, though the Supreme Court of the United States has original jurisdiction in cases where a State is a party, it has only appellate jurisdiction in cases "between citizens of different States." Accordingly in an action of ejectment between citizens of different States in respect of land over which both States claimed jurisdiction, it was held that the Supreme Court had no *original* jurisdiction, inasmuch as a State was neither nominally nor substantially a party; and it was not sufficient that the State might be consequentially affected by having to compensate its grantee. (Fowler *v.* Lindsey, 3 Dall. 411; see Kent, Comm. i. 323.)

The judicial power of the United States extends to controversies "between a State, or the citizens thereof, and foreign States, citizens, or subjects." In this Constitution there is no such provision.

Suits against a State.—It is submitted that—notwithstanding Chisholm *v.* Georgia, cited above—this sub-section, like the rest of the section, only confers a jurisdiction, and not a right of action where no right of action existed before; that it does not extend the category of cases in which a State, or a resident of a State, may be sued, but merely enables certain suits, which might otherwise have been brought in some other court, to be brought in the High Court. (See remarks of Messrs. Barton, Symon, and Isaacs in connection with mandamus; Conv. Deb., Melb., pp. 1875-85.) Apart from express words in the Constitution, a State would not be suable without its own consent. This section does not appear to affect this immunity; but an important limitation has been put upon it by sec. 78, which provides that "in respect of matters within the limits of the judicial power" the Federal Parliament may make laws conferring rights to proceed against a State. The express provision that the Parliament may confer these rights seems to show that they are not conferred by the Constitution itself; and there is thus a guide to the intention of the framers which was absent in the Constitution of the United States. It seems, therefore, that no suit can be brought against a State, either by another State or by a resident of another State, except (1) by consent, expressed by legislation or otherwise, of the State sued, or (2) under a right given by the Federal Parliament under sec. 78.

It has been decided in the United States that a State may waive its immunity, and by appearing in a Federal court, in a suit in which it has an interest, does waive it. (Clark *v.* Barnard, 108 U.S. 436.) And a State may be sued with its own consent. (Hans *v.* Louisiana, 134 U.S. 1.) Such consent may be given on such terms and conditions as the State chooses to impose, and may be withdrawn. (*Re* Ayers, 123 U.S 505; Railroad Co. *v.* Tennessee, 101 U.S. 337; Beers *v.* Arkansas, 20 How. 527.)

"When a State submits itself, without reservation, to the jurisdiction of a Court in a particular case, the jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the

public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up their jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State." (Per Waite, C.J., Louisiana *v.* Jumel, 107 U.S. at p. 728.)

PARTIES.—Jurisdiction under this sub-section depends on the character of the parties; and where that is the case, it has been held in the United States that only the parties on the record must be looked to. (See Story, Comm. §§ 1685-8; Kent, Comm. i. 350; and Notes, § 323, *supra*.)

BETWEEN STATES.—It seems that this jurisdiction, except by consent of the defendant State, can only be exercised under the authority of federal legislation conferring the right to sue a State. (See Notes, *supra*; and § 338, *infra*.)

"The spectacle of a people submitting public controversies to the same mode of settlement as private law suits, and acquiescing in the decisions, has set an example which foreign nations are about to imitate, not only in internal discords, but in those which are international." (Foster, Const. of the U.S. i. 45.)

"This power seems to be essential to the preservation of the union," says Story, Comm. § 1679. After illustrating this from the experience of the Confederation, he proceeds:—

"Some tribunal exercising such authority is essential to prevent an appeal to the sword and a dissolution of the government. That it ought to be established under the national, rather than under the State government, or, to speak more properly, that it can be safely established under the former only, would seem to be a position self-evident, and requiring no reasoning to support it. It may justly be presumed that under the national government, in all controversies of this sort, the decision will be impartially made according to the principles of justice; and all the usual and most effectual precautions are taken to secure this impartiality, by confiding it to the highest judicial tribunal." (§ 1681.)

In the United States, this jurisdiction has been chiefly employed in cases of disputed boundaries. (See opinion of the Court in Wisconsin *v.* Pelican Insurance Co., 127 U.S. 265.) It has been decided that the Supreme Court of the United States has jurisdiction to determine questions of boundary between States, and that the jurisdiction is not defeated because of the fact that in deciding the question the court must examine and construe compacts between States, or because the jurisdiction affects the territorial limits of the political jurisdiction and sovereignty of the States. (Virginia *v.* West Virginia, 11 Wall. 39; Rhode I. *v.* Massachusetts, 12 Pet. 657; and see other cases cited by Baker, Annot. Const. p. 138.)

The Courts of the United States have declined, as between States, to compel the performance of obligations which, between independent nations, could not have been enforced judicially, but only through the political departments. (Kentucky *v.* Dennison 24 How. 66; New York *v.* Louisiana, 108 U.S. 76; and see Wisconsin *v.* Pelican Ins. Co., 127 U S. 265.)

In a recent case, it was held that the words "controversies between States" were intended to include something more than controversies over territory or jurisdiction; but that the jurisdiction was of so delicate and grave a character that its exercise was not contemplated save when the necessity was absolute and the matter itself properly justiciable. To maintain jurisdiction, the controversy must arise directly between the States, and must not be a controversy in the vindication of grievances between private individuals. A bill by the State of Louisiana against the State of Texas, complaining that Texas by unnecessary and unreasonable quarantine regulations was intentionally and absolutely interdicting inter-state commerce, was held to be bad, as its gravamen was not a special and peculiar injury such as would sustain an action by a private person, but Louisiana presented herself in the attitude of *parens patriæ*, trustee, guardian, or representative of her citizens. Nor could the bill be sustained as a controversy between a State and the citizens of another State. (Louisiana *v.* Texas [1899], 176 U.S. 1.)

Between Residents of Different States.—These words (and also those following —"between a State and a resident of another State") were only inserted at a late stage in the Convention. (See Conv. Deb., Melb., p. 1885.) They are taken from the United States Constitution, with the substitution of the word "residents" for "citizens." The reasons for the jurisdiction being given in the United States are explained by Story, Comm. §§ 1690-2, and are based on the advantage of giving the parties in such cases recourse to a national and impartial tribunal.

The word "resident" is undefined, and must be interpreted according to the scope and spirit of the Constitution. (See Notes, § 131, *supra*, and § 463, *infra*.) There are numerous English and colonial cases defining "residence" differently for the purpose of different enactments. Thus where residence is required for an electoral qualification, the guiding principle is that a voter should have some local interest. (Beal *v.* Ford, 3 C.P.D. at p. 78.) Where jurisdiction depends upon the residence of the defendant (as in County or District Court Acts) the principle is that of seeking out the defendant in his own jurisdiction—in the *forum rei*. Here the considerations are somewhat different from both; the principle is that of providing a *forum* which is neither solely the plaintiff's nor solely the defendant's, but belongs impartially to both. The object of the jurisdiction, in fact, is to avoid any suggestion of partiality which might arise if a litigant with a resident in another State had no option but to resort to the courts of that State. The jurisdiction is thus based on the existence of those local citizenships and local patriotisms which are characteristic of a Federation. Residence in a State, for the purposes of this section, should therefore be interpreted as involving a suggestion of State membership, and perhaps even of domicile.

An instructive parallel expression occurs in sec. 117, where "a subject of the Queen resident in any State" is protected from disabilities in other States. That clause as it stood in the Bill of 1891, and also in the Adelaide draft of 1897, referred to the privileges and immunities of "citizens" of the States (see Notes to sec. 117); but at the Melbourne Convention (Debates, pp. 664-691) difficulties were raised in connection with the meaning of the clause, and it was struck out—many members expressing the opinion that citizenship, both of the Commonwealth and of the States, should be defined in the Constitution. Afterwards (Debates, pp. 1750-68) Dr. Quick proposed to give the Federal Parliament power to make laws as to "Commonwealth citizenship." Some members thought this power unnecessary, whilst others still thought that the proper plan was to define citizenship. On Mr. Symon's motion to reinsert a provision for protecting the rights of citizens (Debates, pp. 1780-1802; and see Historical Note, sec. 117) Dr. Quick proposed a definition of Commonwealth citizenship; but this was struck out. Considerable objection being made to the use of the word "citizen," the phrase "subject of the Queen resident in any State" was substituted. It was after the adoption of that phrase that the words "between residents," &c. (adapted from the American "between citizens," etc.) were inserted.

It appears then that the residence in a State contemplated by the Constitution is such residence as, if combined with British nationality, would constitute citizenship of the State, in the general sense of the term. It is not meant by this that the residence should be such as is required by the laws of the particular State for the exercise of any political franchise, but merely that it should be of a character to identify the resident to some extent with the corporate entity of the State.

For the meaning of citizenship of a State in the United States, see Story, Comm. §§ 1693-5; Kent, Comm. i. 345. In its broad sense, the word "citizen" is synonymous with "subject" and "inhabitant," and is understood as conveying the idea of membership of a nation and nothing more. (Minor *v.* Happerset, 21 Wall. 162.)

The question arises whether, in order to give jurisdiction under this sub-section, it is necessary that all the plaintiffs should be residents in a different State or States from all the defendants. The American decisions turn not only on the words in the Constitution, "between citizens of different States," but also on the more precise words

of the Judiciary Act, which give the Circuit Courts jurisdiction "where the suit is between a citizen of the State where the suit is brought, and a citizen of another State." It has been held that those words mean that each distinct interest must be represented by persons all of whom are entitled to sue, or liable to be sued, in the Federal Courts. (Strawbridge *v.* Curtiss, 3 Cranch, 267; Coal Co. *v.* Blatchford, 11 Wall. 172.) Where jurisdiction depends on the parties, the parties to the record are meant, and not the parties in interest. (See Note, § 323, *supra.*) Trustees and executors are no exception; their residence, and not the residence of the beneficiaries whom they represent in the suit, is material. (Coal Co. *v.* Blatchford, 11 Wall. 172.) In the United States, an allegation that the plaintiffs "as such executors" were citizens of a State was held insufficient, inasmuch as citizenship was a personal, not an official quality. (Amory *v.* Amory, 95 U.S. 186.) Where, however, a party to the record is wholly formal, and has no interest in or control over the suit, but is a mere "conduit"—as where a sheriff's bond had to be sued out in the name of the Governor of the State—the residence of the party interested, and not of the formal party, is material. (McNutt *v.* Bland, 2 How. 9.) And jurisdiction cannot be ousted by the joinder of a mere nominal defendant, who has not the requisite character. (Carneal *v.* Banks, 10 Wheat. 181; Walden *v.* Skinner, 101 U.S. 577; Kent, Comm. i. 346.) Where jurisdiction depends on the residence of the parties, the jurisdiction must appear on the record. (Bingham *v.* Cabot, 3 Dall. 382; Abercrombie *v.* Dupuis, 1 Cranch 343; Kent, Comm. i. 344.)

The federal courts have no jurisdiction of a suit between a resident of a territory and a resident of a State; nor where a resident of the federal district is a party. (New Orleans *v.* Winter, 1 Wheat. 91; Barney *v.* Baltimore, 6 Wall. 280.)

Change of Residence.—If a resident of one State changes his domicile to another State, with a *bona fide* intention to reside there, even though his object was to avail himself of the federal jurisdiction, he may sue as a resident of the latter State. (Jones *v.* League, 18 How. 76; Kent, Comm. i. 345.) But a merely colourable conveyance will not give jurisdiction. (*Ib.*)

Residence of Corporation.—In the United States, it was held in some early cases that a corporation aggregate was not, in its corporate capacity, a citizen, and that its right to sue in the federal courts depended on the citizenship of its members, which must be averred on the record. (Hope Ins. Co. *v.* Boardman, 5 Cranch 57; Bank of U.S. *v.* Deveaux, 5 Cranch 61.) These decisions were reviewed and overruled in Louisville R. Co. *v.* Letson, 2 How. 497, where it was held that a corporation created and doing business in a State is an *inhabitant* of the State, capable as being treated as a citizen for all purposes of jurisdiction. And the mischief of the earlier decision is now whittled away by a legal fiction; the members of a corporation being conclusively presumed, for purposes of jurisdiction, to be citizens of the State in which the corporation was created. (Steamship Co. *v.* Tugman, 106 U.S. 118; Memphis, &c., R.R. Co. *v.* Alabama, 107 U.S. 581; Kent, Comm. i. 346.) "It is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States, which define the jurisdiction of the federal courts." (Wisconsin *v.* Pelican Ins. Co. 127 U.S. p. 287.) But such a corporation is not a citizen of the State, so as to be "entitled to all privileges and immunities of citizens in the several States." (Blake *v.* McClung, 172 U.S. 239.)

A corporation may clearly be a "resident" within the meaning of this section. "Residents" are resident persons; and by the (Imperial) Interpretation Act, 1889 (which governs this constitution), the expression "person," unless the contrary intention appears, includes any body of persons corporate or unincorporate. (Sec. 19.)

According to writers on International Law, supported by English decisions, the residence of an incorporated company is determined by the place in which its administrative business is chiefly carried on. (See Westlake, Priv. Internat. Law, 285; Lindley, Company Law, p. 910.)

Between a State and a Resident of Another State.—The object of this jurisdiction also is to avoid partiality, or the suspicion of partiality. (Story, Comm. § 1682; Kent, Comm. i. 323; Wisconsin *v.* Pelican Ins. Co., 127 U.S. p. 265.) In that case it was held that similar words do not give federal jurisdiction in an action by a State upon a judgment recovered by it, in one of its own courts, against a citizen of another State. "The grant is of 'judicial power' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all." (Per Gray, J., at p. 289.)

"The courts of no country execute the penal laws of another." (Per Marshall, C.J., The *Antelope*, 10 Wheat. 123.) This rule "applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." (Wisconsin *v.* Pelican Ins. Co., cited above.)

§ 325. "In which a Writ of Mandamus or Prohibition, or an Injunction, is Sought Against an Officer of the Commonwealth."

The Convention was in considerable doubt as to whether this sub-section was necessary or not. It was included (except so far as injunctions are concerned) in the Bill of 1891; and it reappeared in the Adelaide draft of 1897. At Melbourne (Debates, pp. 320-1) it was omitted, at Mr. Barton's suggestion, on the ground that the words were unnecessary, and might operate as a limitation. On reconsideration (Debates, pp. 1875-85) it was thought advisable to restore the words, owing to principles laid down in American decisions, which show that the power of the Supreme Court of the United States to grant a writ of mandamus is very limited.

American Decisions.—In order to explain the reasons for inserting the words, and to answer the objections which were urged against them, it is necessary first to examine the American decisions. The Constitution of the United States gives *original jurisdiction* to the Supreme Court only in "cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party." Nor has Congress any power whatever to extend the original jurisdiction of the Supreme Court. The Judiciary Act of 1789, which created the Federal Courts, after declaring that the Supreme Court should have appellate jurisdiction from the Circuit Courts and Courts of the several States, in certain cases, provided that it should have power to issue writs of mandamus, in cases warranted by the principles and usages of law, "to any courts appointed, or persons holding office, under the authority of the United States." (See *Re* Green, 141 U.S. 325.) In Marbury *v.* Madison, 1 Cranch 137, this Act was held to be unconstitutional so far as it purported to give the Supreme Court power to issue a mandamus against an officer of the United States (a proceeding which involves the exercise of *original* jurisdiction) in cases not within the original jurisdiction granted by the Constitution. Marbury had been duly appointed a justice of the peace, and his commission had been duly signed and sealed; but the Secretary of State refused to issue it. The Court held (see Kent, i. 322) that this was a violation of a vested legal right, for which the plaintiff was entitled to a remedy by mandamus; but held also that the mandamus could not constitutionally issue from the Supreme Court.

"To enable this Court to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction or to be necessary to enable them to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that

paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary, in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the Supreme Court, by the Act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution." (Per Marshall, C.J., Marbury *v.* Madison, 1 Cranch at p. 175.)

The principles established in Marbury *v.* Madison are very clear. When a writ of mandamus is sought, the first question is whether "the principles and usages of law" warrant the issue of a mandamus as the proper remedy in the case; and if that question is answered in the affirmative, the question remains whether the Supreme Court has jurisdiction over the parties or the subject-matter. If the mandamus is sought against a non-judicial officer, it is an exercise of original jurisdiction, and the court can only act if the matter comes within the scope of its original jurisdiction. If the mandamus is sought against a court, it is an exercise of appellate jurisdiction, and the court can only act if the matter comes within the scope of its appellate jurisdiction.

It is submitted that, in the absence of this sub-section, the American decisions would be completely applicable to this Constitution, and that no mandamus could issue from the High Court against a non-judicial officer of the Commonwealth except in cases which came within the scope of the original jurisdiction of the Court. There is, of course, the difference that the original jurisdiction of the High Court under this Constitution is wider than that of the Supreme Court of the United States, and that this jurisdiction can, within certain limits, be further enlarged by the Parliament; but that is a difference which does not affect the principle. That principle is that the original jurisdiction of the High Court is limited, and that its power to grant mandamus, prohibition, or injunction—or, for the matter of that, any other remedy whatever—is ordinarily confined, so far as that remedy involves an exercise of original jurisdiction, within precisely the same limits. The difference made by this sub-section is that whenever any person seeks any one of those three remedies *against an officer of the Commonwealth*, the High Court will have original jurisdiction in the matter—whether or not it is a matter "arising under a treaty," or "affecting consuls," or "between States," &c.

Objections Answered.—It was suggested by Mr. Isaacs (Conv. Debates, Melb., pp. 1879, 1882) that the words were unnecessary, inasmuch as the jurisdiction proposed to be given was already covered by sub-sec. iii., which gave original jurisdiction where "the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party." It seems clear, however, that that sub-section only applies where the Commonwealth is the real party, and some person sues or is sued as representing the Commonwealth. (See Note, § 323, *supra*; and Mr. Barton's remarks, Conv. Deb., Melb., p. 1884.) In applications for mandamus, that is never the case, because a mandamus cannot issue against the Crown, or against any person representing the Crown. (See Note on Mandamus, *infra*.) A suit "against an officer of the Commonwealth" is a very different thing to a suit against "a person sued on behalf of the Commonwealth."

Another objection urged was that the mention of these particular remedies might raise the implication that the High Court had no jurisdiction with respect to other remedies not mentioned—such as writs of *habeas corpus*, *certiorari*, &c. This argument is practically answered by the foregoing statement of the purport of the provision. The High Court, apart from this sub-section, would have had power to grant the remedies of mandamus, &c., whenever it was incident or necessary to the exercise of their original jurisdiction. This sub-section expressly extends that jurisdiction in the case of three remedies "which are specially in their nature addressed to persons who may be carrying out the provisions of the statute law" (Conv. Deb., Melb., 1885); but as regards all other remedies it leaves the jurisdiction of the court unaltered. That jurisdiction, it is submitted, will be just as extensive as it is in the United States.

"All the courts of the United States have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and

usages of law. So the judges of the Supreme Court, as well as the judges of the District Courts, may, by *habeas corpus*, relieve the citizens from all manner of unjust imprisonment occurring under or by colour of the authority of the United States, or for acts done, or omitted to be done, in pursuance of a law of the United States, or of a judicial authority of any court or judge thereof." (Kent, Comm. i. 300; and see Story, Comm. § 1341.)

The well-recognized principle is, that in the exercise of its lawful jurisdiction the court may employ all appropriate remedies; and that principle is not affected by the fact that in a certain class of cases the nature of the remedy sought is made the ground of jurisdiction.

Another objection urged was that the sub-section might enable the judiciary to interfere in political matters, and control the executive acts of the government. A sufficient answer to this is that this sub-section, like all the others, confers a jurisdiction only, not a right of action. It provides that resort may be had to the High Court when a mandamus, &c., is *sought* against an officer of the Commonwealth; but, as was explained by Mr. Symon, "it does not give any right to *get* mandamus or prohibition. . . . It merely gives a jurisdiction in certain applications." (Conv. Deb., Melb., p. 1877.)

General Jurisdiction in Mandamus, &c.—Two things must combine in order to give jurisdiction under this sub-section in any matter:—(1) That a mandamus, prohibition, or injunction is sought; and (2) that such remedy is sought against an officer of the Commonwealth. If the nature of the remedy sought, and the character of the party against whom it is sought, answer this description, the High Court has original jurisdiction, irrespective of what the subject of the suit may be.

It must not be supposed, however, that the High Court has no power to issue mandamus, prohibition, or injunction except under this sub-section. Whenever the Court has jurisdiction, original or appellate, in any matter, it has power to grant all remedies necessary or appropriate to the exercise of that jurisdiction. (See United States cases cited, *supra*.) That is to say, in cases where the person against whom a mandamus, prohibition, or injunction is sought is *not* an officer of the Commonwealth, then if the character of the parties or the subject-matter of the suit give the High Court original jurisdiction in the matter, the High Court has authority to grant any such writ or remedy in the matter as may be necessary to the exercise of that jurisdiction.

A Writ of Mandamus or Prohibition.—A writ is a document in the Queen's name, and under the seal of the Crown, or of a court or officer of the Crown, commanding the person to whom it is addressed to do or forbear from doing some act. (Sweet's Law Dictionary.)

Writs are either prerogative or of right. A prerogative writ is one which issues, not of strict right, but in the discretion of the Court. (Shortt, Mandamus, p. 223.)

Mandamus and prohibition are prerogative writs. There are other prerogative writs known to English law, such as *habeas corpus*, *certiorari*, *procedendo*, and *quo warranto*. The mention in this section of mandamus and prohibition alone is not meant to exclude or limit any jurisdiction which the High Court may otherwise have with regard to other writs; the object was to make it perfectly clear that the courts should have original jurisdiction in every case in which either of these writs, or an injunction, was sought against an officer of the Commonwealth: these three proceedings being selected because they are "specially in their nature addressed to persons who may be carrying out the provisions of the Statute law." (Conv. Deb., Melb., pp. 1876-85.)

Mandamus.—"A writ of *mandamus* is, in general, a command issuing in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensive remedial nature: . . . it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance." (Blackstone, Comm. iii. 110. See also Steph. Comm. iii. 615; Shortt, Mandamus, 223.)

Besides the prerogative writ of mandamus, there are various kinds of statutory mandamus; especially the mandamus in a civil action, first introduced by the (Imperial) Common Law Procedure Act, 1854, and subsequently adopted in the colonial Common Law Procedure Acts. (See Steph. Comm. iii. 619.) This sub-section appears chiefly to contemplate the prerogative writ; but it is submitted that it is wide enough to include any statutory mandamus which may be authorized by federal legislation.

In the colonies, the courts which exercise a jurisdiction corresponding to that of the Queen's Bench have always exercised the right of issuing the prerogative writ of mandamus. It appears that, in the absence of prohibitive Imperial legislation, the Court of Queen's Bench can exercise jurisdiction in every part of the Queen's Dominions, even in colonies in which an independent legislature has been established. "Writs not ministerially directed (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, are restrained by no clause in the constitution of Berwick; upon a proper case they may issue to *every dominion of the Crown of England*. There is no doubt as to the power of this court (*i.e.*, the court of King's Bench), where the place is under the subjection of the Crown of England; the only question is as to the propriety." (Per Mansfield, C.J., Rex *v.* Cowle, 2 Burr. 855.) In 1861, a writ of *habeas corpus ad subjiciendum* was issued from the court of Queen's Bench to certain officers in Upper Canada. (*Re* John Anderson, 30 L.J.Q.B. 129.)

A mandamus only lies where the applicant has a legal right to the performance of some public duty, and where there is no other adequate remedy. (See Shortt, Mandamus.)

The mandamus provided for in this sub-section is only "against officers of the Commonwealth." Without express words, the High Court has original jurisdiction to issue a mandamus against any person, corporation, or public officer in any matter coming within the scope of its original jurisdiction; and the power to issue a mandamus to any State or Federal Court is incident to the general appellate jurisdiction of the High Court. (Marbury *v.* Madison, 1 Cranch 137; and see notes, *supra*.)

This sub-section merely gives a jurisdiction, and does not confer any right to a mandamus in cases where it did not exist before. (Conv. Deb., Melb., pp. 1875-85.) Consequently the jurisdiction where a mandamus is sought against an officer of the Commonwealth must be read in the light of established authority. It is a clear principle of English law that a mandamus is never granted against the Crown, *or the officers or servants of the Crown as such*. "That there can be no mandamus to the Sovereign there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment." (Per Denman, C.J., Reg. *v.* Powell, 1 Q.B. 361.) The principle, which is laid down clearly in English, Colonial, and American cases, is this: that a mandamus will lie against an officer of the Crown to compel him to perform an act which he is under a statutory or other legal *duty* to perform; but not to compel him to perform an act in which he has any discretion, or in which he is subject to the commands of the Crown. Thus, in Reg. *v.* Lords Commissioners of the Treasury, L.R. 7 Q.B. 387, it was held that no mandamus lies to the Lords of the Treasury to compel them to issue a Treasury minute authorizing certain payments.

"I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction. (Per Cockburn, C.J., at p. 394.)

"The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money: because it seems to me clear that we

ought to grant a mandamus if there is such a statutory obligation. . . . The general principle, applicable not merely to mandamus but running all through the law, is that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. Where the intention of the legislature shows that Her Majesty should be advised to do a thing, and where the obligation, if I may use the word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by mandamus merely because the sovereign happens to be the principal." (Per Blackburn, J., at p. 397.)

In *Exp.* Mackenzie, 6 S.C.R. (N.S.W.) 306, the Supreme Court of New South Wales refused to issue a mandamus against the Colonial Treasurer to compel him to issue a warrant for the payment of certain moneys voted by Parliament. In *Exp.* Cox, 14 S.C.R. (N.S.W.) 287, a mandamus against the Secretary for Mines commanding him to hand over to the applicant a mineral lease executed by the Governor, under the Mining Act, was refused by the same court on the ground that the Act did not impose on the Secretary for Mines any such duty. (See also *Exp.* Krefft, 14 S.C.R. [N.S.W.] 446.) In *Exp.* Gibson, 2 N.S.W. L.R. 202, the Supreme Court of New South Wales held that a mandamus would lie against the Colonial Treasurer for the issue of a license under the Licensing Act of 1862, on the ground that the Act left the Treasurer no discretion; but the court in its own discretion refused the mandamus.

The American cases are to exactly the same effect, and decide that a mandamus will lie to compel the performance of a merely ministerial duty, but not of a discretionary duty. Thus in U.S. *ex rel.* Boynton *v.* Blaine, 139 U.S. 306, the principle was stated by the Court as follows:—

"The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an Executive department in the discharge of an executive duty involving the exercise of judgment or discretion. (U.S. *ex rel.* Redfield *v.* Windom, 137 U.S. 636, 644.) When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the Government; that is, a service which they are bound to perform without further question; then, if they refuse, the mandamus may be issued to compel them. (U.S. *ex rel.* Dunlap *v.* Black, 128 U.S. 40, 48.) The writ goes to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act." (Brownsville Commissioners *v.* Loague, 129 U.S. 493, 501.)

So in Decatur *v.* Paulding, 14 Pet. 497, it was held that a mandamus would not lie against the Secretary of the Navy to compel him to sign a warrant for payment. (See Brashear *v.* Mason, 6 How. 92.) No power can be asserted by the Supreme Court of the United States "to command the withdrawal of a sum or sums of money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States." (U.S. *ex rel.* Goodrich *v.* Guthrie, 17 How. 284. See Kent, Comm. i. 322.) Where a public officer refuses to perform a mere ministerial duty, mandamus is the proper remedy. (Roberts *v.* United States, 176 U.S. 221.)

Prohibition.—"The writ of prohibition issues out of a superior court of law, and is directed to the judge of an inferior court, or the parties to a suit therein, or both conjointly, requiring that the proceedings which have been commenced therein be either conditionally stayed or peremptorily stopped. The object of the writ is the keeping of the court to which it is directed within its proper jurisdiction, or to repress the assumption of authority by any pretended court." (Broom, Com. Law, p. 216. See also Blackstone Comm. iii. 112; Shortt, Mandamus, &c., p. 426.) The general rule is that prohibition only lies where the inferior tribunal acts either without jurisdiction, or in excess of its jurisdiction, or where its procedure has violated the rules of justice. (See Shortt, 436.)

The writ of prohibition will issue, not only to the regular Courts, but to various public bodies exercising powers of a judicial nature—such, for instance, as the Tithe Commissioners and the Railway Commissioners in England. (See Shortt, p. 433.) In a case relating to the Local Government Board, though the power to prohibit was not decided, Brett, L.J., observed:—"I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of

exercising it, and that wherever the legislature entrusts to any body of persons, other than to the superior courts, the power of imposing an obligation upon individuals, the Court ought to exercise, as widely as they can, the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." (Reg. *v.* Local Government Board, 10 Q.B.D. 321.) But a prohibition will only be granted where the proceedings to be prohibited are of a judicial character. (Shortt, p. 439.) Thus it may be argued that prohibition will lie against the Inter-State Commission when acting in its judicial capacity.

Seeing that a writ of prohibition lies against the parties to a suit, as well as against the judge, it would appear that where an "officer of the Commonwealth" is party to a suit in a State court, a prohibition may issue against him out of the High Court, on the suit of the proper party. It would seem that a prohibition directed to the judge of an inferior court is rather an exercise of appellate than of original jurisdiction, inasmuch as it involves the assumption of an authority to control and revise, in certain respects, the proceedings of the inferior court. So it has been held in the United States that a writ of prohibition cannot issue from the Supreme Court where there is no appellate power given by law, nor any special power to issue the writ. (*Exp.* Gordon, 1 Black, 503.) And the Judiciary Act of 1789 authorizes the Supreme Court to issue prohibitions to the federal District Courts when proceeding as courts of Admiralty. (*Exp.* Christy, 3 How. 292; *Exp.* Graham, 10 Wall. 541.) This jurisdiction could not have been conferred if a prohibition had been thought to involve the exercise of original jurisdiction, because the Supreme Court of the United States has no original jurisdiction in Admiralty cases.

But whether a writ of prohibition be regarded as an original or an appellate proceeding seems immaterial under this Constitution. If appellate, the jurisdiction to issue prohibitions to all federal courts, or courts of federal jurisdiction, is given by s. 73; if original, it would seem that the justices of such courts are "officers of the Commonwealth" within the meaning of this section.

Injunction.—An injunction is a remedy of an equitable nature. It used to be "a writ remedial, issuing out of a court of Equity, in those cases in which a plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant." (Joyce on Injunctions, p. 1.) Injunctions are also issued in some cases by courts of common law, acting on equitable principles. The writ of injunction is now generally abolished, injunctions being obtained by order; though the writ of injunction survives in the common law courts of those colonies where the old Common Law Procedure Acts are still in force.

The necessity for the mention of injunctions here is not quite apparent. An injunction is on a different footing altogether from mandamus and prohibition; it is an ordinary remedy in private suits between party and party. It was probably added because of the analogy which exists, in effect, between a mandamus and an injunction.

Is Sought.—The Constitution gives original jurisdiction to the High Court in all matters in which a mandamus, prohibition, or injunction "is sought" against the Commonwealth. It does not follow, however, that the plaintiff in any suit against an officer of the Commonwealth in which the substantial relief sought does not come within this sub-section can bring the proceeding within the jurisdiction of the High Court by adding an untenable claim for a mandamus, prohibition, or injunction. It is submitted that in such a case the same principle would apply as when a plaintiff endeavours to bring a common law dispute into a Court of Equity by alleging an untenable equity. (See Want *v.* Moss, 12 N.S.W. L.R. Eq. at p. 108.)

Against an Officer of the Commonwealth.—The ministers of State are officers appointed to administer Departments of State (sec. 64), and are clearly "officers of the Commonwealth." So are officers of the transferred departments who are retained in the service of the Commonwealth (sec. 84). So are the "officers of the Executive Govern-

ment of the Commonwealth" mentioned in sec. 67. And so also, it is submitted, are the members of the Inter-State Commission, and even the Justices of the High Court and of the other federal courts. It is not clear whether the Judges of a State Court invested with federal jurisdiction can be called, in relation to the duties so imposed upon them, "officers of the Commonwealth." The Commonwealth investiture acts upon the court; the Judges of that Court are appointed, removed, controlled, and paid by the States alone. They are officers of the States exercising functions conferred on them by the Commonwealth.

For the term "officer of the United States" see Robb *v.* Connolly, 111 U.S. 624. "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." (United States *v.* Hartwell, 6 Wall. at p. 393.)

This section does not confer any right of action against officers of the Commonwealth. The High Court is given jurisdiction only; it has to determine in each case, according to the principles of law, whether an action lies. (See Notes, above.) The principles that no action lies against the Crown except by its consent, given by legislation or otherwise, and that no action lies against a judge for anything done in his judicial capacity, are not affected.

§ 326. "The High Court Shall Have Original Jurisdiction."

What is given by this section is jurisdiction merely, not a right of action. If a plaintiff has a legal claim which comes within any of the classes named, the section gives him the right to prosecute his suit in the High Court, and gives the High Court power to entertain his suit; but it does not affect his right to relief. (See notes, §§ 323-324 *supra*.)

The section confers a jurisdiction on the High Court, but it does not take away any jurisdiction from the State Courts. It does not provide that the jurisdiction of the High Court, or of the federal courts, shall be exclusive; though sec. 77 enables the Parliament to make the jurisdiction of any federal court exclusive of the jurisdiction of the State courts to any extent which may be desired. In the absence of such federal legislation, there will be concurrent jurisdiction over all matters within this section, so far as they also come within the jurisdiction of any court of a State. There may, however, be some cases—such as criminal offences against the Constitution or federal laws—in which the jurisdiction is necessarily exclusive. "It is only in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction." (Story, Comm. § 1754; Kent, Comm. i. 319. See also *Federalist*, No. 82; Story, §§ 1748-54; Kent, i. 395-404.)

The gift of original jurisdiction does not exclude the appellate jurisdiction of the High Court in cases mentioned in this section. The words of the Constitution of the United States have been construed to give appellate but not original jurisdiction in some cases, and original but not appellate jurisdiction in others. (See Story, Comm. §§ 1706-21; Kent, Comm. i. 318.) The reasoning by which this interpretation was arrived at has no application to this Constitution, the extent of the appellate jurisdiction being clearly defined. In the Bill of 1891, and also in the Adelaide draft of 1897, the words were "shall have original *as well as appellate* jurisdiction;" but at Melbourne, after the fourth Report, the words in italics were struck out at the instance of the Drafting Committee, as being unnecessary.

It has been held in the United States that the jurisdiction of a federal court will not be presumed, as in the case of a common law English Court, or American State court; but that the record must show the jurisdiction affirmatively. (Dred Scott case, 19 How. 393; *Exp.* Smith, 94 U.S. 455.) The consent of parties cannot give jurisdiction

where it does not exist (Mansfield, &c., R. Co. *v.* Swan, 111 U.S. 379; and see Bac. Abr., Courts (B); Broom's Comm. 43). But the parties may admit facts showing jurisdiction. (Railway Co. *v.* Ramsey, 22 Wall. 322.)

"Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy, and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court." (Boom Co. *v.* Patterson, 98 U.S. at p. 406.)

Where the original jurisdiction of the Court is invoked, it must appear in the declaration or bill of the party suing that the case is one of federal jurisdiction. (Metcalf *v.* Watertown, 128 U.S. 586; Colorado Central Mining Co. *v.* Turck, 150 U.S. 138.)

Common Law Jurisdiction.—The great question whether there is a common law of the Commonwealth involves three distinct enquiries: (1) whether the common law, as existing in the several States, is a "law of the Commonwealth;" (2) whether there is a federal jurisdiction over common law offences; (3) whether there is a common law federal jurisdiction in civil cases.

(1) *Is the Common Law a Law of the Commonwealth?*—In the United States the federal courts follow the decisions of the highest court of a State in questions concerning merely the laws of that State, and only claim a right of "independent interpretation" where the law of the Union is involved. Accordingly the question whether the common law is United States law has arisen in connection with the question whether the United States judiciary, in the exercise of its jurisdiction, has the right of independent interpretation of the law. To this question the Supreme Court of the United States—true to its character as a federal, not a national court—has given the following answer:—

"It has asserted this right in all cases in which jurisdiction is established by the character of the subject matter of the suit; but when jurisdiction is based solely upon the character of the parties to the suit, it has enunciated the principle that the United States Courts, in interpreting the local law which governs the case, must follow the interpretation placed upon the law by the State court of highest instance. This doctrine rests upon the assumption that all purely State law is finally interpreted by the State courts, and that the common law is purely State law (Wheaton *v.* Peters, 8 Pet. 591), *i.e.*, that the United States has no common law. The court has not itself been able to hold to this doctrine in its practice. In many cases where the jurisdiction of the United States courts rests wholly upon the character of the parties to the suit, it has rendered decisions contradicting the decisions of the highest courts of the States concerned. Such action can be rationally explained only upon the theory that the United States has a common law; that the United States courts are quite as independent in their interpretation of this common law as in the interpretation of the Constitution, statutes, and treaties, of the United States; and that, in many cases where the jurisdiction of the United States court rests apparently only upon the character of the parties to the suit, the question involved is one of United States common law." (Burgess, Pol. Sci. ii. 328; see also Kent, Comm. i. 342, notes.)

This test of the existence of a federal common law is wholly inapplicable to the Commonwealth, because the High Court, as a national and not a federal court of appeal, has not only the right, but the duty of "independent interpretation" of the common law in all cases that come before it. In the United States, the decision of the courts of each State being final as to what the common law of the State is, the common law in one State may come in time to be widely different from the common law in another State. Throughout the Commonwealth of Australia, the unlimited appellate jurisdiction of the High Court will make it—subject to review by the Privy Council—the final arbiter of the common law in all the States. The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be—as they always have been—the same in all the States. In this sense, that the common law in all the States is the same, it may certainly be said that there is a common law of the Commonwealth.

(2.) *Jurisdiction over Common Law Offences.*—This question has been the subject of much discussion in the United States, chiefly in relation to criminal cases. In the case of United States *v.* Worrall, 2 Dall. 384 (cited Kent, I. 331), the question arose whether

an indictment would lie in a Circuit Court for an attempt to bribe the Commissioner of the Revenue. Congress had provided by law for the punishment of various crimes, and even for the punishment of bribery in the case of certain public officers ; but in the case of the Commissioner of the Revenue, the Act of Congress did not create or declare the offence. Bribery of a public officer was a common law offence, but the Constitution contained no reference to a common law authority ; and though Congress had power to make such an act criminal, it had not done so. The question arose whether it was an offence arising under the Constitution or laws of the United States.

"The Court were divided in opinion on this question. In the opinion of the Circuit Judge, an indictment at common law could not be sustained in the Circuit Court. It was admitted. that Congress were authorized to define and punish the crime of bribery ; but as the act charged as an offence in the indictment had not been declared by law to be criminal, the courts of the United States could not sustain a criminal prosecution for it. The United States, in their national capacity, have no common law, and their courts have not any common law jurisdiction in criminal cases, and Congress have not provided by law for the offence contained in the indictment ; and until they defined the offence, and prescribed the punishment, he thought the court had not jurisdiction of it. The District Judge was of a different opinion, and he held that the United States were constitutionally possessed of a common-law power to punish misdemeanours, and the power might have been exercised by Congress in the form of a law, or it might be enforced in the course of a judicial proceeding. The offence in question was one against the well-being of the United States, and from its very nature cognizable under their authority. This case settled nothing, as the court were divided ; but it contained some of the principal arguments on each side of this nice and interesting constitutional question." (Kent, Comm. i. 332-3.)

In 1807 the question came before the Supreme Court of the United States in the case of United States *v.* Hudson and Goodwin, 7 Cranch 32. The defendants had been indicted in a Circuit Court for a libel on the President of the United States, and the question was whether there was a common law jurisdiction.

"A majority of the Supreme Court decided, that the circuit courts could not exercise a common law jurisdiction in criminal cases. Of all the courts which the United States, under their general powers, might constitute, the Supreme Court was the only one that possessed jurisdiction derived immediately from the Constitution. All other courts created by the general government possessed no jurisdiction but what was given them by the power that created them, and could be invested with none but what the power ceded to the general government would authorize them to confer ; and the jurisdiction claimed in that case has not been conferred by any legislative act. When a court is created, and its operations confined to certain specific objects, it could not assume a more extended jurisdiction. Certain implied powers must necessarily result to the courts of justice from the nature of their institution, but jurisdiction of crimes against the State was not one of them. . . . To exercise criminal jurisdiction in common-law cases was not within their implied powers, and it was necessary for Congress to make the act a crime, to affix a punishment for it, and to declare the court which should have jurisdiction." (Kent, Comm. i. 334-5.)

In both the above cases it was held, independently of whether a common-law offence could exist, that the courts had no jurisdiction over the case in question. "If that were so, the common law certainly could not give them any. The cases were, therefore, very correctly decided upon the principle assumed by the Court." (Kent, Comm. i. 338.) But the case of United States *v.* Coolidge (1 Gallison, 488, 1 Wheat. 415) went further. That was an indictment for an offence on the high seas, and was clearly a case of admiralty jurisdiction, over which the courts of the United States have general and exclusive jurisdiction. The Circuit Court judge held that there was jurisdiction. He did not think it necessary to consider the broad question whether the United States had entirely adopted the common law. He admitted that the courts of the United States were courts of limited jurisdiction and could not exercise any authority not expressly confided to them. But he insisted that when an authority was once given, its extent and the mode of its exercise must be regulated by the common law, and that if this distinction were kept in sight it would dissipate the whole obscurity of the subject. Under the Judiciary Act, the circuit courts had exclusive cognizance of "crimes and offences cognizable under the authority of the United States."

"This means all crimes and offences to which, by the Constitution of the United States, the judicial power extends; and the jurisdiction could not be given in more broad and comprehensive terms. To ascertain what are crimes and offences against the United States, recourse must be had to the principles of the common law, taken in connection with the Constitution. Thus, Congress had provided for the punishment of murder, manslaughter, and perjury, under certain circumstances, but had not defined those crimes. The explanation of them must be sought in and exclusively governed by the common law; and upon any other supposition, the judicial power of the United States would be left in its exercise to arbitrary discretion . . . It was accordingly concluded that the circuit courts had cognizance of all offences against the United States, and what those offences were depended upon the common law applied to the powers confided to the United States, and that the circuit courts, having such cognizance, might punish by fine and imprisonment, where no punishment was specially provided by statute." (Kent, Comm. i. 336-8.)

This case was brought up to the Supreme Court, but was not argued. There being still a difference of opinion, the Court merely said that they did not choose to review their decision in U.S. *v.* Hudson and Goodwin, or draw it into doubt. The decision was for the defendant, and against the claim to any common law jurisdiction in criminal cases. It seems to be now regarded as settled that in the criminal law there are no common law offences against the United States. (United States *v.* Britton, 108 U.S. 199; United States *v.* Eaton, 144 U.S. 677. Kent Comm. i. 331, Notes.) "The jurisdiction of the United States courts depends exclusively on the Constitution and laws of the United States, and they can, neither in criminal nor in civil cases, resort to the common law as a source of jurisdiction." (*Re* Barry, 136 U.S. at p. 607.)

Chancellor Kent does not regard the total denial of a common law jurisdiction in criminal cases as based upon satisfactory principles; and he cites with approval Du Ponceau's opinion in favour of the distinction drawn by the Court below in United States *v.* Coolidge (*supra*). Du Ponceau maintains "that we have not, under our Federal Government, any common law considered as a *source of jurisdiction;* while on the other hand, the common law, considered merely as the *means* or *instrument* of exercising the jurisdiction, conferred by the Constitution and laws of the Union, does exist, and forms a safe and beneficial system of national jurisprudence. The courts cannot derive their *right to act* from the common law. They must look for that right to the Constitution and law of the United States. But when the general jurisdiction and authority is given, as in cases of admiralty and maritime jurisdiction, the *rules of action* under that jurisdiction, if not prescribed by statute, may and must be taken from the common law, when they are applicable, because they are necessary to give effect to the jurisdiction." (Kent, Comm. i. 339.)

Kent admits that it would be dangerous to leave it altogether to the courts to say what is an offence against the law of the United States, when the law has not specifically defined it; but he suggests that the sound doctrine is that jurisdiction exists in criminal cases, not only as to statute offences duly defined, but as to cases within the *express* jurisdiction given by the Constitution. In other words, he contends that jurisdiction extends to all cases within the judicial power of the United States.

"Though the judiciary power of the United States cannot take cognizance of offences at common law, unless they have jurisdiction over the person or subject-matter given them by the Constitution or laws made in pursuance of it; yet, when the jurisdiction is once granted, the common law, under the correction af the Constitution and statute law of the United States, would seem to be a necessary and a safe guide, in all cases, civil and criminal, arising under the exercise of that jurisdiction and not specially provided for by statute. Without such a guide, the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations." (Kent, Comm. i. 341. See also Story, Comm. § 158, Note.)

It seems therefore that the doctrine that there are no common law offences against the United States, but that every offence must be declared and made punishable by statute, has been hesitatingly adopted by the Courts, and does not meet with universal acceptance. The reasons for denying the existence of a federal common law do not satisfy such writers as Chancellor Kent and Dr. Burgess; and it is submitted to be the sounder

doctrine that, within the scope of the judicial power, the common law may be resorted to, to give effect to the jurisdiction conferred by the Constitution. And in this connection it is to be noticed that the original jurisdiction of the High Court extends to "all matters in which the Commonwealth or a person suing . . . on behalf of the Commonwealth, is a party." The corresponding provision in the United States Constitution is "controversies to which the United States shall be a party;" and it is held (see Notes, § 320, *supra*) that "controversies" do not include criminal cases. "Matters," however, is applicable to criminal as well as civil cases, and therefore it seems clear that the High Court has jurisdiction over every offence against the Commonwealth which is prosecuted by or on behalf of the Commonwealth. For examples of common law offences against the Commonwealth see Note, § 341, *infra*. Acts prohibited by a statute, though not expressly stated to be misdemeanours or punishable, are indictable. (See Notes, § 341, *infra*.)

(3) *Common Law Jurisdiction in Civil Cases.*—In civil, as in criminal cases, the common law cannot be relied on as the source of jurisdiction. (*Re* Barry, 136 U.S. at p. 607.) But "though the common law cannot be the foundation of a jurisdiction not given by the Constitution and laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law. Were it otherwise there would be nothing to exempt us from an absolute despotism of opinion and practice." (Kent, Comm. i. 343, Note; and see Story, § 1645.)

"The Supreme Court of the United States, in Robinson *v.* Campbell (3 Wheaton 212, 10 *Id.* 159), went far towards the admission of the existence and application of the common law to civil cases in the federal courts." (Kent, Comm. i. 341.) Under the Judiciary Acts of 1789 and 1792, the remedies in the federal courts, at common law and equity, were to be, not according to the practice of State courts, but "according to the principles of common law and equity, as distinguished and defined in that country from which we derived our knowledge of those principles."

"In this view of the subject, the common law may be cultivated as part of the jurisprudence of the United States. In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a code of matured ethics and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that with which the Institutes of Justinian are introduced. *(Quod principi placuit legis habet vigorem.)* It is the common jurisprudence of the United States, and was brought with them as colonists from England, and established here, so far as it was adapted to our institutions and circumstances. It was claimed by the Congress of the united Colonies, in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies are entitled.' It fills up every interstice, and occupies every wide space which the statute law cannot occupy. Its principles may be compared to the influence of the liberal arts and sciences; *adversis perfugium ac solatium praebent; delectant domi non impediunt foris; pernoctant nobiscum, peregrinantur, rusticantur.*" (Kent, Comm i. 342-3.)

"We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home: and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language." (Du Ponceau on Jurisdiction, p. 91; cited Kent, Comm. i. 343.)

Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction[327] on the High Court in any matter[328]—

(i.) Arising under this Constitution[329], or involving its interpretation[330]:

(ii.) Arising under any laws made by the Parliament[331]:

(iii.) Of Admiralty and maritime jurisdiction[332]:

(iv.) Relating to the same subject-matter claimed under the laws of different States[333].

UNITED STATES.—The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to all cases of admiralty or maritime jurisdiction; to controversies . . . between citizens of the same State claiming lands under grants of different States. (Const., Art. III., sec. ii., sub-sec. i.) (The jurisdiction in the above cases is appellate only; see Notes to sec. 75.)

HISTORICAL NOTE.—The Bill of 1891 contained a similar provision, but in a different form. Added to the "original jurisdiction" clause was a power to the Parliament to confer original jurisdiction in "such other of the cases enumerated in the last preceding section as it thinks fit." The "preceding section" was that enumerating all the cases in which jurisdiction could be given to the other federal courts, and including those in which the Supreme Court already had federal jurisdiction; so that the ascertainment of the cases to which the power applied involved a process of subtraction. The cases to which the power applied were practically the same as in this section, except that they also included cases arising "under any treaty made by the Commonwealth with another country"—a class of cases, which, in a wider form, is now included in the original jurisdiction of the High Court (sec. 75).

At the Adelaide session, 1897, a somewhat different form of expression was adopted. This provision, instead of referring expressly to a "preceding section," empowered Parliament to confer original jurisdiction "in other matters within the judicial power;" and the section which had enumerated the cases in which jurisdiction might be given to the federal courts other than the High Court was now transformed into a section which purported to enumerate the cases to which "the judicial power shall extend." This arrangement, however, was unsatisfactory, as it involved the use of the phrase "judicial power" with exclusive reference to original jurisdiction, and therefore in a different sense from that which it bears in section 71. It was taken from the United States Constitution, in which the appellate and the original jurisdictions are both limited to certain classes of cases. (See Note, § 339, *infra.*)

At the Melbourne session, on recommittal after the fourth Report, this provision, and the "judicial power" section introduced in Adelaide, were recast to form sections 76 and 77 respectively.

§ 327. "Laws Conferring Original Jurisdiction."

In the absence of federal legislation, the original jurisdiction of the High Court will be limited to the cases mentioned in the five sub-sections of sec. 75; but this section empowers the Federal Parliament to extend that jurisdiction to any or all of the cases mentioned in the four sub-sections. The Federal Parliament has no power to confer original jurisdiction upon the High Court except what is given to it by this section; the affirmation of the power in particular cases excluding it in all others. (See Story,

Comm. § 1703; Kent, Comm. i. 316. The High Court is therefore prohibited by the Constitution from taking original cognizance of any matter not within the scope of this and the preceding section.

The cases mentioned in this section are cases in which the Convention did not think it absolutely essential, at the outset, that the High Court should have original jurisdiction; but in which, on the other hand, such jurisdiction was appropriate and might prove to be highly desirable. While confirming within narrow limits the original jurisdiction actually given by the Constitution, they entrusted to the Parliament the power of extending that jurisdiction to other cases of a specially Federal or inter-state character.

§ 328. "In Any Matter."

These words mean, evidently, "in any class of matter." It is not intended that the Parliament should have power to legislate in respect of particular matters of litigation, but that it should be able to extend the original jurisdiction of the High Court to any class or classes of matters coming within the scope of this section. The reason for using the singular "any matter" instead of the plural "all matters" is apparently to avoid the possibility of construing the section to mean that the Parliament must give the whole of this jurisdiction or none.

§ 329. "Arising under this Constitution."

The words "arising under this Constitution" are taken from the Constitution of the United States; the words "or involving its interpretation' are new, and seem to have been added, in the Adelaide draft of 1897, with the view of incorporating the result of judicial decisions as to the meaning of the preceding words.

"Cases arising under the Constitution, as contradistinguished from those arising under the laws of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the Constitution itself, independent of any particular statute enactment Many cases of this sort may be easily enumerated. Thus . . . . . if a State should coin money, or make paper money a tender; if a person tried for a crime against the United States, should be denied a trial by jury, or a trial in the State where the crime is charged to be committed; . . . . . in these, and many other cases the question to be judicially decided would be a question arising under the Constitution." (Story, Comm. § 1647.)

Substituting "Commonwealth" for "United States," the above illustrations by Story are applicable to this Constitution; and many others may be given. Thus, if a subject of the Queen, resident in one State, were subjected in another State to any disability or discrimination in contravention of sec. 117; if a religious test were required as a qualification for any office or public trust under the Commonwealth; if the Commonwealth were to impose any tax on the property of a State, or *vice versa*; or if a question arose as to the rights of an officer of a transferred department under sec. 84: all these would be matters arising under the Constitution.

In Cohens *v.* Virginia, 6 Wheat. 264, it was contended that a case only arose under the Constitution where the plaintiff relied on some provision in the Constitution to support his case; but the Court refused to adopt this narrow construction. Marshall, C.J., in delivering the judgment of the court, said (at p. 379): "If it [the intention] be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the Constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." It seems, therefore, that the words "or involving its interpretation" add little or nothing to the meaning of the preceding words, as construed by the courts of the United States.

§ 330. "Its Interpretation."

Interpretation.—The interpretation of a written document is the process of ascertaining the meaning and intention expressed in it. Sometimes "interpretation," as contrasted with "construction," is used in a narrower sense, to signify the process of explaining particular provisions in which there is some ambiguity; whilst "construction" is used to signify the process of comparing different parts of the document, and gathering the intent from a survey of the whole. In other words, "interpretation" is thus used in an analytic, and "construction" in a synthetic sense. (See Story, Comm. § 397, *et seqq.*) The word "interpretation" is clearly used here in the most general sense, as including both the analytic and the synthetic processes.

This sub-section empowers the Federal Parliament to give the High Court original jurisdiction in any matter arising under this Constitution, or involving its interpretation. But apart altogether from this sub-section, both State and Federal Courts have the duty of interpreting the Constitution, which is the supreme law of the Commonwealth, in every case in which they have jurisdiction and in which rights or obligations arising under the Constitution are involved; and the High Court, as the general appellate tribunal, has the duty of reviewing the interpretations of State Courts. It is necessary to discuss the questions (1) who are the interpreters of the Constitution? (2) what are the leading principles on which its interpretation should be based?

The Interpreters of the Constitution.—The Constitution, like every other law, is directly binding on every individual and every governmental agency within the Commonwealth. Every person, every officer, every political organ, has the duty of complying with its provisions, and must in the exercise of that duty interpret its provisions, in the first instance, to the best of his ability and on his own responsibility. Every citizen is entitled to the protection of the Constitution and is bound not to infringe it; every officer and department of every Government—State or Federal—has similar rights and obligations; and the Federal Parliament and the State Parliaments alike are bound not to exceed the authority conferred or reserved by the Constitution. But the provisions of the Constitution may, wittingly or unwittingly, be transgressed; rights arising under it may be denied; obligations may be evaded. Every person under these circumstances has recourse to the appropriate courts to defend his own rights and to enforce the obligations of others; and thus, without any express provision, the courts of the States, and the Federal Courts, whenever they have jurisdiction over a case, have the duty of interpreting the Constitution so far as it affects the rights of the parties. From the Supreme Courts of the States, as well as from inferior federal courts, an appeal lies to the High Court, whose decisions are "final and conclusive," unless special leave to appeal to the Privy Council is obtained either from the Privy Council or from the High Court itself, as the case may be. It may therefore be said that every court of competent jurisdiction is an interpreter of the Constitution; and that the High Court—subject to exceptional review by the Privy Council—is the authoritative and final interpreter of the Constitution.

In the exercise of the duty of interpretation and adjudication not only the High Court, but every court of competent jurisdiction, has the right to declare that a law of the Commonwealth or of a State is void by reason of transgressing the Constitution. This is a duty cast upon the courts by the very nature of the judicial function. The Federal Parliament and the State Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all it is simply a nullity, entitled to no obedience. The question whether those powers have in any instance been exceeded is, when it arises in a case between parties, a purely judicial question, on which the courts must pronounce. This doctrine was settled in the United States in 1803 by the great case of Marbury *v.* Madison, 1 Cranch 137, where it was held that the authority given by the Judiciary Act to the Supreme Court of the United States, to issue writs of mandamus to public officers, was not warranted by the Constitution.

"The Supreme Court of the United States . . . has asserted the power of the United States judiciary to stand between the constitution and the legislature, and to pronounce an act of the legislature null and void whenever it comes into conflict with such private rights or private property as, according to the interpretation placed upon the constitution by the judiciary, are guaranteed in that instrument. The Court, on the other hand, declines to claim any such transcendent power where the legislative act does not come into conflict with private rights or private property. Of course, the Court asserts the same power over against executive interference with private rights or private property. A *fortiori*, it claims the same power over against the acts of the States. The Court must itself determine when the case is one primarily affecting private rights or private property, and when, on the contrary, it is primarily a political question. The Court bases this position, in principle, upon the provision of the constitution which vests in the judiciary jurisdiction over all cases arising under the constitution." (Burgess, Political Sci. ii. 326-7. See Civil Rights Cases, 109 U.S. 3; Luther *v.* Borden, 7 How. 1.)

The effect of a judicial decision is primarily only to determine the rights of the parties; but inasmuch as such a decision, unless challenged, is a precedent for future decisions, and a law which the courts refuse to enforce has no sanction and therefore is without one of the fundamental attributes of a law, it follows that a rule established by the highest Court of Appeal must be recognized as authoritative, and that the decisions of that Court must be acquiesced in and conformed to by all persons as the final interpretation of the law.

"The judicial interpretation of the constitution is therefore the ultimate interpretation; but it must be given through the form of a case, and can therefore be given only upon such questions as form a proper subject for a case. Now, a case is a suit, and a suit can be brought only when some private relation is directly involved. The conclusion of political science from this view, held by the Court itself, must be that the decision of the Court really affects only the particular case and that the executive power may, without violating the Constitution, go on enforcing the nullified law in all instances where it is not successfully resisted through the courts. The general respect for judicial decision in the United States has, however, given to any particular judgment of the Supreme Court of the United States the force of a general rule, and has made it a part of our constitutional custom that the executive shall cease to undertake the further enforcement of a statute pronounced unconstitutional in any case." (Burgess, Political Sci. ii. 327. See also Pomeroy, Const. Law, §§ 138-9.)

Principles of Interpretation.—The rules of interpretation and construction of documents in general are outside the scope of this work. But the character of this Constitution involves certain special principles of construction which may be briefly alluded to. It has to be interpreted (1) as an Act of the Imperial Parliament; (2) as a Constitution; (3) as a Federal Constitution.

(1.) *As an Imperial Act.*—The Constitution of the Commonwealth is enacted as an Act of the Imperial Parliament, and is to be construed in accordance with the rules which regulate the construction of these Acts. (See Maxwell, Interpretation of Statutes; Hardcastle, Construction of Statutes.) In addition to the numerous rules which have been laid down by judicial decision, the Imperial Parliament has itself, by enactments which are now consolidated in the Interpretation Act, 1889 (52 and 53 Vic. c. 63), laid down certain rules by which the provisions of every Act of Parliament are, "unless the contrary intention appears," to be interpreted and construed. Only a few of the provisions of that Act are applicable to the Constitution of the Commonwealth; and before enumerating them it may be well to observe that the history of the Constitution, and current Australian usage with respect to any words or phrases found therein, may be important elements in ascertaining whether such "contrary intention" appears. The provisions of the Interpretation Act, 1889, which are likely to be of practical application to this Constitution are as follows:—

> 1. (1) In . . . every Act passed . . . after the commencement of this Act, unless the contrary intention appears—
>
> (*a*) words importing the masculine gender shall include females; and
>
> (*b*) words in the singular shall include the plural, and words in the plural shall include the singular.

3. In every Act passed . . . after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely,—
The expression "month" shall mean calendar month.

8. Every section of an Act shall have effect as a substantive enactment without introductory words.

12. In every Act passed . . . after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely,—
(5) The expression "The Privy Council" shall . . . mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council.

18. In every Act . . . passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely,—
(2) The expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.
(3) The expression "colony" shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

19. In this Act and in every Act passed after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.

32. (1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

34. In the measurement of any distance for the purposes of any Act passed after the commencement of this Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

(2.) *As a Constitution.*—Though an Act of Parliament, this Constitution is an Act of a very special character. It is a constitutional charter for a great and practically self-governing people; framed by them, accepted by them, amendable by them, and interpretable by them. As such a charter, it is of necessity expressed in broad and general terms, it deals with abstract political conceptions, it affects the most important individual and social relations; and it is of the most vital importance that it should receive, not a narrow and technical, but a broad and liberal construction.

"The Constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require." (Per Story, J., Martin *v.* Hunter's Lessee, 1 Wheat. at p. 326.)

"A Constitution, to contain an accurate detail of all the sub-divisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and would scarcely be embraced by the human mind. It would probably never be understood by the public.

Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." (Per Marshall, C.J., McCulloch *v.* Maryland, 4 Wheat at p. 407.)

"Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a Constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. (Per Strong, J., Legal Tender Cases, 12 Wall. at p. 531.)

"In the practical application of legal principles in the common affairs of life, the written agreement, the deed, the testament, the statute, are construed by the aid of the same rules, simply because they are written. The written Constitution, merely because it is written, can form no exception. The most that can be said is, that, as greater interests are involved which affect the State rather than the individual, all narrow and technical construction should, as far as possible, be avoided; the nature of the writing as an organic law should be allowed its full effect." (Pomeroy, Const. Law, § 18.)

(3.) *As a Federal Constitution.*—The Constitution of the Commonwealth is a Federal Constitution; it establishes a government of limited and enumerated powers. The Federal Parliament is not, like the British Parliament, sovereign; it is not even, like the Parliament of the colonies before Federation, invested with powers which, within its territorial jurisdiction, are practically sovereign; its authority is limited to specified subjects. The Constitution draws a line between the enumerated powers assigned to the Federal Government and the residue of powers reserved to the State Governments. Both sets of Governments are limited in their sphere of action; but within their several spheres they are supreme. (See Note, "Plenary Nature of Powers," § 160, *supra.*) The canons of interpretation applicable to such a Constitution as this, in order to determine the existence and extent of a power, have been clearly and logically laid down by Chief Justice Marshall and other American Judges. The guiding principle may be thus stated:—The Federal Government can have no power which, on a reasonable construction of the whole Constitution, has not been given expressly or by necessary implication. But when once it has been determined that the Federal Government has power over the subject matter, the scope of the power, and mode of giving effect to it, will receive a broad and liberal construction. The power of the Federal Parliament, though limited to specified objects, is plenary as to those objects. (Per Marshall, C.J., Gibbons *v.* Ogden, 9 Wheat. 1.)

"The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." (Per Story, J., Martin *v.* Hunter's Lessee, 1 Wheat. at p. 326.)

"If any one proposition could command the universal assent of mankind, we might expect that it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all: it represents all, and acts for all." (Per Marshall, C.J., McCulloch *v.* Maryland, 4 Wheat. at p. 405.)

"We admit, as we must all admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will

enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (Per Marshall, C.J., *ib.* at p. 421.)

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." (Per Marshall, C.J., Gibbons *v.* Ogden, 9 Wheat. at p. 187.)

"Now the doctrines laid down by Chief Justice Marshall, and on which the courts have constantly since proceeded, may be summed up in two propositions

"1. Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in the persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.

"2. When once the grant of a power by the people to the National government has been established, that power will be construed broadly. The strictness applied in determining its existence gives place to liberality in supporting its application. The people—so Marshall and his successors have argued—when they confer a power, must be deemed to confer a wide discretion as to the means whereby it is to be used in their service. For their main object is that it should be used vigorously and wisely, which it cannot be if the choice of methods is narrowly restricted; and while the people may well be chary in delegating powers to their agents, they must be presumed, when they do grant these powers, to grant them with confidence in the agents' judgment, allowing all that freedom in using one means or another to attain the desired end which is needed to ensure success." (Bryce, Amer. Comm. I. 368-9.)

American Cases.—For the way in which these principles have been applied to incidental and implied powers, see Notes, § 226, *supra*. A few other principles of construction laid down in leading American cases may be briefly noted.

Validity of Law.—"It is not on slight implication and vain conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability with each other." (Per Marshall, C.J., Fletcher *v.* Peck, 6 Cranch 87; and see Commonwealth *v.* Smith, 4 Binney [Penns.], 123.)

"It is incumbent, therefore, upon those who affirm the unconstitutionality of an Act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." (Per Strong, J., Legal Tender Cases, 12 Wall. at p. 531. See also United States *v.* Harris, 106 U.S. 629.)

It is a settled rule that statutes which are unconstitutional in part only will be upheld so far as they do not conflict with the Constitution, if the parts which are unconstitutional are separable. (Austin *v.* Aldermen of Boston, 7 Wall. 694; State Freight Tax Case, 15 Wall. 232; Packet Co. *v.* Keokuk, 95 U.S 80; Trade Mark Cases, 100 U.S. 582; Railroad Companies *v.* Schutte, 103 U.S. 118; Unity *v.* Burrage, 103 U.S. 447; Penniman's Case, 103 U.S. 714; Supervisors *v.* Stanley, 105 U.S. 305; Presser *v.* Illinois, 116 U.S. 252.) But this will not be done unless the valid and invalid parts are capable of separation so that each can be read by itself. (United States *v.* Reese, 92 U.S. 214; United States *v.* Harris, 106 U.S. 629; Virginia Coupon Cases, 114 U.S. 269; Baldwin *v.* Franks, 120 U.S. 678.) If the unconstitutional part cannot be rejected without giving to the rest of the statute a meaning which was not contemplated, the whole statute is void. (Spraigue *v.* Thompson, 118 U.S. 90. Baker, Annot. Const. p. 229.)

Restriction by Implication.—It is well established that when a power comes within the reasonable intendment of one clause in the Constitution, an express gift of a portion of the power, in another clause, will not be taken to cut the power down by implication. Thus in the Legal Tender Cases, 12 Wall. 457, it was held that the clause giving Congress express power "to coin money, regulate the value thereof, and of foreign coin," did not contain an implication that Congress had no other powers over the currency.

"If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive." (Per Strong, J., Legal Tender Cases, 12 Wall. at p. 544. See also United States *v.* Marigold, 9 How. 560; Rhode Island *v.* Massachusetts, 12 Pet. 657.)

Exception Marks Extent of Power.—"It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted – that which the words of a grant could not comprehend." (Per Marshall, C.J., Gibbons *v.* Ogden, 9 Wheat. at p. 191. See also Rhode Island *v.* Massachusetts, 12 Pet. 657.

Nature and Objects of the Power.—The Court should look to the nature and objects of the power, in the light of contemporary history, and give to the words of the Constitution such operation, consistent with their legitimate meaning, as to fairly attain the ends proposed. (Prigg *v.* Pennsylvania, 16 Pet. 539; Gibbons *v.* Ogden, 9 Wheat. 1) Consequently, though it is a general rule in the construction of statutes that extrinsic evidence, such as reference to the proceedings in Parliament, is not admissible to vary or add to the terms of a statute (Reg. *v.* Hertford College, 3 Q.B.D. 693; Richards *v.* M'Bride, 8 Q.B.D. 119), it would seem that the Debates of the Convention, or other contemporary records, may be referred to as a guide to the construction of the Constitution.

§ 331. "Arising Under Any Laws made by the Parliament."

In this sub-section the words of the United States Constitution have been accepted without the addition (as in sub-s. i.) of the words "or involving their interpretation;" but the difference seems not to affect the scope of the provision.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, within the scope of their constitutional authority, whether they constitute the right, or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted." (Story, Comm. § 1647.) A case may arise under the laws of the Commonwealth in a criminal as well as in a civil suit; and a case arises under a law when it arises under the implication of the law. (Tennessee *v.* Davis, 100 U.S. 257.)

§ 332. "Of Admiralty and Maritime Jurisdiction."

Secs. 2 and 3 of the (Imperial) Colonial Courts of Admiralty Act, 1890 (53 and 54 Vic. c. 27) contain the following provisions:—

2. (1) Every court of law in a British possession which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. . . .

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations.

(3) Subject to the provisions of this Act, any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court," or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof, and the Colonial Court of Admiralty shall have jurisdiction accordingly; provided as follows:—

(*a*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and

(*b*) A Colonial Court of Admiralty shall have under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court, and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and

(*c*) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which, according to the law of England, is punishable on indictment; and

(*d*) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea, or under any Act providing for the discipline of Her Majesty's Navy, than may be from time to time conferred on such court by Order-in-Council.

(4) Where a court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

3. The legislature of a British possession may by any Colonial law

(*a*) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and

(*b*) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit. Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

By s. 15 the expression "unlimited civil jurisdiction" is defined as meaning "civil jurisdiction unlimited as to the value of the subject matter at issue, or as to the amount that may be claimed or recovered."

By s. 16 it was provided that the Act should not come into force in New South Wales and Victoria until Her Majesty should so direct by Order-in-Council—which has not been done with respect to either colony. With these exceptions (and others which do not affect Australia) it was to come into force in "every British possession" on 1st July, 1891.

Accordingly, in New South Wales and Victoria there is still a Vice-Admiralty jurisdiction exercised by Imperial Courts under the Vice-Admiralty Courts Act, 1863 (26 and 27 Vic. c. 24), and the Vice-Admiralty Courts Act Amendment Act, 1867 (30 and 31 Vic. c. 45). For the history and extent of this jurisdiction see Webb, Imperial Law in Vic., p. 68. In every other Australian colony the Colonial Courts of Admiralty Act, 1890, has superseded and repealed the Vice-Admiralty Acts, and the Supreme Court of the colony is a Colonial Court of Admiralty accordingly. It remains to discuss the combined effect of this Constitution and of the Colonial Courts of Admiralty Act, 1890 both being Imperial statutes – on the jurisdiction of the States and of the Commonwealth in Admiralty matters.

Jurisdiction of Courts in States.—Until the Federal Parliament legislates under this section, the sole original jurisdiction in admiralty matters will rest with the Courts of Admiralty or Vice-Admiralty, as the case may be, in the several States. It seems clear that the constitution of those courts is not in any way affected by the establishment of the Commonwealth. The Constitution of each State, and the laws in force in each State, continue, subject to this Constitution (secs. 106, 108); and the identity of each State as a "British possession" remains unchanged notwithstanding the establishment of the Commonwealth.

"The object of the (British North America) Act was neither to weld the Provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy." (Per Lord Watson, delivering judgment of the Privy Council, Liquidators of Maritime Bank of Canada *v.* Receiver-General of New Brunswick (1892), App. Ca. at p. 441.) It seems clear that the above-mentioned Imperial Acts relating to Vice-Admiralty and Admiralty Courts continue to apply to the States individually, and that the existing Admiralty and Vice-Admiralty Courts may exercise the same jurisdiction as before. But the provisions of those Acts, so far as

they apply to colonies which become States of the Commonwealth, are in some respects over-ridden by the words of the Constitution.

In those States where, under the Colonial Courts of Admiralty Act, 1890, the Supreme Courts have an Admiralty jurisdiction, that jurisdiction is clearly subject to the provisions as to appeal contained in this Constitution, and the provisions as to appeal contained in the Colonial Courts of Admiralty Act are superseded and impliedly repealed with respect to such States. Moreover, the Admiralty jurisdiction of the Supreme Courts of the States is subject to sec. 77 of the Constitution; so that the Federal Parliament may, after investing the federal courts with such jurisdiction, make that jurisdiction to any extent exclusive, and thereby to a corresponding extent deprive the State courts of jurisdiction.

With respect to the Vice-Admiralty Courts at present established in New South Wales and Victoria, the application of sections 73 and 77 is more difficult Does an appeal lie from these Vice-Admiralty Courts to the High Courts, and can the Federal Parliament, under sec. 77, deprive these Courts of any part of their jurisdiction? The answer to these questions depends on the question whether these courts are included in the expressions "any other court of any State" in sec. 73, and "the courts of the States" in sec. 77. Now it does not seem that either of these Vice-Admiralty Courts can, without an undue stretching of the words, be called a Court "of a State." "The Vice-Admiralty Court is an Imperial Court, established by Commission of the Admiralty. The jurisdiction exercisable by it is an Imperial one, and is altogether independent of that of the Supreme Court and of a different nature—and it is not competent for the local legislature to deal either with the extent thereof or the practice and procedure observed therein." (Webb, Imperial Law in Vic., p. 68; Vice-Admiralty Courts Amendment Act, 1867 [Imp.], s. 16.) In short it would seem that the Vice-Admiralty Court is an Imperial Court "in" a State, and not, in any strict sense of the word, a court "of" a State; and therefore that there is nothing in sec. 73 to give the High Court an appellate jurisdiction. The same reasoning would apply to exclude the Vice-Admiralty Courts from liability to have their jurisdiction cut down under sec. 77. This construction is strengthened by the general presumption against ousting existing jurisdiction, or creating new jurisdictions. (See Maxwell, Interpr. of Statutes, Chap. V.) The difficulty, of course, may be removed at any time by the issue of Orders in Council, under the Imperial Act of 1890, directing the Act to be in force in New South Wales and Victoria, and thus superseding the Vice-Admiralty Courts altogether. On this question the case of Attorney-General of Canada *v.* Flint, 3 S.C. (Nova Scotia) 453; 16 S.C.R. (Can.) 707, and cited in Wheeler, Confed. Law of Canada, pp. 68-9, is instructive. A Dominion law, conferring jurisdiction on the Vice-Admiralty Court of Nova Scotia in prosecutions for certain penalties incurred under the Inland Revenue Act, was held to be constitutional. Henry, J., said (16 S.C.R. [Can.] p. 713):—

"Although the Vice-Admiralty Court is established by the authority of England, still I see nothing to prevent the Parliament of Canada, inasmuch as that Court sits within the jurisdiction of that Parliament, to give it power and authority to try Inland Revenue cases or cases connected with the customs. I would say, however, I do not think that Court could be obliged to perform such duty, and that it is a Court that could very well wrap itself up in its authority and say, 'Our other duties prevent us from assuming the functions assigned to us by the Parliament of Canada;' but it is ready to adopt the duty, and I see no reason why the Parliament of Canada should not have the power to impose it."

Original Jurisdiction of High Court.—The question next arises whether, in conferring original jurisdiction on the High Court, the Parliament is limited by the provisions of the Colonial Courts of Admiralty Act, 1890. Sec. 3 of that Act (cited above) empowers the Legislature of a British possession to "declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty." Under this provision, the Dominion Parliament in Canada has passed an Act (54 and 55 Vic. c. 29) declaring the Exchequer Court of Canada to be a "Colonial Court of Admiralty."

Under this Constitution, however, the Parliament has power, independently of the Colonial Courts of Admiralty Act, to confer Admiralty and maritime jurisdiction on the High Court; and it seems clear that the limitations imposed by that Act on the jurisdiction of "Colonial Courts of Admiralty" within the meaning of that Act, and upon colonial Parliaments legislating under the powers conferred by that Act, cannot be read into the plenary powers conferred by this section. Nevertheless, whatever may be the legal powers of the Commonwealth, it would probably be inexpedient, in conferring Admiralty jurisdiction on the High Court or other courts of federal jurisdiction, to go outside the limits defined by that Act, which may be taken as a guide to the reasonable limits of the jurisdiction.

Extent of Jurisdiction.—For the extent of the Admiralty jurisdiction in England, see Story, Comm. §§ 1663-73; Kent, Comm. i. 304, 354-80.

"The jurisdiction claimed by the Courts of Admiralty, as properly belonging to them, extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea, and to all maritime contracts, that is, to all contracts touching trade, navigation, or business upon the sea, or the waters of the sea, within the ebb and flow of the tide. Some part of this jurisdiction has been matter of heated controversy between the courts of common law and the High Court of Admiralty in England, with alternate success and defeat. But much of it has been gradually yielded to the latter, in consideration of its public convenience, if not its paramount necessity. . . . The Admiralty and maritime jurisdiction (and the word 'maritime' was, doubtless, added to guard against the narrow interpretation of the preceding word 'Admiralty') conferred by the Constitution, embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract. The first respects acts or injuries done upon the high sea, where all nations claim a common right and common jurisdiction; or acts and injuries done upon the coast of the sea; or, at furthest, acts and injuries done within the ebb and flow of the tide. The second respects contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches—one embracing captures, and questions of prize arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations." (Story, Comm. §§ 1665-6.)

In the United States, it has been held that the grant in the Constitution is neither to be limited to or interpreted by what were cases of Admiralty jurisdiction in England when the Constitution was adopted, but extends the power so as to cover every expansion of such jurisdiction. (Waring *v.* Clarke, 5 How. 441.)

All the navigable waters of the Atlantic coast which empty into the sea, or into bays and gulfs that form a part of the sea, are as much within the admiralty and maritime jurisdiction of the United States as is the sea itself. (Transportation Co. *v.* Fitzhugh, 1 Black, 574.) The jurisdiction is not confined to tide waters, but extends to all lakes and rivers where commerce is carried on between States or with foreign nations. (The *Genessee Chief v.* Fitzhugh, 12 How. 443.) All previous decisions limiting the Admiralty jurisdiction to tide waters are overruled, and the broad doctrine is announced that jurisdiction as conferred by the Constitution exists wherever ships float and navigation successfully aids commerce, whether internal or external. (The *Hine* v. Trevor, 4 Wall. 555.)

For other American cases on the Admiralty and maritime jurisdiction, see Baker, Annot. Const. pp. 124-6; also Commentaries of Story and Kent, passages cited above.

§ 333. "Relating to the same Subject-matter claimed under the Laws of Different States."

The corresponding words in the Constitution of the United States are:—"Controversies between citizens of the same State, claiming lands under grants of different States." The provision in this Constitution is considerably wider. It refers not to land alone, but to anything which may be the subject-matter of a suit; and the claim need not be made under grants of different States, but under "the laws of different States" generally. The absence of such words as "between citizens (or residents) of the same

State" not only simplifies the procedure, by requiring no allegation or proof of citizenship or residence, but extends the jurisdiction to cases where either party is not a citizen or resident of any State.

"The Federalist has remarked that the reasonableness of the agency of the national courts in cases in which the national tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the State to which they belonged. And where this has not been done, it would be natural that the judges, as men, should feel a strong predilection for the claims of their own Government. And, at all events, the providing of a tribunal having no possible interest on the one side more than the other, would have a most salutary tendency in quieting the jealousies and disarming the resentments of the State whose grant should be held invalid." (Story, Comm. § 1696.)

It has been held in the United States that "this jurisdiction attaches not only to grants made by different States which were never united, but also to grants made by different States which were originally united under one jurisdiction, if made since the separation, although the origin of the title may be traced back to an antecedent period." (Story, Comm. § 1696; Town of Pawlet *v.* Clark, 9 Cranch 292; Colson *v.* Lewis, 2 Wheat. 377.) Under the wider terms of this sub-section, the jurisdiction would seem to attach, in such a case, even though the grant had been made before the separation, if the claim at the time of action depended on the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections[334] the Parliament may make laws—

(i.) Defining the jurisdiction of any federal court other than the High Court[335]:

(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive[336] of that which belongs to or is invested in the courts of the States:

(iii.) Investing any court of a State with federal jurisdiction[337].

Historical Note.—In a somewhat different form, the whole of this section (except sub-s. iii.) was substantially contained in the Bill of 1891 (Ch. III. sec. 7), which enumerated the cases in which jurisdiction might be given.

At the Adelaide session, 1897, the clause was cast practically into its present form, except that the introductory limitation was worded "within the limits of the judicial power"—the "judicial power" referred to being defined in a previous clause. (Conv. Deb., Adel., p. 1203. See Historical Note, sec. 76.)

At the Melbourne session, on recommittal after the fourth Report, the section was altered by the Drafting Committee to accord with the two preceding sections. (Conv. Deb., Melb., pp. 348-9.)

The word "invested," in sub-s. ii., seems to have been substituted *per incuriam* in the Imperial Parliament, for "vested," which was the word in the Draft Bill.

§ 334. "With Respect to any of the Matters Mentioned in the Last Two Sections."

This section supplements the legislative powers given to the Parliament by the last section with respect to conferring jurisdiction on federal and State courts and limiting the concurrent jurisdiction of the State Courts. By these preliminary words the whole operation of the section is limited to the nine classes of matters enumerated in secs. 75 and 76. The cases in which jurisdiction may be given to the inferior federal courts and to the courts of the States are precisely the same as the cases in which original jurisdiction has been given, or may be given, to the High Court. It is to be observed, however, that the jurisdiction which may be given under this section is not restricted to "original jurisdiction." The matters in which jurisdiction may be given are those enumerated in the "original jurisdiction" clauses; but the jurisdiction which may be given in these matters, under this section, is apparently either original or appellate. (See Martin *v.* Hunter's Lessee, 1 Wheat. 304; Kent, Comm. i. 319; Story, Comm. § 1732.) It is thus possible that the inferior courts created by the Parliament may come to play a very important part in the federal judiciary. There may be established, not only courts of original jurisdiction corresponding to the District Courts of the United States, but also courts of appellate as well as original jurisdiction, corresponding to the Circuit Courts of the United States.

§ 335. "Defining the Jurisdiction of any Federal Court other than the High Court."

This sub-section deals with the jurisdiction of "such other federal courts as the Parliament creates" (s. 71). The High Court is created, and a great part of its jurisdiction is conferred, by the Constitution itself; but the inferior courts will depend wholly, for their existence and for their jurisdiction, on federal legislation. And of course the jurisdiction so given must be within the limits allowed by the Constitution. The following quotation from the opinion of the Supreme Court of the United States in Mayor *v.* Cooper, 6 Wall. at p. 252, is completely applicable:—"As regards all courts of the United States inferior to this tribunal, two things are necessary to create federal jurisdiction, whether original or appellate. The Constitution must have given the court the capacity to take it, and an act of Congress must have supplied it."

§ 336. "Defining the Extent to which the Jurisdiction of any Federal Court shall be Exclusive."

The Constitution, whilst it confers jurisdiction, or enables jurisdiction to be conferred, on the federal courts in certain cases, does not take away the pre-existing jurisdiction of the State courts in any of those cases. The consequence is that there remains a concurrent jurisdiction in the courts of the States in all those cases of federal jurisdiction which would have been within the competence of the courts of the States if no federal courts had existed. (See Note, § 326, *supra.*) It is obvious that some federal control over this concurrent jurisdiction is necessary; and in the United States it has been definitely settled that wherever the judicial power of the United States is not in its nature exclusive of State authority, it may at the election of Congress be made so. (See Kent, Comm. i. 397; Cooley, Const. Lim. 18.) This provision is, therefore, merely an explicit enactment of what in the Constitution of the United States is held to be implied.

The power to make the federal jurisdiction exclusive means the power to take jurisdiction away from the courts of the States, in all cases in which jurisdiction is given to the courts of the Commonwealth. But this power of taking away jurisdiction is confined, not only within the limits of "the matters mentioned in the last two sections,"

but within the narrower limits of the jurisdiction actually conferred on Federal Courts under those sections. That is to say, the Parliament can at once take away the jurisdiction of the State courts in matters enumerated in sec. 75 ; but it cannot take away the jurisdiction of the State courts in any matter enumerated in sec. 76 until it has first conferred that jurisdiction upon a federal court. The exclusion of the State jurisdiction must be founded on the establishment of the federal jurisdiction.

Concurrent Jurisdiction.—If a case be within the ordinary jurisdiction of a State Court, the Court may take cognizance of it notwithstanding that it arises under rights acquired by the Constitution or a law of the Commonwealth, provided of course that the jurisdiction of the State Court has not been excluded under this section. "State Courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the Constitution, the laws and treaties of the United States." (Kent, Comm. i. 397.) In Claflin *v.* Houseman, (93 U.S. 130) it was held that an assignee in bankruptcy, under the federal bankrupt law, might sue in a State Court. It was laid down that the laws of the United States are, within the limits of a State, as much the law of the land as are the laws of the State itself ; and that therefore the Courts of the State are competent to adjudge rights under them if the matter is otherwise within their jurisdiction and if Congress has not excluded that jurisdiction. The jurisdiction of the State Court in such cases was held not to be a new jurisdiction conferred by Congress, but a jurisdiction derived from the Constitution and laws of the State. (See Calhoun v. Lanaux, 127 U.S. 634.)

This doctrine applies to criminal as well as civil matters. In the case of offences against the laws of the Commonwealth, it appears that the Courts of a State may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal Courts. (Kent, Comm. i. 399.)

Where a Federal and a State Court have concurrent jurisdiction of a criminal matter, it has been held in the United States that a sentence either of acquittal or conviction by either court may be pleaded in bar of a prosecution before the other ; and the same principle applies in civil cases. (Houston *v.* Moore, 5 Wheat. 1 ; Kent, Comm. i. 399). A doubt arose in the same case whether, in case of a conviction by a State Court for a crime against the United States, the Governor of the State would have power to pardon, and so control the law and policy of the United States. It is submitted that in Australia such right would be undoubted. The prerogative of mercy rests with the Queen's Representative in the States as well as with her Representative in the Commonwealth ; and in the case of a sentence of a State Court must belong to the Governor of the State. (See sec. 70.)

§ 337. "Investing any Court of a State with Federal Jurisdiction."

Under the Constitution of the United States, the Congress cannot vest federal jurisdiction in any courts except those of its own creation—or at least, it cannot compel those courts to entertain such jurisdiction ; and acts of Congress purporting to vest such jurisdiction have been held unconstitutional. (See Kent, Comm. i. 400-404 ; and compare Attorney-General of Canada *v.* Flint 3 S.C. [Nova Scot.] 453 ; 16 S.C.R. [Can.] 707 ; cited Wheeler, Conf. Law of Canada, pp. 68-9.) This Constitution supplies the omission by giving the Federal Parliament a very full and complete power to invest the State Courts with jurisdiction in any or all of the matters enumerated in secs. 75 and 76.

It will be practicable under this section, should the Parliament so desire, to dispense altogether, at the outset, with the creation of any federal courts other than the High Court, and to assign to the courts of the States such federal jurisdiction as may be necessary in order to secure the proper administration of the judicial business of the Commonwealth. In this way it will be possible to dispense with unduly cumbersome

judicial machinery in the early years of the Commonwealth, and only develop and extend the national judicial system to meet the gradually increasing requirements of the people. But whilst federal functions may thus be exercised under federal authority, by State tribunals, the Federal Parliament can at any time revoke the authority, and transfer the whole of this subsidiary jurisdiction to courts of its own creation.

It is noteworthy that in this section, as elsewhere in the Constitution, the judicial department of the Commonwealth is more national, and less distinctively federal, in character, than either the legislative or the executive departments. The High Court, as has already been pointed out (§§ 288, 299, *supra*), is not only a federal, but a national court of appeal; it has appellate jurisdiction in matters of the most purely provincial character as well as in matters of federal concern. Confidence in the integrity and impartiality of the Bench prevents any jealousy or distrust of this wide federal jurisdiction; and the same confidence makes it possible to contemplate without misgiving the exercise of federal jurisdiction by State courts—subject, of course, to the controlling power of the Federal Parliament.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State[338] in respect of matters within the limits of the judicial power[339].

UNITED STATES.—The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State. (Amendment xi.)

HISTORICAL NOTE.—The Commonwealth Bill of 1891 contained the following clause (Ch. iii. sec. 7):—

"Nothing in this Constitution shall be construed to authorize any suit in law or equity against the Commonwealth, or any person sued on behalf of the Commonwealth, or against a State, or any person sued on behalf of a State, except by the consent of the Commonwealth, or of the State, as the case may be."

At the Adelaide session, 1897, at the instance of the Judiciary Committee, the clause of the 1891 Bill was adopted *verbatim*; but in committee, Mr. Barton proposed its omission. Mr. Glynn, who had prepared an amendment to allow Parliament to deal with the matter, fell in with this suggestion. No one defended the clause, and it was struck out. (Conv. Deb, Adel., pp. 989-90.)

At the Melbourne session, Mr. Glynn moved the insertion of a new clause as follows:—

"Proceedings may be taken against the Commonwealth or a State in all cases, within the limits of the judicial power, in which a claim against a subject might be maintained."

Mr. Symon thought the clause dangerously wide, and that the proper course was to give Parliament power to legislate with regard to proceedings against the Crown. He argued, however (dissenting from Mr. Glynn and Mr. Barton) that the Parliament would have this power even in the absence of express provision, as it was a mere matter of procedure. Sir John Downer supported the clause, as very properly abolishing the maxim "the Queen can do no wrong"—just as had been done in New South Wales by the Claims against Government Act, 1876. Mr. Dobson preferred the clause as it stood to Mr. Symon's suggestion. Mr. O'Connor thought it a matter not of procedure merely, but of prerogative right, which could not be taken away without express words; and he proposed, as an amendment to Mr. Glynn's proposition, the clause which now stands in the Constitution. After further debate, Mr. O'Connor's amendment was carried. (Conv. Deb., Melb., pp. 1653-79.)

§ 338. "Rights to Proceed against the Commonwealth or a State."

Remedies against the Crown.—"It is an ancient and fundamental principle of the English Constitution, that the king can do no wrong." (Broom's Maxims, p. 53.) One consequence of this principle is that no suit or action, even in respect of civil matters, can—apart from statute—be brought against the sovereign. "Indeed, his immunity, both from civil suit and from penal proceeding, rests on another subordinate reason also, viz., that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the Crown itself. But who, says Finch, shall command the king?" (Steph. Comm. ii. 480.) In England there are ancient remedies by petition of right and by *monstrans de droit*, by which a subject who has a claim against the Crown, in respect of property or arising out of contract, may obtain redress as a matter of royal grace. In 1860, by the (Imperial) Act 23 and 24 Vic. c. 34, the remedy by petition of right was practically assimilated to the ordinary procedure by action at law or suit in equity, and was made triable in any Superior Court of appropriate jurisdiction; so that in cases where a petition of right lies, there is substantially a right of suit against the Crown, in the guise of a petition.

In some of the Australasian colonies more extended rights of proceeding against the Crown have been conferred. Thus in New South Wales, under the Claims Against the Colonial Government Act, 1876, any person making a claim against the Government may petition the Governor to appoint a nominal defendant, and in default of such appointment the Colonial Treasurer shall be the nominal defendant. The claimant may sue the nominal defendant at law or equity in any competent court, may obtain judgment or costs as in an ordinary case between subject and subject, and in default of payment may levy execution upon the property of the Government. In Queensland, the Claims Against Government Act, 1866, is to the same effect. For the history of these Acts, see *Sydney Morning Herald*, 10 August, 1867, 17 April, 1875. It has been held by the Privy Council that under the New South Wales Act an action will lie for torts committed by the servants of the Crown. (Bowman *v.* Farnell, 7 N.S.W. L.R. 1; *sub nomine* Farnell *v.* Bowman, 12 App. Ca. 643.) Sir Barnes Peacock, delivering the judgment of the Judicial Committee, made the following pertinent remarks on the policy of allowing suits against the Crown in the colonies:—

"It must be borne in mind that the local Governments in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to colonial governments in the way now contended for by the appellants, it would work much greater hardship than it does in England." (12 App. Ca. at p. 649.)

In New Zealand, under the Crown Suits Act, 1881, actions may be maintained against the Crown for breach of any contract entered into by the Government, and also for torts committed under the authority of the Government in connection with any public work. (See Reg. *v.* Williams, 9 App. Ca. at p. 432.) In Western Australia, the Crown Suits Act, 1898, is to a similar effect.

In Tasmania, under the Crown Redress Act, 1891, any one having a claim against the Queen in respect of any contract entered into by the Government of Tasmania, or in respect of any act or omission of any officer, agent, or servant of the Government, which would between subject and subject be the ground of an action at law or a suit in equity, may file in any court of competent jurisdiction a supplication in the form of a declaration at law or bill in equity, which is to be pleaded to by the Attorney-General, and tried like an action or suit between subjects. If judgment is against the Crown, no execution is to issue, but the suppliant is entitled to a certificate of judgment, which authorizes payment of damages and costs out of the Consolidated Revenue Fund.

In Victoria and South Australia there is no remedy against the Crown for torts, and the remedy in contract is by petition. (See Crown Remedies and Liability Act, 1890 Victoria], and Claims Against Government Act, 1853 [South Australia].)

The Governments both of the Commonwealth and the States represent the authority of the sovereign in the Commonwealth and in the States respectively; and a suit against the Commonwealth or a State is therefore a suit against the Crown. Without the consent of the Crown, given in the proper way, no such suit would lie.

Suits against the Commonwealth.—That the Federal Parliament should have the power to make laws conferring rights to proceed against the Commonwealth is a proposition which will hardly be disputed. Probably it would have had such power, even without express words; inasmuch as the prerogative right of the Crown in the Commonwealth exempting it from suit is a right which can be waived by the consent of the Crown, and legislation by the Federal Parliament, of which the Crown is a part, would be an appropriate mode of giving such consent. Thus in the United States it has never been disputed that Congress has power to consent by law to the federal government being sued. (Per Marshall, C.J., Cohens *v.* Virginia, 6 Wheat. 412; Kendall *v.* United States, 12 Pet. 524; Hill *v.* United States, 9 How. 386; Kent, Comm. i. 297.) But it is unnecessary to consider whether this would have been among the implied legislative powers of the Parliament; because this section gives the power in express terms.

Suits against a State.—It is clear that each State retains the power which it has always possessed to make laws conferring rights of procedure against itself. That, however, is not sufficient. Under the Constitution, there are duties cast upon the States which the federal judiciary ought to have power to enforce at the suit of any person injured; such for instance as the duty of not subjecting the residents of other States to disabilities or discriminations (sec. 117), and the duty of giving full faith and credit to the laws, &c., of every State (sec. 118). If each State were free to allow or not to allow itself to be sued in matters of federal jurisdiction, the federal courts might find themselves powerless in such matters; and therefore the Federal Parliament has been empowered to confer rights of proceeding against a State in respect of matters "within the limits of the judicial power."

The Constitution of the United States was formerly silent on this point, and in the famous case of Chisholm *v.* Georgia, 2 Dall. 419, the question arose whether the Constitution conferred the right to sue a State. It was decided that it did; but the decision aroused such a storm of indignation in Georgia and in the other States that the eleventh amendment was passed, declaring that the judicial power should not be construed to extend to suits against a State by citizens of another State, or by citizens or subjects of a foreign State. (See § 324, *supra*; Kent, Comm. i. 297; Story, Comm. § 1683.)

§ 339. "Within the Limits of the Judicial Power."

"The judicial power" here has a narrower meaning than in sec. 71, where it includes the whole appellate power of the High Court—a power not limited in respect of "matters." It must in fact be taken as equivalent to the expression in sec. 77, "in respect of matters mentioned in the last two sections"—in other words, as referring to matters in which *original* jurisdiction may be given to the federal courts. As a matter of fact, in the Adelaide draft the words "within the limits of the judicial power" were used in both this and the preceding section, and the words "judicial power" were used in the original jurisdiction clauses. It was recognized, however, that the expression—though apt enough in the Constitution of the United States, where the scope of the whole judicial power, appellate as well as original, is strictly limited—was inapt in this Constitution, where the appellate power is general; and therefore in secs. 75-77 the Drafting Committee substituted words which made it clear that original jurisdiction only was referred to. In this section, however, the phrase was left, apparently by an

oversight. In sec. 71 the phrase "judicial power" is correctly applied as meaning the whole of the power vested in the federal judiciary (see § 286, *supra*); here it is used somewhat loosely. There can be no doubt, however, as to the meaning of the section. The power of the Federal Parliament to confer rights of proceeding against a State is strictly limited to those cases of specially federal cognizance enumerated in secs. 75 and 76.

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

HISTORICAL NOTE.—The clause was originally framed by the 1891 Convention, and has only been verbally amended since then. (Conv. Deb., Adel., p. 787; Melb., pp. 349-50.)

Trial by jury.

80. The trial on indictment[340] of any offence against any law of the Commonwealth[341] shall be by jury[342], and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

UNITED STATES.—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.—Const., Art III., sec. 2, sub-s. 3.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law. (Amendment V.)

HISTORICAL NOTE.—The first part of the clause, as framed and passed in 1891, ran "The trial of all indictable offences cognizable by any Court established under the authority of this Act shall be by jury."

At the Adelaide session, 1897, the clause was introduced almost verbatim as in 1891. Mr. Higgins opposed the clause, on the ground that the question of trial by jury might safely be left to the Federal Parliament; but it was agreed to. (Conv. Deb., Adel., pp. 990-1.)

At the Melbourne session an amendment suggested by the Legislative Assembly of South Australia, to omit the requirement that trial should be by jury, was supported by Mr. Glynn and Mr. Higgins. Mr. Wise supported the clause, as a necessary safeguard of individual liberty. Mr. Isaacs thought the clause afforded little guarantee, as it might be evaded by a technicality. After further debate, the amendment was negatived on division by 17 votes to 8. An amendment by Mr. Higgins, to insert "unless Parliament otherwise provides" before the words "be held in the State where," was negatived. Before the first report, the clause was verbally amended by the Drafting Committee. (Conv. Deb., Melb., pp. 350-4.) On recommittal after the first report, the words "trial of all indictable offences" were, on Mr. Barton's motion, altered to "trial on indictment of any offence." The object was to allow summary punishment of minor offences and contempts, even though they might be indictable. Mr. Isaacs thought that the clause, in either form, would have little real effect. (Conv. Deb., Melb., pp. 1894-5.)

§ 340. "The Trial on Indictment."

The Trial.—It has been held in the United States that the word "trial" means the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial. (United States *v.* Curtis, 4 Mason 232.),

It would seem that this provision is only intended to apply to trials in federal courts, and courts exercising federal jurisdiction; and not to extend to the courts of the States in those cases in which they may have a concurrent jurisdiction to try offences against the laws of the Commonwealth. With regard to the corresponding provision of the Constitution of the United States (set out above), Miller, J., in Eilenbecker *v.* District Court, 134 U.S. at p. 35, said:—

"This article is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that all crimes . . . shall be by jury. It is impossible to examine the accompanying provisions of the Constitution without seeing very clearly that this provision was not intended to be applied to trials in the State Courts."

"As the Constitution of the United States was ordained and established by the people of the United States, for their own government as a nation, and not for the government of the individual States, the powers conferred, and the limitations on power contained in that instrument, are applicable to the Government of the United States, and the limitations do not apply to the State Governments unless expressed in terms." (Kent Comm. i. 407; Barron *v.* Baltimore, 7 Peters, 243.)

On Indictment.—The constitutional requirement of trial by jury only applies when the trial is "on indictment;" and there is no provision, corresponding to the Fifth Amendment of the United States Constitution, that all capital or infamous crimes must be tried on indictment. As was pointed out by Mr. Isaacs (Conv. Deb., Melb., p. 1894), "it is within the powers of the Parliament to say what shall be an indictable offence and what shall not. The Parliament could, if it chose, say that murder was not an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury."

It is submitted that, according to general usage in Australia, "indictment" includes an information filed by the Attorney-General or other proper officer for the prosecution of an indictable offence. In England, an indictment in the strict sense is "a written accusation of one or more persons of a crime presented upon oath by a jury of twelve or more men, termed a grand jury." (Chitty, Crim. Law, i. 167.) An indictment by a grand jury is in England "the most usual and constitutional course for bringing offenders to justice on criminal charges" (Broom, Com. Law, p. 1047); whilst an *ex officio* information by the Attorney-General is only employed in the case of offences of peculiar public danger. Accordingly it has been held that the word "indictment" occurring in a particular statute did not include an *ex officio* information. (Reg. *v* Slator, 8 Q.B.D. 267.) In some Acts, however, for instance, 14 and 15 Vic. c. 100, s. 30, "indictment" is defined as including information. And "indictment" includes inquisition. (2 Hale, 155; Withipole's Case, Cro. Car. 134; Maxwell, Interpr. of Stat. p. 456.)

In New South Wales and Van Diemen's Land, by the Constitution Act of 1828 (9 Geo. IV. c. 83, s. 5) it was provided that "until further provision be made as hereinafter directed for proceeding by juries," all offences cognizable in the Supreme Courts of those colonies should be "prosecuted by information in the name of His Majesty's Attorney-General, or other officer duly appointed for such purpose by the Governor of New South Wales and Van Diemen's Land respectively," and that such information should be tried before a Judge and seven naval or military officers. By sec. 10 the Legislatures of the two colonies respectively were authorized to "extend and apply the form and manner of proceeding by grand and petit juries." It was doubtless contemplated that when the colonies became ripe for the jury system, the procedure by information would be superseded by indictment before a grand jury; but in both colonies an information in the name of the Attorney-General continues to be the usual mode of prosecuting indictable offences, and the information is called, in the

Statute book and in common parlance, an "indictment." The same is the case in Queensland. (See Crim. Law Amendment Act of 1883 [N.S.W.], s. 3; Crim. Practice Act, 1865 [Queensland], s. 76.) In South Australia and Western Australia grand juries were instituted for a time, but were abolished in 1865 and 1883 in those colonies respectively, an information by the Attorney-General, in lieu of a grand jury, being substituted. In Victoria there is provision made for indictment by grand juries; but the most usual form of prosecuting indictable offences is by "presentment" by the Attorney-General. (See Crimes Act 1890 [Vic.], ss. 387-9.)

In all the Australian colonies, therefore, indictable offences are prosecuted in the name of the Attorney-General by a procedure variously known as information, presentment, or indictment, and chiefly differing from an indictment in being found by a law officer instead of by a grand jury. It seems clear that the words "on indictment" would extend to any such form of prosecution as this. The distinction intended by the section is between indictable offences and offences punishable in a summary way; and its operation ought, therefore, to extend to all prosecutions which are substantially in the nature of an indictment.

§ 341. "Any Offence Against any Law of the Commonwealth."

Offence.—The word "offence" has no special technical meaning in law. It is a general word signifying a public wrong, and includes all crimes and misdemeanours, whether indictable or punishable by summary conviction.

Any Law of the Commonwealth.—The phrase "any law of the Commonwealth" includes, in the first place, the Constitution itself; which is not only a law of the Commonwealth, but in a sense, and with the reservation of the supremacy of the British Parliament, may be called the supreme law of the Commonwealth. It includes, in the next place, the laws of the Federal Parliament; which, together with the Constitution, are "binding on the courts, judges, and people of every State, and of every part of the Commonwealth." (Constitution Act, clause v.)

Common Law Offences.—It is submitted that the words "offence against any law of the Commonwealth" would cover also any common law offence against the Commonwealth which the Federal Courts may have jurisdiction to try. (See sec. 326, *supra*.) So far as the common law can be relied upon by the Commonwealth and in relation to the affairs of the Commonwealth, it would seem to be, equally with federal statutes, the law of the Commonwealth. As examples of common law offences against the Commonwealth which might be indictable, even in the absence of federal legislation, the following are suggested:—Bribery of a public officer is a common law offence, and indictable as a misdemeanour. (Reg. *v.* Lancaster, 16 Cox, 737.) Any act of fraud upon a public officer, with intent to deceive, whereby a matter required by law for the accomplishment of an act of a public nature is illegally obtained, is an indictable misdemeanour. (Reg. *v.* Chapman, 2 Car. and K. 846; 1 Den. 432; 18 L.J. M.C. 152.) Being in possession of coining tools, with intent to use them, is a common law misdemeanour. (Rex *v.* Sutton, 1 East P.C. 172.) So is procuring base coin, with intent to utter it. (Rex *v.* Fuller, R. and R. 308.)

Acts Prohibited.—The Constitution is an Imperial Statute, and both it and the laws of the Parliament made under it are the law of the land. Accordingly the wilful doing of any act expressly prohibited by the Constitution or laws, even though not declared punishable, is a misdemeanour.

"Where an offence is not so at common law, but made an offence by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. Thus, an unqualified person may be indicted for acting as an attorney contrary to the 6 and 7 Vic. c. 73, sec. 2, although sec. 35 and sec. 36 enact that in case any person shall so act he shall be incapable of recovering his fees, and such offence shall be

deemed a contempt of court, and punishable accordingly." (Russell on Crimes, 5th ed. i. 192.)

"Wherever a statute forbids the doing of a thing, the doing of it wilfully, although without any corrupt motive, is indictable." (*Id*; Rex. *v.* Sainsbury, 4 T.R. 457.) Accordingly the provision that "each elector shall vote only once" (secs. 8, 30) is an express provision against plural voting, and any elector voting more than once at a federal election will be guilty of a misdemeanour. (Conv. Deb., Adel., p. 1183.)

§ 342. "By Jury."

This provision guarantees not merely the form of trial by jury, but all the substantial elements of trial by jury, as they exist at common law. (Walker *v.* New Mexico and S.P. Railroad, 165 U.S. 593.) "Unanimity was one of the peculiar and essential conditions of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right." (American Publishing Co. *v.* Fisher, 166 U.S. at p. 467; Springville *v.* Thomas, 166 U.S. 707.) "Trial by jury, in the primary and usual sense of the term at common law and the American Constitution, is a trial by a jury of 12 men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts, and (except upon acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the evidence." (Capital Traction Co. *v.* Hof, 174 U.S. 1.) In the last-mentioned case it was also decided that the provisions of the Constitution as to trial by jury extend to the federal district of Columbia.

A jury means a jury composed, as at common law, of twelve men. (Thompson *v.* Utah, 170 U.S. 343; Maxwell *v.* Dow, 176 U.S. at p. 586.)

"The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbours, fellows, associates, persons having the same legal status in society, as that which he holds. Blackstone, in his Commentaries, says:—'The right of trial by the jury, or the country, is a trial by the peers of every Englishmen, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.'" (Strauder *v.* West Virginia, 100 U.S. 303.)

CHAPTER IV.—FINANCE AND TRADE.

Consolidated Revenue Fund.

81. All revenues or moneys[343] raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund[344], to be appropriated for the purposes of the Commonwealth[345] in the manner and subject to the charges and liabilities imposed by this Constitution[346].

CANADA.—All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have the power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.—B.N.A. Act, sec. 102. And see Constitutions of Aust. Colonies.

HISTORICAL NOTE.—As originally drafted and passed in 1891, the clause read :—

"All duties, revenues, and moneys . . . to be appropriated for the public service of the Commonwealth . . . subject to the charges provided by this Constitution."

At the Adelaide session, 1897, the clause was introduced in the same form. On Sir John Downer's motion, the words "duties" and "moneys" were omitted, to make it clear that loan moneys do not go to the Consolidated Revenue Fund. (Conv. Deb., Adel., pp. 834-5.) At the Melbourne session there was a general debate on the report of the Finance Committee (p. 197, *supra*). A suggestion of the Legislative Council of Tasmania, to restore "and moneys," was negatived. (Conv. Deb., Melb., pp. 774-900.) Drafting amendments were made before the first Report: The words "or moneys" were inserted, the word "purposes" was substituted for "public service," and the words "and liabilities" were inserted, to make it clear that the payments to the States, under secs. 89 and 93, were included.

§ 343. "All Revenues or Moneys."

In the corresponding clauses of the Constitutions of the Australian colonies—and, it is believed, of all British colonies—the word "moneys" is not used: the usual words associated with "revenues" being "duties," "taxes," &c. In this Constitution the word "moneys" was struck out in Adelaide, to make it clear that loan moneys were not included, and a suggestion to restore it was negatived at Melbourne for the same reason (see Hist. Note, *supra*); but at a subsequent drafting stage it was reinserted for some reason that is not apparent. It cannot, however, be supposed that the Convention meant that loan moneys should be paid into the Consolidated Revenue Fund. (See Conv. Deb., Melb., p. 1114.) The generic word "moneys" must be controlled by the preceding specific word "revenues," and limited to moneys in the nature of revenue. This is a well-known and sound principle of construction. (See Maxwell, Interpr of Statutes, chap. XI., sec. v.)

The universal constitutional practice, not only of Great Britain, but of all the British colonies, to keep loan funds distinct from revenue funds, is the strongest possible corroboration of the evidence afforded by the debates, that there was no intention whatever of departing from established usage in this respect.

"Revenue is the annual yield of taxes, excise, customs duties, rents, &c., which a nation, state, or municipality collects and receives into the treasury for public use." (Webster, Internat. Dict.) It includes not only revenue from taxation, but all revenue received by the Government as payment for services rendered—such as the revenue of the post and telegraph department. It also includes all payments in the nature of penalties, or fees for licenses, &c., and in fact every kind of public income.

§ 344. "Consolidated Revenue Fund."

In 1787, by the Imperial Act 27 Geo. III. c. 13, the numerous revenues of the Crown in the United Kingdom were brought together into a "Consolidated Fund," into which flows every stream of the public revenue, and whence issues the supply for every public service. (See May, Parl. Practice, p. 558.) In the Australian colonies the land revenues were for many years kept distinct from the general revenues; but on the grant of responsible government a Consolidated Revenue Fund was created in each colony. This feature of financial administration, universal in all the self-governing parts of the Empire, is reproduced in this Constitution.

§ 345. "To be Appropriated for the Purposes of the Commonwealth."

For notes on appropriation, see § 350, *infra*. "The purposes of the Commonwealth" include the payments to the States made by virtue of the Constitution. The States being "parts of the Commonwealth," expenditure by the federal government in pursuance of its constitutional liability to the States is as much a "purpose of the Commonwealth" as its expenditure upon the services of the federal government.

§ 346. "Subject to the Charges and Liabilities Imposed by this Constitution."

This is a stock provision, to be found in all the colonial Constitutions; except that the word "liabilities" is new, and is intended to meet the peculiar conditions of Commonwealth finance. The Consolidated Revenue Fund is, for purposes of collection and receipt, as much a single fund as the Consolidated Fund of the United Kingdom, or of any of the British colonies. But for purposes of appropriation, it is subject, under the distribution clauses of the Constitution, to somewhat rigid financial provisions, which constitute "liabilities" imposed upon the residue of the fund, after the charges upon it for federal expenditure have been satisfied.

The charges and liabilities imposed by the Constitution are:—(1) The costs, charges, and expenses incident to collection, management, and receipt (sec. 82); (2) the other expenditure of the Commonwealth (sec. 82); (3) any financial assistance which, during the currency of sec. 96, the Parliament may think fit to provide out of revenue; (4) the payments of surplus revenue to the States, on the basis prescribed for the time being (secs. 89, 93, 94).

Expenditure Charged Thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon[347]; and the revenue of the Commonwealth[348] shall in the first instance be applied to the payment of the expenditure of the Commonwealth[349].

CANADA.—The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon.—B N.A. Act, sec. 103; and see Constitutions of the Australian Colonies.

Historical Note.—The clause as originally adopted in the Commonwealth Bill, 1891, followed the wording of the Canadian clause; and the words "The revenue of the Commonwealth shall be applied in the first instance in the payment of the expenditure of the Commonwealth" were prefixed to clause 9 (apportionment of surplus revenue).

At the Adelaide Session, 1897, the clause was introduced and passed as in 1891, but with the words "and the revenue . . . . . Commonwealth" transferred from clause 9.

At the Melbourne Session, a suggestion of the Legislative Assembly of New South Wales, to omit the concluding words, was considered. Dr Quick pointed out that the clause might be regarded as a permanent special appropriation, dispensing with the need of Appropriation Acts—an argument which had been raised on sec. 45 of the Victorian Constitution Act. Mr. Barton promised consideration by the Drafting Committee. (Conv. Deb., Melb., p. 901; and see pp. 907-8.)

Drafting amendments:—Before the 1st Report, the word "permanently" was omitted to meet the objection. After the 4th Report, the clause was recast.

§ 347. "Shall Form the First Charge Thereon."

These words are not intended to create, and, it seems, do not create, a special appropriation of the expenses of collection, which must therefore be authorized by Appropriation Act like any other expenditure of the Commonwealth. (See Conv. Deb., Melb., pp. 900-1, 907-8; and Historical Note, *supra*.)

§ 348. "The Revenue of the Commonwealth."

"The revenue of the Commonwealth" is apparently synonymous with the expression in sec. 81, "all revenues or moneys raised or received by the Executive Government of the Commonwealth." (See Notes, § 343, *supra*.)

§ 349. "The Expenditure of the Commonwealth."

The phrase "expenditure of the Commonwealth" (which occurs again in sec. 89; and see secs. 87, 93) means all moneys expended for the public service of the Commonwealth. It includes the expenses of collection; so that the provision that "the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth" is not inconsistent with the provision that the expenses of collection shall be a first charge on the Consolidated Revenue Fund.

Money to be Appropriated by Law.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law[350].

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

United States.—No money shall be drawn from the Treasury, but in consequence of appropriations made by law.—Art. I., sec. 9, subs. 6.

Canada.—Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.—B.N.A. Act, sec. 106; and see Colonial Constitutions: *e.g.*, Const. of N.S.W., sec. 53.

Historical Note.—The clause as passed in 1891 consisted of the first paragraph only. Mr. Thynne proposed to add "and for purposes authorized by this Constitution" in order to limit expenditure to those purposes. The amendment was negatived, as being unnecessary. (Conv. Deb., Syd. [1891], pp. 788-9.)

At the Adelaide Session, 1897, the draft of 1891 was followed, with the addition of the words "and by warrant countersigned by the Chief Officer of Audit of the Commonwealth." (Conv. Deb., Adel., p. 835.)

At the Melbourne Session, the Finance Committee recommended the omission of the provision for warrant on the ground that there would be no Officer of Audit at first, and that it was a matter for legislation. On Sir Geo. Turner's motion the omission was agreed to. Dr. Quick proposed to add "but section 82 [Consol. Rev. Fund] shall not be deemed to constitute such an appropriation." The amendment was withdrawn for consideration by the Drafting Committee. (See Historical Note to sec. 81.) Mr. Glynn suggested that there should be provision for audit; which Mr. Barton promised to consider. (See sec. 97, Conv. Deb., Melb., pp. 774, 901-9.)

§ 350. "Appropriation Made by Law."

With the temporary exception prescribed in the second paragraph of the section, the provision that no money shall be drawn from the Treasury "except under appropriation made by law" is absolute and general. Where no appropriation is effected by the Constitution itself, every appropriation—whether for expenditure for federal services, or for payments to the States—must be made by a law of the Federal Parliament.

Appropriations are of two kinds—special (or permanent) and annual. Those payments which it is not desirable to make subject to the annual vote of Parliament are specially appropriated, once for all, by a permanent Act. Such payments, for instance, are the salaries and pensions of Judges, the interest on the public debt, and certain endowments. Such, too, are the payments provided for in the "civil lists" set out in the Schedules to the Constitutions of the several colonies. But by far the greater bulk of the public expenditure is usually appropriated by annual votes comprised in the Appropriation Bill.

Special Appropriations.—There are several sections of the Constitution which clearly constitute special appropriations. Among these are sec. 3, which declares that there shall be payable to the Queen out of the Consolidated Revenue Fund, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be £10,000; sec. 48, which declares that, until the Parliament otherwise provides, every member of either House shall receive an allowance of £400 a year; and sec. 66, which declares that there shall be payable to the Queen, out of the Consolidated Revenue Fund, for the salaries of Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed £12,000 a year. The opinion has already been expressed (see Notes, § 347, *supra*) that sec. 82 does not constitute a special appropriation of the costs of collecting the federal revenue, or the general expenditure of the Commonwealth.

The view also appears to be justified, both as a matter of construction and by considerations of expediency, that the provisions of secs. 89 and 93, requiring the Commonwealth, after crediting revenue and debiting expenditure to the several States, to pay the balances monthly to the several States, amount to a special appropriation. It may indeed be argued that this is merely a direction to the Federal Parliament to appropriate the balances to the several States, and is not in itself an appropriation. This view, however, seems hardly satisfactory. The period of these payments is determined, and the amount is made ascertainable, by the Constitution itself. An appropriation by the Federal Parliament could do no more than confirm the provisions of the Constitution, and such confirmation seems quite unnecessary. Moreover, the payments are to be made monthly from the establishment of the Commonwealth; and the first payments will be due before the Federal Parliament can possibly meet. Sec. 83 makes provision for the payments necessary for maintaining the federal departments during that interval, and for holding the first federal elections, without any Parlia-

mentary appropriation; but no such provision is made with regard to payments to the States; and it seems that the necessity for Parliamentary appropriation of these payments was not contemplated.

Procedure.—The procedure in connection with the granting of supply is largely dependent on Standing Orders. The details of procedure differ in many respects in the different Legislatures within the Empire; but the general features are much the same, and it may be assumed that they will be followed in the Parliament of the Commonwealth. The Treasurer will first bring down into the House of Representatives the estimates of expenditure, with a message from the Governor-General (see sec. 56). In Committee of Supply, each vote or resolution in the Estimates, and each item therein, may be discussed, and may be reduced or omitted; but the Committee of Supply cannot increase any grant which has been recommended by the Governor-General. When the grants have been voted by the Committee of Supply, resolutions will be moved in Committee of Ways and Means, to the effect that, towards making good the supply granted, a certain sum be granted out of the Consolidated Revenue Fund. These resolutions having been reported and agreed to by the House, the Appropriation Bill will be introduced and passed, and forwarded to the Senate. (For the Senate's powers in regard to it, see sec. 53.) The Appropriation Act, when duly assented to, will give legal effect to the resolutions of the Committees. Upon a proper warrant from the Governor-General, which will give final validity to a grant of supply, the Treasurer will make the issues to meet those grants out of the Consolidated Revenue Fund. (See May, Parl. Practice, Ch. XXII.; Bourinot, Parl. Procedure, Ch. XVII.)

It is sometimes impracticable, owing to the conditions of Parliamentary business, to deal with the estimates before the financial year begins; and in order to meet the immediate demands of the Public Service, "votes on account" are authorized by Temporary Supply Bills as occasion may require. In the British Parliament, votes on account for the first months of the financial year are now the invariable practice; and they have also been frequently employed in the different Australian Parliaments. In Canada, on the other hand—where the Dominion Parliament meets in January, and the financial year ends on 30th June—they are rarely resorted to. (Bourinot, Parl. Procedure, p. 576.)

Preliminary Expenses.—From the day of the establishment of the Commonwealth, revenue will be collected by the Federal Government, and expenditure will be ncurred; but no statutory appropriation can be made until the Federal Parliament has met. During this interval, and for a month after the meeting of Parliament, the necessity for such appropriation is suspended to the extent of any payments necessary for the maintenance of the transferred departments and for the conduct of the federal elections. As to the question whether the expenses of elections for the Senate are to be borne by the Commonwealth, see note, § 74, *supra*.

Transfer of Officers[351].

84. When any department[352] of the public service of a State becomes transferred to the Commonwealth, all officers of the department[353] shall become subject to the control of the Executive Government of the Commonwealth[354].

Any such officer who is not retained[355] in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.

Any such officer who is retained[356] in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer[357] who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

CANADA.—Until the Parliament of Canada otherwise provides, all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties, as if the Union had not been made.—B.N.A. Act, sec. 130.

HISTORICAL NOTE.—The clause as drafted and passed at the Sydney Convention, 1891, merely provided that all officers of the transferred departments should become subject to the control of the Federal Executive, and that their existing rights should be preserved. Mr. Gordon moved to add "But the Commonwealth shall not be responsible for any pensions agreed to be paid by the States." This was negatived. (Conv. Deb, Syd., 1891, pp. 801-2.)

At the Adelaide Session, 1897, the draft of 1891 was followed, except that in place of the provision as to existing rights the following words were added: "and thereupon every such officer shall be entitled to receive from the State any gratuity, pension, or retiring allowance payable under the law of the State on abolition of his office." It was pointed out in Committee that different provision was needed for those who were retained and those who were not: also that accruing as well as existing rights ought to be preserved. The clause was postponed, and afterwards an amendment moved by Mr. Barton was agreed to, providing that officers not retained in the service should receive from the State the proper compensation on abolition of office, whilst officers retained should eventually be entitled to a retiring allowance to be paid by the Commonwealth and the State jointly. On Mr. Deakin's motion, words preserving the existing and accruing rights of such officers were added. (Conv. Deb. Adel., pp. 866-70, 1444-51.)

At the Melbourne Session, a suggestion by the Legislative Assembly of Western Australia, to insert the words "unless he is appointed to some other office in the State," was considered, and formally negatived on the understanding that it would be considered by the Drafting Committee. (Conv. Deb., Melb., pp. 990-8.) A re-draft was subsequently adopted, the last paragraph being added (Conv. Deb., Melb., pp. 1899-1901); and the clause was further verbally amended after the fourth Report.

§ 351. "Transfer of Officers."

Object of Section.—The object of this section is to prevent any hardship to the officers of transferred departments by reason of their change of masters. Many of them would, under the public service laws of their respective States, have become entitled to pensions or retiring allowances; many more, though not yet so entitled, would have inchoate or accruing rights on which they had based legitimate expectations. It was necessary to give the Federal Government an entirely free hand in the organization of the Public Service of the Commonwealth and in the appointment and dismissal of officers; but it was thought fair that the existing and accruing rights of the officers of the transferred departments should be expressly recognized in the Constitution, and that the respective responsibilities of the States and the Commonwealth in this respect should be clearly defined.

Two events had to be provided for: the event (which would probably be exceptional) of any such officer not being retained in the service of the Commonwealth, and the event of his being so retained.

(1.) With regard to any officer whose services are not required by the Commonwealth, the refusal of the Commonwealth to employ him is treated as being equivalent to the abolition of his office by the State, so that he will be entitled to claim from the State any compensation payable under the law of the State on such abolition. An exception, however, is made in the event of his being appointed by the State to some other office of equal emolument.

(2.) Any officer retained in the service of the Commonwealth is allowed to carry with him the benefit of the public service laws of his State, so as to preserve "all his existing and accruing rights." His rights of retirement, and of pension or retiring allowance, continue to be governed by the law of the State, as though he were continuing in the service of the State—except that such rights are now rights against the Commonwealth. When such pension or retiring allowance becomes payable, the officer himself looks only to the Commonwealth; but the Commonwealth has recourse against the State for a part thereof, based on the calculation prescribed.

The last paragraph provides for a different class of cases. If, by arrangement between the Commonwealth and a State, any public officer, *not belonging to one of the transferred departments*, is transferred to the public service of the Commonwealth, he is to have the same rights as if he had been an officer of a transferred department, and were retained in the service of the Commonwealth.

§ 352. "Any Department."

The departments of customs and excise become transferred on the establishment of the Commonwealth; the departments of posts, telegraphs, and telephones, naval and military defence, lighthouses, lightships, beacons and buoys, and quarantine, are to become transferred on a date or dates to be proclaimed by the Governor-General. (See sec. 69.)

By virtue of the legislative powers of the Parliament, other departments which come wholly within the scope of those powers can be taken over from time to time—such, for instance, as the departments of copyright, patents, and trade marks. In the exercise of its legislative power over matters referred to it by the States, the Federal Parliament may also be able to assume control over other departments. (See s. 51, subs. xxxvii.)

§ 353. "All Officers of the Department."

Where the department transferred is the whole of one of the great political departments—as, for instance, the department of posts, telegraphs and telephones—the interpretation of the term "all officers" presents no difficulty; it evidently includes every officer, whatever his tenure or the nature of his employment, from the permanent head of the department downwards; but not, of course, the political head. When the department ceases to exist as a "State Department," the ministerial portfolio established by the State in connection with it must also cease to exist.

Where the department transferred is a sub-department—as, for instance, the department of quarantine—it seems that only those officers who are exclusively officers of the sub-department will become subject to the control of the Commonwealth.

§ 354. "Subject to the Control of the Executive Government of the Commonwealth."

Every department, on being transferred to the Commonwealth, becomes at once a department of the public service of the Commonwealth, and subject to the provisions of Chap. III. of the Constitution. The appointment and removal of its officers is thenceforth vested in the Governor-General in Council, until other provision is made (sec. 67), and its administration is vested in the Executive Government (secs. 61-64).

§ 355. "Any Such Officer Who is not Retained."

The rights of an officer of a transferred department differ accordingly as he is "retained" or "not retained" in the service of the Commonwealth, and it becomes important to define exactly what is meant by these expressions. Is the executive government of the Commonwealth required to make any express declaration of retainer or non-retainer? And if so, when must its choice be made?

It is clear, in the first place, that the Federal Government has an option to retain, or not to retain, any officer; and it is also clear that such option cannot easily be exercised at the actual moment of transfer—at least with regard to the departments transferred at the establishment of the Commonwealth. It would seem, also, that the fact of transfer does not alter the obligation upon each officer to continue, as a servant of the Crown, to perform the duties of his office; though he is subject thenceforth to the control, not of the State, but of the Federal Government. Every officer of the department becomes "subject to the control" of the Federal Government, but every officer is not necessarily "retained in the service of the Commonwealth." Apparently, therefore, the option of retaining or not retaining an officer is one which the Federal Government may exercise within a reasonable time after transfer, and the mere fact that the Government assumes the control and accepts the services of an officer at the outset need not necessarily imply a decision to retain him. On the other hand, acquiescence by the Federal Government for any time longer than was reasonably necessary might fairly be held, in the absence of a definite notification to the contrary, to imply a decision to retain an officer in the service.

In respect of a State officer who is "not retained in the service of the Commonwealth," the Commonwealth has no liability whatever. His only claim for compensation is against the State, which is under a constitutional obligation to treat him as though his office had been abolished by the Government of the State.

§ 356. "Any Such Officer Who is Retained."

The object of this provision is to give to those State officers who are retained by the Commonwealth the same rights which they would have had if they had continued in the service of the State. These rights are of course determined by the laws of the State at the moment of transfer. The words of the Constitution are necessarily general; and it may be that federal legislation—and perhaps State legislation also—will be necessary in order to give full effect to this intention. Questions, for instance, as to past and future contributions to superannuation funds may need further provision. But the general intention of the section is clear; and the rest may safely be left to the sense of justice of the Federal and State Governments.

§ 357. "Any Officer . . . in the Public Service of a State."

By the last paragraph of the above section the Federal Government, with the consent of the Government of any State concerned, is authorized to take over State officers not belonging to transferred departments, but who may be required in the service of the Commonwealth. This provision contemplates the creation of new departments of

service which will be absolutely necessary on the establishment of the Commonwealth; such as those which will be in immediate attendance on the Federal Parliament and the Federal Executive. The officers so taken over are guaranteed the same rights as if they had been officers of departments transferred, and as if they had been retained in the service of the Commonwealth under the earlier part of the section.

Transfer of Property of State[358].

85. When any department of the public service of a State is transferred to the Commonwealth—

(i.) All property of the State of any kind[359], used exclusively in connexion with the department[360], shall become vested in the Commonwealth[361]; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary.

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used[362] in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth.

(iii.) The Commonwealth shall compensate the State[363] for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation[364], it shall be determined under laws to be made by the Parliament.

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred[365].

Canada.—The public works and property of each Province, enumerated in the third schedule to this Act, shall be the property of Canada.—B.N.A. Act, sec. 108.

Historical Note.—The clause as originally framed at the Sydney Convention, 1891, did not distinguish between exclusive and partial use; and the value was to be ascertained under the resumption laws *of the State*. The provision for assuming the obligations of the State was contained in the clause providing for the transfer of the departments.

At the Adelaide Session, 1897, the 1891 draft was adopted with verbal alterations. Mr. Wise moved to add "railways," in order to put his views on record; but withdrew the amendment for the present. (Conv. Deb., Adel., pp. 870-7, 1203-4.)

At the Melbourne Session, an amendment of the Legislative Assembly of Western Australia, to restrict the clause to property "exclusively used," was negatived. Mr. Kingston suggested that the vesting should be at the option of the Commonwealth. An amendment of the Legislative Assembly of South Australia, that payment may be made by taking over equivalent part of public debt, was negatived, Mr. Barton promising a redraft. The clause was redrafted, and verbally amended after the 4th Report. (Conv. Deb., Melb., pp. 998-1007, 1901-6.)

§ 358. "Transfer of Property of State."

OBJECT OF SECTION.—The general principle embodied in this section is that the lands, buildings, and other public property used by the transferred departments shall be taken over by the Commonwealth, and paid for at their fair value; but the necessary provision for this is complicated by two circumstances.

In the first place, property used by a transferred department is not always *exclusively* so used; the department may occupy part of a building the rest of which is occupied by a department not transferred, or it may make use of property which belongs wholly to another department. For example, telegraph lines in many cases run along the railway lines, and many post and telegraph offices are situated upon railway premises.

In the second place, all the property used in connection with the collection of customs on the inland borders will not be required by the Commonwealth after inter-colonial freetrade is established, and therefore only needs to be transferred for a limited time.

The section is therefore framed so that property used exclusively by a transferred department shall be vested at once in the Commonwealth, either permanently or temporarily as the case may be; whilst property used, but not exclusively, by a transferred department may be acquired by the Commonwealth at its option.

§ 359. "All Property of the State, of any Kind."

"Property of the State" means the public property of the State, and includes real as well as personal property—lands, buildings, public works, vessels, materials, and so forth. In earlier drafts these particular words were inserted; but they were afterwards discarded in favour of the general word "property." A similar expression is used in the B.N.A. Act, secs. 108 and 117, where the "property" of a province is referred to. See also sec. 51—xxxi. (the acquisition of property for public purposes), and sec. 54—i., giving the Federal Parliament exclusive power over all places acquired by the Commonwealth for public purposes.

§ 360. "Used Exclusively in Connection with the Department."

The chief difficulty under this sub-section is likely to arise in ascertaining exactly what property comes within this description. No mode of ascertaining this is prescribed, and it is therefore a question of interpretation upon the facts. In most cases there will probably be little doubt; and, in those cases where doubt does arise, the question (which is one of proprietary rights only—see note below) will be capable of settlement by agreement between the governments of the Commonwealth and the State, under the authority of the respective Parliaments.

§ 361. "Vested in the Commonwealth."

The effect of this expression is to vest the property in the Commonwealth when the department is transferred—*i.e.*, from the time of transfer—without the need of any legal assurance (see Conv. Deb., Adel., p. 871); and the result of the vesting would seem to be that the Commonwealth acquires the property to exactly the same extent as if it had been acquired under the next sub-section, or under sec. 51, subs. xxxi. The difference is in the mode of vesting, not in the nature of the interest acquired. Compare the phrase used in sec. 125, which provides that the seat of Government shall be within territory "which shall have been granted to or acquired by the Commonwealth and shall be vested in and belong to the Commonwealth." The substantial difference between the two expressions is that under this section the *property* is vested, and under sec. 125 the *territory* only. The effect of this section, considered by itself, seems to be to transfer only the proprietary rights of the State, and not its territorial rights; but sec. 52 supplements this by giving the Federal Parliament "exclusive power to make laws" with respect to places acquired by the Commonwealth for public purposes.

§ 362. "The Commonwealth may Acquire any Property . . . not Exclusively Used."

The Commonwealth has a general power (sec. 51—xxxi.) to make laws for the acquisition of property on just terms from any State for any purpose in respect of which the Parliament has power to make laws. Legislation under that section would—assuming legislation to be necessary—apply to acquisitions for the purpose of this section; except as to the ascertainment of value and the mode of compensation, for which special provision is here made. If the Commonwealth and the State are agreed as to the property to be transferred, it appears that this section of itself is sufficient authority for the transfer, without any federal legislation; but if there is any dispute, legislation will be necessary to prescribe the mode of acquisition.

§ 363. "The Commonwealth shall Compensate the State."

The following returns of the value of the property of the chief departments proposed to be transferred are taken from Papers on Federation circulated by the Government of Victoria, 1897, p. 296:—

ESTIMATED PRESENT VALUES OF PROPERTY OF CHIEF DEPARTMENTS PROPOSED TO BE TRANSFERRED TO A FEDERAL GOVERNMENT.

(a) *Distinguishing Departments.*

Departments.	Victoria.	Other Colonies.	Total.
	£	£	£
Customs—			
Buildings, fittings, furniture, &c.	120,000	391,000	511,000
Land	310,000	770,000	1,080,000
Total	430,000	1,161,000	1,591,000
Posts and Telegraphs—			
Buildings, apparatus, &c.	875,000	3,260,000	4,135,000
Land	574,000	1,530,000	2,104,000
Total	1,449,000	4,790,000	6,239,000
Defences—			
Works, armament, buildings, furniture, &c.	506,000	880,000	1,386,000
Land	67,000	87,000	154,000
Total	573,000	967,000	1,540,000
Coast and harbour light-houses, buoys, and beacons...	198,000	656,000	854,000
Quarantine—			
Buildings, &c	22,000	51,000	73,000
Land	3,000	5,000	8,000
Total	25,000	56,000	81,000
Mint—			
Buildings, &c...	62,000	61,000	123,000
Land	8,000	9,000	17,000
Total	70,000	70,000	140,000
Grand Total—			
Buildings, &c....	1,783,000	5,299,000	7,082,000
Land	962,000	2,401,000	3,363,000
Total	2,745,000	7,700,000	10,445,000

NOTE.—The above figures must be regarded only as a rough approximation, in the absence of definite information on the subject, which has been applied for but not yet received.

(b) *Distinguishing Colonies, and showing also Cost of Maintenance and Interest.*

Colony.	Capital Value of—			Estimated Cost of Maintenance of Buildings, Furniture, &c., at 1½ per cent. of Capital Cost.	Interest on Capital Cost at 3 per cent.
	Lands.	Buildings, Works, Furniture, and Fittings.	Total		
	£	£	£	£	£
Victoria	962,000	1,783,000	2,745,000	27,000	82,000
New South Wales	1,121,000	2,079,000	3,200,000	31,000	96,000
South Australia	582,000	1,083,000	1,665,000	16,000	50,000
Tasmania	115,000	321,000	436,000	5,000	13,000
Western Australia	132,000	677,000	809,000	10,000	24,000
Queensland	451,000	1,139,000	1,590,000	17,000	48,000
	3,363,000	7,082,000	10,445,000	106,000	313,000
Less cost of maintenance of defences	...	...	...	21,000	...
Total	...	...	...	85,000	...

§ 364. "The Mode of Compensation."

These words were inserted at the Melbourne Convention (see Debates, pp. 1001-7) To carry out, with a somewhat wider scope, a suggestion of the Legislative Assembly of South Australia that payment might be made by taking over an equivalent part of the public debt of the State. The *amount* of compensation is arrived at under subs. ii., and subs. iii. then provides that the *mode* of compensation may be determined by Parliament. It seems that it will be open to the Parliament under this section to provide that compensation may be made in cash, or in instalments, or by an annual rental, or by issuing debentures, or by taking over an equivalent part of the public debt, or in any other way which will give to the State the value agreed upon or ascertained.

§ 365. "The Current Obligations of the State in Respect of the Department."

The transfer of the property used in connection with the departments having been provided for, it was necessary also to provide for the transfer of claims against the departments. This provision is intended to meet the case of current contracts with the department, by requiring that the obligations under them should be taken over by the Commonwealth. The word "current" was inserted by the Drafting Committee to meet a criticism that the words might be construed to extend to loan moneys spent in connection with the department. (See Conv. Deb., Adel., pp. 920-2; Melb., p. 1902.) It is quite clear that the words refer only to the "current" obligations incurred in the course of departmental business, and have no reference whatever to capital invested by the State in departmental works, or the obligations which the State may have incurred in raising such capital—obligations which cannot be said to be incurred "in connection with" the department on which the money is afterwards spent.

It was also suggested (Conv. Deb., Melb., pp. 1905-6) that contracts of service entered into by the department with its officers might be held to be included; but seeing that these are expressly dealt with in the preceding section, this construction would be superfluous as well as forced.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise[366], and the control of the payment of bounties[367], shall pass to the Executive Government of the Commonwealth.

Historical Note.—In the Commonwealth Bill of 1891, this provision, in substantially the same words (except that "the payment of bounties," not "the control of the payment of bounties," passed to the Commonwealth) stood as a paragraph of Clause 4, Chap. IV. (Exclusive power over customs, &c.) There were also provisions (clauses 7, 9) that until the uniform tariff, bounties payable in the several States should be paid by the officers of the Commonwealth, and charged against the States.

At the Adelaide session, 1897, the provision, following the draft of 1891, still stood part of the "exclusive power" clause. The debate, which turned entirely on bounties, is summarized in Historical Note to sec. 90, Conv. Deb., Adel., pp. 835, 838-66.

At the Melbourne session the paragraph was struck out, and re-inserted as a new clause. An amendment by Sir George Turner, excepting State bounties consented to by the Federal Parliament, is noted under sec. 91, Conv. Deb., Melb., pp. 964-5, 990, 2343-65.

§ 366. "The Collection and Control of Duties of Customs and of Excise."

Collection.—By sec. 69 the departments of customs and excise become transferred to the Commonwealth on its establishment, and by this section the collection of the duties also passes at once to the Executive Government of the Commonwealth. That is to say, the duties continue to be collected by the same departments as before, but on behalf of the Commonwealth instead of the several States.

Until the imposition of the federal tariff (sec. 89) customs and excise duties will continue to be collected in the several States, according to their respective tariffs—which do not "cease to have effect" until then (sec. 90). During this period, customs duties will of course be collected on intercolonial trade as well as on imports from abroad. As long as the medley of tariffs remains, it would obviously be impracticable to allow the free passage of goods across the borders, and therefore intercolonial free-trade is postponed until the uniform tariff is in force (sec. 92).

Meanwhile, though the duties themselves are collected and controlled by the Commonwealth, the tariff of each State remains alterable by the Parliament of the State. The power to impose duties of customs and excise does not become exclusive with the Commonwealth until the first federal tariff is imposed (sec. 90); and until it becomes exclusive, the concurrent power of the State Parliament continues (sec. 107).

Control.—By "control" of the duties is meant the disposal of them after collection. That "control" is of course subject to the provisions of the Constitution. The duties collected, instead of being paid into the Treasuries of the respective States, are paid into the Consolidated Revenue Fund of the Commonwealth (sec. 81) to be dealt with as the Constitution provides.

§ 367. "The Control of the Payment of Bounties."

The Bill of 1891 provided (chap. IV., secs. 4, 7, 9) that "the *payment* of bounties" should pass to the Commonwealth; that until the imposition of uniform duties the bounties payable in each State should be "paid by the officers of the Commonwealth;" and that the amount so paid on behalf of any State should be deducted from its share of the surplus. In the Adelaide draft of 1897 these provisions were all omitted, and nothing but "the control of the payment of bounties" passed to the Commonwealth.

What passes to the Executive Government of the Commonwealth by these words is not a liability, but a right of control. "Control" means regulation, government, direction; it is a matter of authority, not of obligation. To interpret the somewhat vague words of this provision, it is necessary to refer to the other sections of the Constitution dealing with bounties.

Sec. 51—iii. empowers the Federal Parliament to make laws with respect to "bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth."

Sec. 90 provides that on the imposition of uniform duties, the power of the Commonwealth to grant bounties shall become exclusive; that thereupon all laws of the States offering bounties shall cease to have effect; but that "any grant of or agreement for any such bounty" shall be good if made before 30th June, 1898. It follows from that section, read together with sec. 107, that *until* the imposition of uniform duties the States may make laws offering bounties; but that when the uniform tariff begins the laws so made must cease to have effect and the bounties so offered (unless granted or contracted for before the date named) must cease also.

Sec. 90 declares that nothing in the Constitution prohibits a State from granting any bounty for mining for metals, or from granting, with the consent of both Houses of the Federal Parliament, any bounty whatever.

The Constitution therefore refers to two kinds of bounties—Federal bounties and State bounties. With regard to Federal bounties, the words of this section raise no difficulty; whenever such bounties have been authorized by the Parliament the Federal Executive will control their payment as it controls every other part of the federal administration.

With regard to State bounties, it is hard to see what control the Federal Executive can exercise over payments, beyond seeing that the requirements of the Constitution are complied with. State bounties may come under four heads: (1) Before the uniform tariff each State may, as before, grant what bounties it pleases. (2) After the uniform tariff, there may be (*a*) State bounties to the extent of grants made, or binding agreements entered into, before 30th June, 1898; (*b*) State bounties on mining for metals; (*c*) any State bounties granted with the consent of both Houses of the Federal Parliament. As to grants and agreements made before 30th June, 1898, see Notes, § 383, *infra*. With respect to State bounties on mining for metals, or given with the consent of the Federal Parliament, the powers reserved to the States leave little room for federal control. Such bounties are arrangements between a State and its producers; they are granted by the State, and payable by the State, and involve no obligation on the part of the Commonwealth.

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87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides[368], of the net revenue[369] of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure[370].

The balance shall, in accordance with this Constitution, be paid to the several States[371], or applied towards the payment of interest[372] on debts of the several States taken over by the Commonwealth.

HISTORICAL NOTE.—The Commonwealth Bill of 1891 contained no guarantee to the States, though the desire for some guarantee was prominent throughout the financial debate. It was specially emphasized by Sir John Bray in his proposal to make the Commonwealth liable for the public debts of the States. (Conv. Deb., Syd., 1891, pp. 836-49.)

In the Finance Committee appointed at the Adelaide Session of the Convention of 1897-8 to frame financial resolutions for submission to the Constitutional Committee the guarantee question was raised at once, and various forms of guarantee were suggested. Almost the first of them was the following, moved by Mr. Holder:—"That, until a uniform tariff has come into force, each State . . . . shall receive from the federal authority, in monthly instalments, a return of 70 per cent. of the customs and excise duties contributed by the State." (Minutes of Committee, p. 5.) Mr. Holder's proposal, which was almost identical with this section, was negatived, and the guarantees resolved on by the Committee, and agreed to by the Convention, were a limitation of federal expenditure, and a provision for the return of a minimum aggregate surplus (see p. 170, *supra*). (Conv. Deb., Adel., pp. 889, 1053-67.)

At the Sydney session, 1897, in the general financial debate (p. 176, *supra*) the question of guarantees was prominent, but no definite proposition was made.

At the Melbourne session (Debates, pp. 2378-9, 2422-31, 2456-7), on the discussion of the Finance Committee's report, which recommended the omission of the Adelaide guarantees, Mr. Holder again (pp. 890-3) suggested a return of a fixed proportion of the revenue, stating that he had put it before both Finance Committees, and now wished to put it before the Convention. He read a clause which he had drafted to carry out his views, and discussed the objections which had been raised. The proposal was referred to by Mr. Solomon (pp. 1056-7), by Mr. Reid (p. 1070), by Sir John Downer (p. 1074), and by Mr. Lyne (p. 1082). The Adelaide guarantees were excised; but various substitutes were unsuccessfully proposed. First came Mr. Henry's "financial assistance" clause (see Historical Note to sec. 96). Then, on the discussion of the West Australian clause (guaranteeing to Western Australia a subsidy which would equalize the "proportionate net loss" of that colony with the "average proportionate net losses" of the other colonies), Sir John Forrest moved an amendment to make the clause apply to all the States—which he afterwards withdrew in favour of a clause of Sir George Turner's, guaranteeing to each State a return equal to its so-called "net loss," calculated on the customs and excise revenue collected in the State under the federal tariff and the amount which would have been collected *on the same trade* under the superseded provincial tariff. This also was withdrawn, but Mr. Isaacs afterwards brought it up again in a modified form, and it was finally negatived. (Conv. Deb., Melb., pp. 1122-90, 1244-9.) At last, on the second recommittal, Sir Edward Braddon brought forward and carried the first draft of the "Braddon clause," which, after being twice recommitted, was ultimately agreed to (p. 198, *supra*). (Conv. Deb., Melb., pp. 2378-9, 2422-31, 2456-7.) After the fourth Report it was verbally amended.

After the failure of the Convention Bill to secure the statutory majority in New South Wales, both Houses of the New South Wales Parliament asked for the omission of the clause (see p. 216, *supra*). This would have been agreed to by the Premiers' Conference, 1899, if another form of guarantee could have been suggested which would have been equally satisfactory; but all alternative suggestions were thought by Mr. Reid to be more objectionable than the clause itself. By way of compromise, the words "During a period of ten years, and thereafter until the Parliament otherwise provides" were inserted.

§ 368. "During a Period of Ten Years after the Establishment of the Commonwealth, and thereafter until the Parliament otherwise Provides."

These words were inserted at the Premiers' Conference (p. 219, *supra*). Compare the amendment proposed by Mr. Barton. (Conv. Deb., Melb., p. 2424.) For ten years after the establishment of the Commonwealth this section is a constitutional provision, alterable only by the process of constitutional amendment. At the expiration of that time, it will, in effect, descend to the level of an Act of the Federal Parliament; that is to say, it will, by virtue of the words "until the Parliament otherwise provides" (see sec. 51—xxxvi.) become subject to alteration or repeal by simple federal legislation. If the Parliament is satisfied with its operation, it will remain in force, but always on sufferance.

This limitation removes one of the chief objections to the section, namely, its want of elasticity. For the present, and in the near future, the section is not likely to cause much inconvenience, but in the unknown future, when conditions have changed—as they must change—it may seriously hamper federal finance. It fixes an arbitrary and unalterable proportion, on one side, in the apportionment of customs and excise revenue between the central and local governments. Should it be desired to increase the proportion of customs and excise revenue paid to the States, the section would not stand in the way; but should it be desired to increase the proportion which may be spent by the Commonwealth, it would offer an insurmountable barrier. There is no "eternal principle" in the three-to-one proportion, which is based merely on present financial conditions; and its loss of constitutional protection after ten years obviates the danger of undue rigidity.

§ 369. "Of the Net Revenue."

Net Revenue.—The "net revenue" from duties of customs and excise is the total receipts from those sources after deducting the cost of collection. No attempt is made in the constitution to define the deductions which may be made in order to arrive at the net revenue; this is a matter of book-keeping, which is left wholly to the Executive Government. The Federal Parliament, under its incidental legislative power (sec. 51—xxxix; sec. 52—ii.) will presumably have power to regulate the matter; but it is hard to see how the High Court could be invoked by any person or State that might happen to be dissatisfied. It seems to be one of those political matters with which the judiciary have no power to interfere.

Effect of the Section.—The object of this section is to secure a constitutional guarantee that, during the period named, at least three-fourths of the net customs and excise revenue raised by the Commonwealth shall be devoted to State purposes; and its explanation is found in the fact that whilst the transfer of customs and excise duties deprives the federating colonies of a large revenue, the estimated expenditure of which the colonies are relieved, or with which the Commonwealth is saddled, are not more than one-fourth of that amount. (See Historical Introduction and Historical Note.)

The probable effect of the clause on the finances of the Commonwealth and of the States has several aspects, which may be dealt with separately. The chief questions are:—How will it affect (1) the amount of federal revenue, (2) the amount of federal expenditure, (3) the mode of federal taxation, (4) the finances of the States?

(1) *The Amount of Federal Revenue.*—One of the most effective arguments against the Constitution in New South Wales, in the campaigns of 1898 and 1899, was that the Braddon clause would necessitate an immense burden of taxation—the stock phrases being that it required "four times as much taxation as was necessary," or that the Federal Treasurer "for every £1 he wanted, would have to raise £4." The fallacy of this ingenious perversion of the clause was that it utterly ignored the requirements

of the States. The Convention found, from the figures before them, that the Commonwealth, without Queensland, if it raised the very moderate revenue of £6,000,000, would not need, *for federal expenditure*, more than one-fourth of that sum, whilst the States would need the rest. The representatives of all the colonies except New South Wales asked for some guarantee—first, that the Commonwealth would not raise too little; next, that the Commonwealth would not spend too much. Looked at apart from the circumstances, it seems that this section operates in both these ways, but a few figures will show that it is practically no guarantee at all of the amount to be raised through the customs, because the amount which, owing to other circumstances, will inevitably be raised through the customs, is more than four times the ordinary expenditure of the Commonwealth.

The net customs and excise revenue raised in the six federating colonies for the year 1899 was £7,402,333 (Coghlan's Statistics of the Seven Colonies, 1900, p. 23). It may be taken for granted—without any guarantee—that the federal tariff will be framed to bring in not less than this amount. Of this the Commonwealth would be able under this section to spend, for federal purposes, one-fourth, or £1,850,000; an amount which exceeds the most lavish estimates of what will be required.

The Braddon clause, therefore, will not, under ordinary circumstances, increase the revenue which the Commonwealth will require to raise; even assuming—what will doubtless be the case for many years—that practically the whole of the federal taxation will be raised through customs and excise. Any great emergency, such as an increase of defence expenditure in time of war, might greatly increase the necessities of the Commonwealth; but these necessities, should they arise, would probably be met by temporary direct taxation. It should be noticed that the Constitution does not explicitly require that a single penny should be raised by customs and excise, but only that three-fourths of whatever is so raised should be devoted to State purposes.

(2) *The Amount of Federal Expenditure.*—The chief influence of the section will undoubtedly be in the direction of ensuring economy of federal expenditure. The Federal Parliament will be subject to two opposite forces: the national impulse, which will tend towards enlarging the scope of federal operations, and therefore of federal expenditure; and the restraining influence of the States, and of their representatives in the Federal Parliament, which will make for limiting federal expenditure so as to ensure an adequate subsidy to the States. The chief merit of the Braddon clause is that it fixes the maximum ratio of federal to provincial expenditure, and thus checks, during the early years of Federation, any attempt at an undue encroachment of the federal power. If the vast revenues of the Commonwealth were entirely at its disposal, subject only to such political pressure as the States could bring to bear, there might be a serious temptation to federal extravagance, and a serious risk of the diminution of the State revenues. But when extra expenditure by the Commonwealth means extra taxation by the Commonwealth, all the checks of representative and responsible government will be strengthened, and the temptations of the Federal Treasurer will be correspondingly reduced.

(3) *The Mode of Federal Taxation.*—It has been argued (see for instance Mr. Reid's speech, Conv Deb., Melb., p. 2424) that this section would be a strong temptation to the Federal Treasurer to resort to direct instead of indirect taxation, in order that he might spend on federal purposes the whole of what he raised. If it were not for the fact that the Federal Treasurer will have ample revenue under the section, and the further fact that the fiscal circumstances of the States will make it politically necessary for the Treasurer to raise through the customs at least as much as the aggregate raised in all the colonies before Federation, this argument would have much weight. If the section were permanent, a time might come when it would have even greater weight. But during the first ten years of Federation it is most unlikely that any resort will be made to federal direct taxation. The real problem will not be the finances of the Commonwealth, but the finances of the States. Taxation difficulties will arise, not

in respect of federal expenditure, but in respect of State expenditure; and if any increase of direct taxation is required to meet the varying needs of the States, local taxation proportioned to the needs of each State will be a much easier policy than uniform federal taxation which would fall equally on the States which required more revenue and on those which did not. The federal tariff will be framed to meet the wants of the Australian people; and if, when the desirable level of customs and excise taxation has been reached, any States require more revenue for provincial purposes, which it is thought fit to raise by direct taxation, provincial direct taxation and not federal direct taxation is the obvious resource.

(4) *The Finances of the States.*—To the States, the section will doubtless be some guarantee of a substantial return of revenue, but it is by no means a guarantee that each State will be fully compensated, through its share of customs and excise duties, for the difference between the revenue which it has surrendered and the expenditure of which it has been relieved. In framing the federal tariff, the interests of each State will be considered; but when the tariff is framed, each State will have to cut its coat according to the cloth. Some States may have to resort to a reduction of their local expenditure, or an increase of their local taxation, or both. The different financial requirements of six States cannot be met solely by uniform taxation; and it can hardly be doubted that one result of Federation will, sooner or later, be that provincial taxation will be increasingly resorted to for provincial purposes.

§ 370. "Not More than One-fourth shall be Applied Annually by the Commonwealth towards its Expenditure."

The "expenditure" here referred to is the expenditure other than the cost of collection, which has already been deducted in order to arrive at the net revenue. It follows that the total amount which the Commonwealth can spend is made up of (1) the cost of collecting the duties; and (2) one-fourth of the net revenue.

This amount can only be expended under appropriation made by law; and the question arises whether, if such appropriation should exceed the specified proportion of the revenue, the courts could pronounce the law to be invalid. It is submitted that the answer must clearly be in the negative. As a matter of practical politics and invariable constitutional usage, appropriations are made in advance of the receipt of revenue, on the basis of the Treasurer's estimates of what the revenue will be. It would be a grave constitutional impropriety for the Governor-General to recommend, for Ministers to submit, or for the Parliament to vote, expenditure in excess of the proper proportion of the estimated revenue. It would also be a grave impropriety for the Treasurer to wilfully over-estimate the prospects of revenue. At the same time, the most capable Treasurer, with the very best intentions, may be over-sanguine; and it would be absurd to hold that the validity of an appropriation might depend on the accuracy of a Ministerial forecast. The validity of a law must be absolutely determinable at the moment it is passed; a law which appropriates the year's revenue before the revenue is received, and whilst its amount is matter for conjecture, cannot depend for its validity upon subsequent events.

§ 371. "The Balance Shall, in Accordance with this Constitution, be Paid to the Several States."

"The balance" is the balance of the net revenue from customs and excise. This section does not affect any revenue of the Commonwealth which may be derived from other sources; but merely requires that three-fourths of the net revenue from customs and excise shall either be distributed among the States, on the basis of secs. 89 and 93, or expended in payment of the interest on the debts of the States, under sec. 105.

§ 372. "Or Applied towards the Payment of Interest."

These words were added at the suggestion of Mr. Nicholas Brown, to meet Mr. Barton's objection that the clause as it then stood would make it impossible for the Commonwealth to take over the debts. (Conv. Deb., Melb., pp. 2428-31.) This addition does not in any way touch the principle of the section, that the customs and excise revenue shall be shared between the Commonwealth and the States in certain proportions; it merely provides that when the Commonwealth has taken over any of the debts, payment of interest on account of a State shall, for the purposes of the section, be equivalent to payment to the State.

This provision suggests that the ultimate absorption of the federal surplus will be effected by devoting it to payment of the interest bills of the States. Sir Samuel Griffith, in a paper presented to the Government of Queensland in 1896 (entitled "Notes on Australian Federation: its nature and probable effects") pointed out that the interest bills of the several colonies, both individually and in the aggregate, showed a striking correspondence in amount with the customs and excise revenues; and he expressed the opinion that, though the correspondence was no doubt accidental, it was likely to have some element of permanence. This fact at once makes it clear that the States require the unexpended balance of the customs and excise revenues not so much for the purpose of current expenditure as to meet the interest on their debts. That explains why they cannot, as did the American States in 1787, surrender the customs and excise revenues wholly to the union; and it points to the probability that when the debts have been taken over by the Commonwealth, and a few years' experience of the working of the Constitution have been gained, the difficulties in the way of a final settlement of the financial problem will be far less than at present.

Uniform duties of customs.

88. Uniform duties of customs[373] shall be imposed[374] within two years after the establishment of the Commonwealth.

Historical Note.—This provision was first suggested by the Finance Committee at Adelaide, and was first drafted as part of the "exclusive power over customs" clause. Sir George Turner suggested that the uniform tariff, instead of coming into force suddenly, should be led up to by a sliding scale. The Drafting Committee afterwards placed the provision as a separate clause. (Conv. Deb., Adel., pp. 835, 838.)

At the Sydney session, 1897, a general financial debate took place under cover of this clause. (Debates, pp. 35-222.)

At the Melbourne session Mr. McMillan, while sympathizing with the intention of the clause, thought it a mistake to fetter the discretion of the Parliament. Mr. Reid replied that New South Wales wanted a definite assurance of intercolonial free-trade, and without this there would be no guarantee that the tariff would not be deadlocked. (Conv. Deb., Melb., pp. 1011-4.)

§ 373. "Uniform Duties of Customs."

Uniform.—The word "uniform" here is merely descriptive. The absolute constitutional requirement that all federal taxation, whether through the customs or otherwise, shall be uniform, is contained in sec. 51—ii., where the gift of federal powers of taxation is expressly qualified by the words "so as not to discriminate between States or parts of States."

Duties of Customs.—Customs are here mentioned alone, and not in connection with excise, for a very simple reason. It was necessary to define the time at which

the provincial duties of customs and excise should cease ; and the time so fixed (sec. 90) is the time of "the imposition of uniform duties of customs." Under sec. 55, which requires that laws imposing taxation shall deal with one kind of taxation only, customs duties cannot be included in the same bill with excise duties ; and though the Commonwealth will doubtless resort to both modes of taxation, and the two bills will probably be passed at the same time, it was obviously necessary to make the termination of provincial customs and excise, and the inauguration of intercolonial free-trade, depend on a single, not a double, event.

§ 374. "Shall be Imposed."

This section is an unequivocal and unqualified direction to the Government and Parliament of the Commonwealth to impose customs duties within the time fixed. Such a direction in a constitutional instrument has almost the weight of a mandate, and obedience to it may be anticipated with perfect confidence. It is necessary, however, to observe that in strict legal effect the words must be interpreted as directory only, not mandatory. The section does not contemplate non-compliance, and does not attempt to prescribe any consequences of non-compliance. It would have been easy to enact that at the expiration of the two years, if no federal tariff had been imposed, the provincial duties of customs and excise should come to an end. That would have had the effect of leaving the Commonwealth wholly without revenue from those sources in the event of non-compliance ; but the Convention did not elect to frame any such provision. It cannot be doubted that under the Constitution, if a tariff bill should not become law at the expiration of the two years, the provincial duties would continue in force until it did become law. Nor can it be doubted that such a law, though passed after the two years had elapsed, would be as valid as if passed before ; otherwise it would have to be held that the default of the first Parliament should cripple the taxing powers of the Commonwealth for all time. The true interpretation of the section is that a solemn constitutional obligation has been laid upon the Parliament ; but that no attempt has been made to threaten pains and penalties in the improbable event of that obligation not being fulfilled.

The framing of the first uniform tariff for a group of communities whose present tariffs are so widely divergent is certainly as difficult and responsible a task as could be entrusted to any legislative body. It is a matter which intimately concerns, not only the people of the Commonwealth as a whole, but the people of each State ; seeing that it affects the revenue necessities of each State, and also the industries and vested interests that have grown up in each State in reliance upon the continuance of its present fiscal policy. Unless opposing parties and interests recognize the necessity for compromise, it is likely, not only that there will be a prolonged contest in each House, but that there may also be a disagreement between the two Houses. The constitutional provisions for deciding such a disagreement, together with the political urgency of the question, may be trusted to bring about a settlement ; and to that end this provision may be expected to contribute. The command of the people, by whom and for whom the Commonwealth is established, that within two years all differences must be reconciled and a tariff agreed to, ought to be a powerful moral aid to the forces making for compromise and settlement.

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs[375]—

(i.) The Commonwealth shall credit to each State[376] the revenues collected therein by the Commonwealth[377].

(ii.) The Commonwealth shall debit to each State—

(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer[378], of any department transferred from the State to the Commonwealth ;

(*b*) The proportion of the State, according to the number of its people[379], in the other expenditure of the Commonwealth.

(iii.) The Commonwealth shall pay to each State month by month[380] the balance (if any) in favour of the State.

Historical Note.—For the history of this clause in the Commonwealth Bill of 1891, see pp. 133, 139, *supra*. (Conv. Deb., Syd., 1891, pp. 802, 833.) The clause as adopted provided for the apportionment of surplus revenue both before and after the imposition of uniform duties, and was as follows :—

" 9. The Revenue of the Commonwealth shall be applied in the first instance in the payment of the expenditure of the Commonwealth, which shall be charged to the several States in proportion to the numbers of their people, and the surplus shall, until uniform duties of Customs have been imposed, be returned to the several States or parts of the Commonwealth in proportion to the amount of Revenue raised therein respectively, subject to the following provisions :—

(1.) As to duties of Customs or Excise, provision shall be made for ascertaining, as nearly as may be, the amount of duties collected in each State or part of the Commonwealth in respect of dutiable goods which are afterwards exported to another State or part of the Commonwealth, and the amount of the duties so ascertained shall be taken to have been collected in the State or part to which the goods have been so exported, and shall be added to the duties actually collected in that State or part, and deducted from the duties collected in the State or part of the Commonwealth from which the goods were exported :

(2.) As to the proceeds of direct taxes, the amount contributed or raised in respect of income earned in any State or part of the Commonwealth, or arising from property situated in any State or part of the Commonwealth, and the amount contributed or raised in respect of property situated in any State or part of the Commonwealth, shall be taken to have been raised in that State or part :

(3.) The amount of any bounties paid to any of the people of a State or part of the Commonwealth shall be deducted from the amount of the surplus to be returned to that State or part.

After uniform duties of Customs have been imposed, the surplus shall be returned to the several States or parts of the Commonwealth in the same manner and proportions until the Parliament otherwise prescribes.

Such returns shall be made monthly, or at such shorter intervals as may be convenient."

Adelaide Session, 1897 (Debates, pp. 877-908; 1051-3).—For the history of the clause in Adelaide, see pp. 169, 176, *supra*. It was passed in the following form:—

"90. Until uniform duties of Customs have been imposed, there shall be shown, in the books of the Treasury of the Commonwealth, in respect of each State:—

(i.) The revenues collected from duties of customs and excise and from the performance of the service and the exercise of the powers transferred from the States to the Commonwealth by this Constitution.

(ii.) The expenditure of the Commonwealth in the collection of duties of customs and excise, and in the performance of the services and the exercise of the powers transferred from the State to the Commonwealth by this Constitution:

(iii.) The monthly balance (if any) in favour of the State.

From the balance so found in favour of each State there shall be deducted its share of the expenditure of the Commonwealth in the exercise of the original powers given to it by this Constitution, and this share shall be in the numerical proportion of the people of the State to those of the Commonwealth as shown by the latest statistics of the Commonwealth. After such deduction the surplus shown to be due to the State shall be paid to the State month by month."

Melbourne Session, 1898 (Debates, pp. 775, &c.; 1036-9, 1906-11, 2375-8). In accordance with the recommendations of the Finance Committee, the clause was recast, the only difference in substance being a declaration that any expenditure "originated by the requirements of the Commonwealth, in respect of services and powers transferred, and not incurred solely for the maintenance or continuance in any State of the services as existing at the time of the transfer, shall be taken to be incurred by reason of the original powers given to the Commonwealth by this Constitution." This somewhat extended the scope of *per capita* division of the expenditure; and Mr. O'Connor (pp. 1906-11) to meet what he thought was the wish of the Finance Committee, proposed that the *per capita* basis should be further extended to the expenditure of all the non-revenue producing departments—*i.e.*, defence, light-houses, light-ships, beacons and buoys, and quarantine. The amendment was, however, opposed by Mr. Holder, Sir Geo. Turner, and Mr. Henry, who objected to expenditure being charged *per capita* unless revenue were credited in the same way. At the suggestion of the Drafting Committee, the clause was simplified by defining the two classes of expenditure as they now stand in the section. It was further verbally amended after the 4th Report.

§ 375. "Until the Imposition of Uniform Duties of Customs."

The Surplus Revenue.—This section forms one of a series of three (see secs. 93, 94) which provide for the distribution of the federal surplus among the States during three periods:- (1) Before the uniform tariff; (2) During the transition period immediately following the imposition of the uniform tariff; (3) After that period.

These three sections are widely different from any provision to be found in other Federal Constitutions. In the United States, revenue raised by Congress from customs and excise, or from any other source, is entirely at the disposal of the Federal Government, and the States are obliged to rely entirely on direct taxation to meet their own expenditure. In Canada, the Dominion must pay to each Province a certain fixed subsidy for the support of its Government and Legislature, and also an annual grant of 80 cents per head of its population as ascertained by the census of 1861—or, in the case of Nova Scotia and New Brunswick, by each subsequent census till the population of each amounts to 400,000 (B.N.A. Act, 1867, sec. 118). In 1869 Nova Scotia obtained "better terms" from the Dominion Parliament. The new Provinces of Manitoba and New Brunswick were afterwards admitted on a similar basis, and in 1873 the "better terms" were extended to all the Provinces. (See Garran, Coming Commonwealth, pp. 91-2.)

First Period.—This section provides for the distribution of surplus revenue during the first of the three periods marked out by the Constitution. The characteristic of this period is that free-trade and a uniform tariff have not yet been introduced ; customs duties are still collected on intercolonial imports, as well as on imports from abroad, according to the tariffs of the several States; and secs. 90 and 92 are not yet in operation.

The one difference between this section and sec. 93, which provides for distribution during the first five years after the uniform tariff, arises out of these circumstances. The ascertainment of the revenue contributed by each State does not involve the book-keeping adjustment which is afterwards necessary : because, so long as each colony is surrounded by a circle of Custom-houses, it may be considered for all practical purposes that the dutiable goods imported into each State, or produced in each State, are intended for consumption in that State, and, therefore, that the revenue actually collected in any State by the Commonwealth is practically the revenue contributed by the people of that State. During this period, therefore, the crediting of revenue on the basis of contributions is a very simple matter.

§ 376. "The Commonwealth shall credit to each State."

These words impose upon the Federal Treasury the duty of keeping an account of the revenues collected in each State by the Commonwealth. The clause, as framed at Adelaide, provided that the necessary particulars should be "shown" in the books of the Treasury of the Commonwealth, in respect of each State ;" and in the simpler language of the section as it stands the same direction is clearly implied.

The actual moneys are of course to be paid into the Consolidated Revenue Fund of the Commonwealth (sec. 81). The process of crediting and debiting prescribed by this section is a mere matter of book-keeping entries, upon which the appropriations and payments to the State are ultimately to be based.

To each State.—One thing to be noticed about this section is that it does not appear to contemplate the existence of any federal territory not forming part of a State, but which may form part of the Commonwealth ; or, at least, that it does not appear to deal with any revenue or expenditure except such as is collected or incurred in a State. In subs. i. and subs. ii. (*a*) the word "therein" seems clearly to exclude any revenue collected, or expenditure incurred, elsewhere than in a State. In sub-s. ii. (*b*), where "the other expenditure of the Commonwealth" is mentioned without limitation, it is not clear whether the proportion which each State has to bear is the proportion of the number of its people to the number of the people *of the Commonwealth*, or the proportion of the number of its people to the number of the people of *all the States*, exclusive of any federal territories.

It therefore becomes a question how far the section applies to revenue collected and expenditure incurred – (1) in the federal territory selected for the seat of Government ; (2) in any other territory which may be acquired by the Commonwealth. As regards the latter territories, the question is of no immediate interest, and could probably be arranged for in the terms and conditions of admission of such territories. But with regard to the seat of government, the question will arise as soon as the territory is acquired by the Commonwealth.

It is submitted that revenue collected, or expenditure incurred, in the federal territory is not collected or incurred in a State, although as a matter of *location* it is provided in sec. 125 that the seat of government, or the territory—it is not clear which —shall be "in" the State of New South Wales. The question is not of great practical importance, because the only substantial "revenue" collected in the federal territory at first will be from the post and telegraph department, and the bulk, if not the whole, of the federal expenditure in the territory will be included in the "other expenditure" of the Commonwealth which is to be borne in proportion to population. (See § 379, *infra*.)

§ 377. "The Revenues Collected Therein by the Commonwealth."

REVENUES.—These words extend to all revenues which the Commonwealth collects in the States; not only those arising from customs and excise, but also the receipts from any other kind of taxation, from the revenue-producing services, from fees, licences, penalties, and so forth. It seems clear that the gross revenues are meant—the expenses of collection being apportioned under sub-s. ii.

COLLECTED IN.—During this period, the place of actual collection determines the State to which the revenue is to be credited. (See Note, § 375, *supra*.)

§ 378. "Incurred Solely for the Maintenance or Continuance as at the Time of Transfer."

To explain the purport of these words, some reference to the history of the section is necessary. The Bill of 1891 provided that all expenditure should be debited in proportion to population. The Adelaide Bill of 1897 distinguished between (1) expenditure incurred "in the performance of the services and the exercise of the powers transferred" from each State to the Commonwealth—which was to be charged against the State from which the department in question had been transferred—and (2) expenditure incurred "in the exercise of the original powers" given to the Commonwealth—which was to be charged, as before, according to population. (See Historical Note.)

The Finance Committee at Melbourne thought that the distinction required some definition; and to make it clear that expenditure in exercise of "original powers" included (1) expenditure in connection with the new central administrative staffs of the transferred departments, and (2) any extension of the transferred services which might be undertaken, the definition (cited in the Historical Note) was added. In bringing up the report of the Finance Committee, Mr. Reid explained this provision in the following words (Conv. Deb., Melb., p. 775):—

"The new clause does not differ in principle from the clause, which we propose should be omitted, but it re-arranges it to a certain extent, and clears up a difficulty which might arise in administration after the Commonwealth was established. Whilst it would be perfectly clear that the actual expenditure in the services transferred, on the basis existing at the time of the transfer, would be charged in a certain way, there would be some doubt left as to how new works—for instance, buildings or new developments made by the Commonwealth—should be charged. We came to the conclusion, and we did not think it a matter of very great consequence so far as administration is concerned, that, as to such new developments under the Commonwealth, they should be taken to follow the principle under which the expenditure in the exercise of the original powers of the Commonwealth is dealt with. For instance, supposing the Commonwealth built some permanent structure—a post office, a telegraph office, or perhaps some important fortification of a permanent character—it manifestly would not be fair to charge such works to the particular locality, especially as the system of distributing expenditure will, at the end of five years, give way to the ordinary *per capita* distribution. We have removed that difficulty, which would have arisen if the matter had not been dealt with."

The words used seem fairly to carry out this intention, and whilst it is difficult to give any more exact definition of the items of expenditure, in connection with the transferred departments, which may properly under this provision be charged *per capita*, it is probable that in practical administration no serious difficulty will be raised. The Executive Government, in the preparation of its accounts, will be charged with the duty of interpreting the true scope of the provision, and it would seem that this—like other matters arising in connection with the book-keeping provisions—is a political matter, in which the political departments of the government must exercise an unhampered discretion.

§ 379. "The Proportion of the State, According to the Number of its People."

This proportion (see Notes, § 376, *supra*) is not very clearly defined. It is submitted, however (1) that the people of New South Wales will not include the residents in the federal territory (secs. 52—i. and 125); (2) that the second term of the proportion is the population of the whole Commonwealth, inclusive of the residents in federal territory. This means that the debit against each State will be in the proportion which its people bears to the whole population of the Commonwealth, and that no provision is made by the section for the debiting of the small share of the expenditure corresponding to the population of the federal territory—just as no provision is made for debiting the expenditure under sub-sec. 2 (*a*) incurred in the federal territory, or for crediting the revenue collected in the federal territory. The Federal Parliament will, however, under its exclusive power of legislation for the government of the territory (sec. 52—i. and sec. 122) have power to credit and debit these amounts to the territory, just as the Constitution does in respect of the States.

In reckoning the number of the people of a State or of the Commonwealth, aboriginal natives are not to be counted. (Sec. 127.)

§ 380. "The Commonwealth shall Pay to Each State Month by Month.'

These words seem to amount to a special appropriation. (See Note, § 350, *supra*.)

There does not seem to be any special difficulty about the adjustment of these monthly balances, so far as compliance with the provisions of this section is concerned. There may, however, be a difficulty in ascertaining, before the several accounts for the financial year are complete, what expenditure for federal purposes the government is authorized in incurring in view of sec. 87. From the balance payable to any State under this section the Commonwealth may deduct and retain the amount of any interest payable on the debts of the State taken over by the Commonwealth. (See sec. 105.)

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive[381].

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect[382], but any grant of or agreement for any such bounty[383] lawfully made by or under the authority of the Government of any State shall be taken to be good[384] if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

CANADA.—The customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.—B.N.A. Act, 1867, sec. 122.

UNITED STATES.—No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.—Const., Art. I., sec. 10, sub-sec. 2.

Historical Note.—At the Sydney Convention, 1891, the clause as framed and passed was substantially to the same effect, except that the exclusive power over excise was limited to excise "upon goods for the time being the subject of customs duties;" and also that the particular provision as to "grants of or agreements for bounties" was not there. An amendment by Colonel Smith, to postpone intercolonial free-trade until "twelve months after" the imposition of uniform duties (with a view to prevent "loading up" (see Note, § 390, *infra*) was negatived. An amendment by Mr. Dibbs, to provide that the Victorian tariff should be the tariff of the Commonwealth until the Parliament should otherwise provide, was negatived. (Conv. Deb., Syd., 1891, pp. 789-801.)

Adelaide Session, 1897.—The 1891 draft was followed almost verbatim. On Sir George Turner's motion, the words "upon goods the subject of customs duties" were omitted.

Upon the clause dealing with the control of customs, &c., there was much debate on the subject of bounties. Sir George Turner wished to protect existing arrangements and existing contracts—and also future arrangements which might be made before the Bill became law. He also questioned the necessity of prohibiting State bounties on *exports*. Other members objected to *future* arrangements being protected, at least unless a definite near date was fixed. Everyone agreed that existing contracts ought to be protected; but Mr. McMillan, Mr. Symon, Mr. Reid, Mr. Barton, and others protested against any further exceptions to intercolonial free-trade. Mr. Deakin and Mr. Cockburn argued that bounties - especially on exports—did not necessarily interfere with internal free-trade, and ought to be allowed to the States subject to the constitutional restriction that trade shall be "absolutely free." Mr. Trenwith suggested that State bounties should be allowed with the consent of the Federal Parliament. It seemed to be the general opinion that aids to gold-mining ought not to be prevented, though some members suggested that the clause was wide enough to cover them; and Mr. Barton suggested adding the words, "wares and merchandise" after "goods," to narrow the meaning. Amendments were proposed to protect contracts "for the discovery of gold or minerals," and also contracts entered into before 31st March, 1897 (the date of this debate being 19th April, 1897). The legal members thought that the clause in its then form would not invalidate contracts made before the commencement of the Act; and Mr. Isaacs proposed an amendment to place this beyond doubt. Mr. Grant and Dr. Cockburn submitted amendments to preserve bounties which did not interfere with freedom of trade. Finally all amendments were withdrawn and the clause passed provisionally. (See Hist. Note to sec. 91. Conv. Deb., Adel., pp. 835-66.)

Melbourne Session, 1898.—An amendment of the Legislative Assembly of Victoria was discussed, to omit mention of bounties. Sir Geo. Turner thought that the States ought to have power to grant bounties which were not unfederal—which he afterwards defined as "bounties for the promotion of agricultural, horticultural, viticultural, or dairying interests"—subject to such bounties being annulled at any time by the Federal Parliament. Mr. O'Connor objected that any State bounty interfered with equality of intercourse. Dr. Cockburn would limit the provision to bounties on exports, which he thought could not affect any other State; but Mr. McMillan replied that a bounty on export was practically an import duty. Mr. Deakin suggested a veto by the Federal Executive. Mr. Reid objected to all State bounties, saving existing obligations. Mr. Isaacs wanted State freedom in primary production, subject to the paramount rights of the Federal Parliament. Mr. Trenwith argued that State money could develop industries in many ways without injuring the federal principle. Mr. Higgins suggested the assent of the Inter-State Commission, as a compromise—Parliamentary assent involving too much delay. The Victorian amendment was negatived. The proposal of the Finance Committee, to except "any grant of or agreement for any such bounty made by or under the authority of the Government of any State before the 30th day of June, 1898," was then carried. (Conv. Deb., Melb., pp. 909-64.)

§ 381. "Customs and Excise . . . shall become Exclusive.

The first paragraph of this section provides that on the imposition of uniform duties of customs, the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. Three questions have to be considered in connection with this grant of power—(1) what are duties of customs? (2) what are duties of excise? (3) what is the meaning of exclusive?

Duties of Customs.—Customs duties are duties or tolls imposed by law on the importation or exportation of commodities. Such duties have been levied by commercial communities from the earliest periods of recorded history. The Athenians imposed a tax of 20 per cent. on corn and other merchandise imported from abroad. In republican Rome, duties paid on exports and imports constituted an important part of the public revenue. Duties of customs were levied in England long before the conquest. They derived their name from having been customarily charged on certain articles, when carried across the principal bridges and ferries within the kingdom, and on other productions when exported or imported. The articles which were first and principally the subjects of these customs or duties were wool, skin, and leather. Duties of tonnage were duties paid on wine by the tun, and duties of poundage were the *ad valorem* duties of so much per pound on other commodities. These duties, when granted to the Crown, were called subsidies.

Duties of Excise.—The definition of the term excise is not so clear and well established as that of customs. Excise duties were first introduced into England in the year 1643, as part of a new scheme of revenue and taxation devised by Pym and approved by the Long Parliament. These duties consisted of charges on beer, ale, cider, cherry wine and tobacco, to which list were afterwards added paper, soap, candles, malt, hops, and sweets. The only excise duties now surviving in England, similar to those of the original list, are duties on beer, spirits, chicory, imitations and substitutes of chicory and coffee, and chicory mixture. The basic principle of excise duties was that they were taxes on the production and manufacture of articles which could not be taxed through the customs house, and revenue derived from that source is called excise revenue proper. In the course of time licenses were required from the makers of and the dealers in excisable commodities, and these license fees acquired the name of "duties of excise." The next step was to require persons to take out licenses, who neither produced nor manufactured nor disposed of excisable commodities, and these license fees also became known as "duties of excise." Thus the list of excise licenses, which at first included only brewers, beer-dealers, beer-retailers, distillers, spirit-dealers, spirit-retailers, tobacco and snuff manufacturers and dealers, wine-dealers, and wine-retailers, was expanded by English usage until it embraced auctioneers, owners of armorial bearings, owners of dogs, owners of game, gun-dealers, persons entitled to carry guns, hawkers, house agents, patent medicine sellers, owners of carriages, pawnbrokers, plate-dealers, refiners of gold and silver, refreshment house keepers, and carriers.

Such was the primary meaning of "excise," and such the secondary and enlarged use of the term. The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury, as spirits, beer, tobacco, and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth. It was never intended to take from the States those miscellaneous sources of revenue, improperly designated as "excise licenses" in British legislation. It was considered essential that the two correlative powers over customs and excise, properly so called, should run together and be exclusively vested in the Federal Parliament. It was not contemplated that the

Federal Parliament, in acquiring the necessary power to provide uniformity of commercial laws, should absorb the absolute and exclusive control of so wide an area of inland taxation as would be covered by licenses similar to those enumerated in the above list, such as auctioneers and pawnbrokers.

Meaning of "Exclusive."—The term "exclusive" does not mean unlimited It means that the power to impose customs and excise is, subject to the Constitution, wholly vested in the Federal Parliament as against the States. It means that the power, being granted to the Federal Parliament, is—from the moment of the imposition of uniform duties—taken once and for all from the States; and that the States can thenceforth not legislate for that purpose in any way whatever, even in the absence of Federal legislation. If, for instance, the Federal Parliament imposed uniform customs duties without making any provision for excise, the States would still be powerless to impose excise duties.

This gift of exclusive power is supplemented by an express provision that all laws of the States imposing duties of customs or excise, or offering bounties, shall, from the moment when the exclusiveness attaches, "cease to have effect;" so that the existing laws of the States, as well as their power to make future laws, will be absolutely superseded. (For further notes on the meaning of "exclusive power," see § 234, *supra*.)

§ 382. "Shall Cease to have Effect."

These words operate as a repeal of all the customs and excise duty Acts of the States, and all Acts of the States authorizing bounties, from the time that the federal customs duties come into force. The imposition of the federal tariff is thus made contemporaneous with the sweeping away of the provincial tariffs; the border custom houses cease to exist, so far as the collection of duties is concerned; so that the establishment of uniformity for the whole Commonwealth is accompanied by the abolition of fiscal barriers between the States. This is the stage at which the Federation of Australia, as one commercial people, becomes complete. The Commonwealth is indeed established on the date fixed by the Queen's proclamation; but until the federal tariff is passed by the Federal Parliament, the Constitution is not in full working order; two of its most fundamental provisions—sections 90 and 92—being inoperative. With the imposition of a uniform tariff, the principle of inter-state trade and full commercial unity comes into play, and the last step is taken in the accomplishment of Federation.

It is clear that this annulment of State laws is only co-extensive with the exclusive power of the Federal Parliament, and therefore that it does not affect laws granting bounties on mining for metals, or granting any bounties with the consent of both Houses of the Federal Parliament.

§ 383. "Any Grant of or Agreement for any such Bounty."

The object of this provision is to protect existing obligations. Though, on the imposition of uniform duties, State bounties, generally speaking, are to end immediately, yet existing contracts, and grants already made, are to hold good. This question was first discussed at the Adelaide session of the Convention, when Sir Geo. Turner expressed some anxiety as to "contracts already in existence, or which may be in existence before this Act comes into force, or before the uniform duties of customs come into operation." (Conv. Deb., Adel., p. 838.) The provision as it now stands was framed by the Finance Committee of the Convention at Melbourne. (See Historical Note.)

Although the general aim of the "bounty" clauses of the Constitution is clear enough, their exact construction is a matter of some difficulty. To discuss the meaning of this provision as to "grants of and agreements for" bounties, it will be necessary to recapitulate the provisions of the Constitution which refer to bounties.

(1.) At the establishment of the Commonwealth, the Federal Parliament has power to make laws with respect to "bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth." (Sec. 51—iii.) At the same moment, however, the control of the payment of bounties passes to the Executive Government of the Commonwealth. (Sec. 86.)

(2.) On the imposition of uniform duties, the power of the Parliament to grant bounties on the production or export of goods becomes exclusive. Thereupon all laws of the States offering bounties on the production or export of goods shall cease to have effect; but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before 30th June, 1898, and not otherwise. (Sec. 90.)

(3.) Nothing in this Constitution prohibits a State from granting bounties on mining for metals, or from granting any bounty with the consent of both Houses of the Federal Parliament. (Sec. 91.)

Before the imposition of uniform duties of customs therefore, the power of the Federal Parliament to grant federal bounties is accompanied by a power of the State Parliaments to grant State bounties; but though there is thus, in a sense, a concurrent legislative power, the executive control of the payment of bounties passes to the Federal Government. (See Note, § 367, *supra*.) On the imposition of uniform duties, the power of the State Parliaments to grant bounties is excluded, and State laws offering bounties are annulled; but certain "grants of or agreements for" bounties are to be taken to be good. And, lastly, an exception is made, by sec. 91, to both the exclusiveness of the federal power and the annulment of State laws. What, then, are "grants of and agreements for bounties," and how does the Constitution affect them?

Agreement.—The phrase "agreement for any such bounty lawfully made by or under the authority of the Government of any State" clearly means a binding contract actually entered into between the Government and a producer or exporter. No mere political promise, or announcement of policy on the one hand, or public expectation on the other hand, can constitute an agreement; the word can only mean a definite and binding legal agreement. The word "lawfully" seems only inserted to prevent the section being construed to validate any agreements which, apart altogether from this section, might be invalid.

Grant.—The words "grant of" are not so easy to construe. They must, apparently—according to strict grammar—be read as "any grant of any such bounty lawfully made by or under the authority of the Government of any State." The grant referred to cannot be the actual payment by the Executive Government of the State to the producer; because that would mean that such payments already made between 30th June, 1898, and the imposition of uniform duties of customs would, upon the latter event, become unlawfully made. It apparently means the appropriation of money to the purpose of the bounty—the actual setting aside of money, under Parliamentary authority, to that purpose.

§ 384. "Shall be Taken to be Good."

Effect of the Reservation.—What then is the effect of a grant or agreement being "taken to be good?" A survey of all the "bounty" provisions leads to two possible interpretations.

(1.) One view is that these words must be read subject to the provision that all State laws offering bounties shall "cease to have effect." In that view, the appropriation by the Parliament of a State is no longer an authorization for the expenditure of any balance remaining unexpended at the imposition of uniform duties. The grant or agreement is good, but the State law under which it can be effectuated has ceased to have effect. This difficulty can only be met by sec. 86, which gives the Federal Executive "the control of the payment of bounties," and it is argued that by virtue of

this control the Federal Government can pay the amount of the State bounties itself, and debit the so amount so paid to the account of the State, under sec. 89, sub-sec. ii. (*a*).

(2.) The other view is that the words "but any grant or agreement," &c., are an exception to the words immediately preceding—"shall cease to have effect." In this view, though State laws offering bounties are declared, generally speaking, to cease to have effect, yet the subsequent saving of certain grants and agreements means that the State laws by which those grants or agreements are made or effectuated are excepted from the rule of annulment. The grants or agreements which are "taken to be good" are good against the State which made them, and must be fulfilled by that State. The "control" of the Federal Executive is in that case merely a right of supervision, to see that the provisions of the Constitution are complied with.

Restrictive Effect.—This section not only saves grants or agreements made before 30th June, 1898, but invalidates (by the words "not otherwise") every grant or agreement made on or after that date. Technically speaking, therefore, the provision is retrospective, because it invalidates not only contracts made after the commencement of the Act, but contracts made at any time after a date previous to the passing of the Act. Looking, however, at the time at which the clause was actually framed, and the fact that it was publicly framed by the representatives of the parties interested, all objection to it on the ground of its retrospective character vanishes.

This particular provision has been assailed as affording a loop-hole for permitting the evasion of the provision for the termination of bounties. Looked at closely, however, it is restrictive rather than permissive. In the absence of any such provision, it is clear that the repeal of laws offering bounties would not operate retrospectively to invalidate agreements made under such laws. (See Maxwell, Interpr. of Statutes, p. 192; cited Conv. Deb., Adel., p. 848.)

As regards grants made after 30th June, 1898, they are only invalidated to the extent of moneys remaining unexpended at the imposition of the uniform tariff, and similarly agreements are only invalidated to the extent of bounties promised but not paid at that date. "Laws offering bounties" remain in force until the imposition of the uniform tariff; and there is nothing in the Constitution which interferes with payments actually made before that date.

Exceptions as to bounties[385].

91. Nothing in this Constitution prohibits a State from granting[386] any aid to or bounty on mining for gold, silver, or other metals[387], nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution[388], any aid to or bounty on the production or export of goods.

Historical Note.—For the earlier discussions of the bounty question, see Historical Note, sec. 90. At the Adelaide Session, 1897, on recommittal, Mr. Higgins added (to what is now sec. 90) a new paragraph:—"This section shall not apply to bounties or aids to mining for gold, silver, or other metals." (Conv. Deb., Adel., p. 1203.)

At the Melbourne session Sir Geo. Turner moved to omit (from Mr. Higgins' paragraph) all words after "mining"—so as to include coal and other non-metallic minerals. He argued that aids to the development of natural resources could not interfere with free trade, though bounties to manufacturers might; but Mr. O'Connor, Mr. Higgins, and Mr. McMillan differed from him, on the ground that coal is as much

an article of inter-state commerce as any other product. The amendment was negatived. Sir Geo. Turner then proposed an amendment to allow "any bounty or aid granted by any State with the consent of the Governor-General in Council or the Parliament of the Commonwealth." The words "Governor-General in Council" were strongly objected to on the ground that they excluded the corporate influence of the States—the Ministry being responsible only to the House of Representatives. Sir Geo. Turner and Mr. Isaacs, however, insisted that without these words the provision would be useless, as the assent of Parliament would involve too much delay. Mr. Dobson moved to omit the words "Governor-General in Council," but this was negatived on division by 26 to 21—several members voting to retain the words and afterwards voting against the whole provision, which was then negatived by 27 to 19. (Conv. Deb., Melb., pp 965-90.)

In the second recommittal, Sir Geo. Turner moved his amendment again. Sir John Downer, by way of compromise, proposed to omit both Governor-General and Parliament, and substitute the assent of "both Houses of Parliament expressed by resolution." Sir Geo. Turner and Mr. Isaacs thought this no better than Act of Parliament, and secured its rejection by 22 votes to 19. Thereupon an amendment was moved to add a condition that the bounty should not derogate from inter-state free-trade. Sir Geo. Turner complained that this made the whole clause useless, as any bounty might be set aside by the High Court, and therefore no one would venture to invest capital; but it was carried by 29 to 12. Sir Geo. Turner then asked the Convention to assist him out of his difficulty by retracing their steps, and allowing him to accept Sir John Downer's amendment; and this was done. (Conv. Deb., Melb., pp. 2343-65.)

After the fourth report the clause (which up to then had formed part of preceding clause) was redrafted as a separate clause.

§ 385. "Exceptions as to Bounties."

The Bounty Question.—The question of State bounties—as clearly appears from the discussions in the Convention—bears a close analogy to the question of discriminating railway rates. Both bounties and discriminating rates may have a lawful or an unlawful purpose. They may be used purely for the development of the resources of a State, or they may be used te create unfair and unfederal competition with the trade of another State. The Convention was therefore not satisfied with the absolute prohibition of bounties, any more than with the absolute prohibition of preferences; they wished to protect purely developmental bounties, while forbidding unfederal bounties. The difficulty was, however, to frame a definition. Bounties on mining for metals were, without much dispute, accepted as developmental; but as regards other bounties, no definition was possible, and the matter was left to the decision of the Federal Parliament in much the same way as the question of unfederal rates is left to the Inter-State Commission.

§ 386. "Nothing in this Constitution Prohibits a State from Granting."

These words qualify the provisions of sec. 90, which otherwise would prohibit a State from granting any aid or bounty which came within the description "bounty on the production or export of goods." If the State is not prohibited from granting certain bounties, it must follow that it is not prohibited from legislating for that purpose, and therefore that to that extent an exception is made to the exclusive nature of the power of the Federal Parliament.

It is submitted that the wide words, "nothing in this Constitution prohibits," do not exempt such grants of bounties from the provisions of the Constitution generally, but only from those prohibitions which relate specifically to bounties. The declaration that the Constitution does not prohibit a State from granting certain bounties does not mean that such bounties may not be unlawful if they do not comply with the

requirements of the Constitution, or of federal statutes, in other respects. These particular bounties are excluded, *qua* bounties, from all the constitutional prohibitions against granting bounties; but they are not exempted from the whole ambit of the Constitution.

Suggestions were made throughout the debate that State bounties might be unconstitutional, without express provision to that effect, on the ground that they derogated from freedom of trade among the States. (See, for instance, Conv. Deb., Adel., pp. 840 seqq.; Conv. Deb., Melb., pp. 910 seqq.) It is extremely doubtful, however, whether a local encouragement to industry could ever be held to be a violation of the constitutional provision for freedom of trade. It might, indeed, and often would, be a derogation from *equality* of trade, and therefore be unfederal; but it is hard to say that encouragement by a State of its own industries, by means of bounties on production or export, can interfere with the freedom of inter-state or foreign trade. (See notes to sec. 92.)

§ 387. "Any Aid to or Bounty on Mining for . . . Metals."

It was not contended at the Convention that aids to the development of mineral resources—at least as regards metals—would be likely to interfere with equality of trade. The sums so spent at present are chiefly in the way of rewards for the discovery of gold-fields. It was suggested at the Adelaide Convention that these payments might be held to be bounties on the production of goods. (Conv. Deb., Adel., pp. 843, 850.) The chief reason for inserting this provision seems to have been to remove doubts on this point; though of course the words have, and were intended to have, a wider scope. (See Conv. Deb., Melb., p. 966.)

As regards bonuses for mining discoveries, it is submitted that they could not, in any case, be held to be "bounties on the production of goods." The bounty contemplated by the section is a sum paid to the producer in respect of the goods produced: and even admitting that mining is the "production of goods" within the meaning of the Constitution, it is clear that a reward paid for discovery is essentially different from a reward paid for production. It is submitted, therefore, that rewards for discovery do not come within the meaning of a bounty, and do not need the protection of this section; but may be given in respect of any industry.

The reasons for limiting the exemption in favour of mining bounties to "gold, silver, and other metals" is stated by Mr. O'Connor (Conv. Deb., Melb., p. 965).

"The clause as it stands was the result of a long discussion in Adelaide. It was held that bounties granted for the production of metals stood in a different position altogether from bounties granted on the production of goods which might be the objects of commerce between different States. It is because a bounty on the production of metals would have no effect on the price that this clause was agreed to. . . . . The reason why you are not allowed to give a bounty on butter, or any other article of that kind produced in a State, is because the bounty would interfere with the price and the sale in commerce between the States, and exactly the same consideration would apply to a mineral like coal, which is the subject of sale."

The distinction thus made, between bounties which affect and which do not affect the price of a commodity the subject of inter-state commerce, is a sound one; but the line drawn in the section, between metals and non-metals, is hardly so satisfactory. As regards gold and silver on the one hand, and coal on the other, it applies well enough; but it does not seem clear why the price of such a metal as iron—which, if produced in any State, would be distinctly an article of inter-state commerce—might not be affected by bounties almost as much as the price of coal.

§ 388. "With the Consent of Both Houses . . . Expressed by Resolution."

This provision amounts to an absolute power given to the two Houses of the Federal Parliament to dispense, to any extent which they may desire, with the prohibition imposed by the preceding section. The intention is that whilst State bounties in general are prohibited, there should be full opportunity given for the allowance of bounties which are purely developmental in aim and not unfederal in effect. It being impossible to frame any definition which would secure this desirable object, the matter was entrusted absolutely to the discretion of the Federal Houses of Parliament.

As to the nature of the consent, it is conceived that it may be absolute or conditional, particular or general, for a fixed or an indefinite period; and that the resolution may be either antecedent or subsequent to the grant by the State. Perhaps the most important questions likely to arise are (1) whether the consent once given is revocable, and (2) if so, what will constitute revocation.

(1.) That any consent given under this section is revocable there can hardly be any doubt. The consent of Parliament in such a case is not the consent of a contracting party, but a license given by a governing body. If instead of the consent of "both Houses of the Parliament expressed by resolution," the consent of the Parliament itself had been required, the consent would have been by legislative Act, revocable at any moment at the will of the Parliament. A Parliament cannot bind succeeding Parliaments, and cannot even bind itself; and it is impossible to suppose that it was intended to empower the two Houses by joint resolution to do what the Queen and both Houses together would be unable to do. It is submitted, therefore, that the consent of both Houses must be a continuing consent, revocable at any moment. Consideration of the object of the general prohibition against bounties, and of this exception, leads to the same conclusion; because it is obvious that a bounty which does not, when granted, interfere with equality of trade may afterwards, under altered conditions of trade, involve serious inequality.

(2.) Then comes the question—what constitutes revocation? If the consent is revocable, it can clearly be revoked in the way in which it was made—by resolution of both Houses. But would the rescission of the resolution by either House, without the other, constitute revocation? The answer seems to depend on the further question whether the "consent of both Houses" is to be regarded as a joint or a several consent—as one consent or two. If the consent of each House were regarded independently, it would seem that the consent of both Houses could not be said to continue when the consent of one was withdrawn; whereas if the consent of both Houses were regarded as one common consent, the concurrence of both would be needed to withdraw that consent. Looking at the language of the section (which speaks of "both Houses," not of "each House;" compare sec. 128), and also at the character of the Parliament as a legislative body, and the semi-legislative character of the consent required, it seems clear that a joint revocation would be necessary. If the intention of the Convention be considered, this view is borne out. The proposal to require the consent of "both Houses" was a compromise to meet the views of those who feared that the consent "of the Parliament" would involve undue delay. The joint resolutions seem to have been regarded as a slightly more expeditious substitute for an Act of Parliament, and not to differ in effect. (Conv. Deb., Melb., p. 2352.)

It was indeed suggested (*id.* pp. 2357-8) that a consent once given would become "part and parcel of the Constitution," and would be interminable unless so expressed by the resolutions themselves; but it is submitted that this view—which was not based on the distinction between resolutions and Act of Parliament—cannot be supported.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free[389].

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs[390] into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State[391] within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

CANADA.—All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.—B.N.A. Act, 1867, sec. 121.

Where customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares, and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on proof of payment of the customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of customs duty as is leviable thereon in the Province of importation.—*Id.* sec. 123.

HISTORICAL NOTE.—At the Sydney Convention, 1891, the first paragraph of the clause was drafted and passed substantially in its present form—except that it referred to trade "throughout the Commonwealth," not merely "among the States." There was also a clause enabling the Parliament to annul any law having the effect of derogating from inter-state free trade.

The difficulty as to the possible evasion of the federal tariff by "loading up" just before its imposition, in a colony where goods were duty-free, was raised by Colonel Smith, who proposed to retain the intercolonial duties for twelve months after the imposition of the Federal Tariff. The amendment was, however, withdrawn. (Conv. Deb., 1891, pp. 790-802.)

At the Adelaide session, 1897, the 1891 draft was followed almost *verbatim*. In place of the power to annul laws made in derogation of free-trade, there was appended to the preference clause a provision that such laws should be wholly void. Sir George Turner feared that "absolutely free" might have a wider interpretation than was meant; and Mr. Isaacs suggested that the clause was unnecessary, and dangerously wide. All that was needed was a prohibition of inter-state duties—which was elsewhere provided for. He also suggested "among the States" as better than the wide phrase "throughout the Commonwealth." (Conv. Deb., Adel., pp. 875-7.)

For an amendment by Mr. Deakin, to enable a State to prohibit importation of articles the sale of which within the State is prohibited, see Hist. Note to sec. 113.

At the Melbourne session, a suggestion of the Legislative Assembly of Western Australia to omit "throughout the Commonwealth," and substitute "between the States," was agreed to.

The second paragraph was added in accordance with the Report of the Finance Committee. Mr. McMillan feared it would be unworkable; but Mr. Holder replied that it would probably not need to be enforced, as the mere fact of its existence would prevent the mischief. The provision was amended by inserting "colony or" before

"State," so as to make it applicable to goods imported before the establishment of the Commonwealth. Sir Philip Fysh proposed words to make it clear that these duties are to be credited to the State of destination; but the amendment was deemed unnecessary, and withdrawn. Sir George Turner suggested that where the duty paid in the colony was higher than the Commonwealth duty, the State should give a drawback; but the matter was left over for consideration. An amendment by Mr. Henry, to limit the clause to one year, was negatived by 32 to 9. The provision that laws derogating from free-trade should be void disappeared from the Bill, that result being sufficiently secured by this clause. (Conv. Deb., Melb., pp. 1014-36.) Drafting amendments were made before the first report and after the fourth report.

§ 389. "Trade Commerce and Intercourse . . . shall be Absolutely Free."

Freedom of Inter-State Trade.—This section is intended to provide for the perfect freedom of trade and commerce among the States, from the moment of the imposition of uniform duties In order to secure that object the strongest possible words have been used. Nothing has been left to implication. In this respect the Constitution of the Commonwealth is more explicit than the Constitution of the United States, which merely forbids the States to lay any duties on imports or exports without the consent of Congress. (Art I. sec. x. subs. 2.) But it was held in Brown *v.* Houston, 114 U.S. 622, and Woodruff *v.* Parham, 8 Wall. 123, that the prohibition did not apply to goods carried from one State of the Union to another; such goods were not imports or exports; imports were commodities coming from foreign countries into the Union, and exports were those proceeding out of the Union into foreign countries. In America, therefore, inter-state free-trade depends solely on the rule of construction that the regulation of trade and commerce, in matters requiring uniformity of legislation, is exclusively vested in Congress, and that the States are, *ipso facto*, deprived of the power to impose duties on goods proceeding from one State into another. Under the Constitution of the Commonwealth there are two express guarantees for freedom of trade between the States; sec. 90, which provides that on the imposition of duties of customs the power of the Parliament to deal with that subject becomes exclusive; and sec. 92, which provides that thenceforth trade, commerce, and intercourse among the States shall be absolutely free.

This section, and all the cases cited in illustration of its meaning, must be read subject to the special provisions of sec. 113, which enacts that "All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State."

The Elements of Inter-State Free-Trade.—Two questions have to be considered in connection with sec. 92 in order to grasp its significance; first, what is absolute freedom of trade, commerce, and intercourse? and secondly, during what period of time or within what limits of space do inter-state trade and commerce operate, so as to remain protected by the shield of Federal freedom? In reference to the first question, absolute freedom of trade, commerce, and intercourse may be defined as the right to introduce goods, wares, and merchandise from one State into another, the right to sell the same, and the right to travel unburdened by State restrictions, regulations, or obstructions. Freedom of trade necessarily means the right to sell as well as the right to introduce, and the right to travel in order to sell. The right of introduction without the right of disposition would reduce freedom of trade to an empty name. The second question may be conveniently discussed under the headings, (1) When does exportation begin? and (2) When is importation complete?

When Exportation Begins.—It has been held that exportation does not begin until the goods are committed to the custody of a carrier for transportation out of a

State. Until then they remain subject to State laws and are taxable as a part of the general mass of property in the State. (Coe *v.* Errol, 116 U.S. 517. See other cases cited p. 519, *supra.*)

When Importation is Complete.—Articles of foreign or inter-state commerce become subject to State laws and State taxation from the moment when they are divested of their inter-state or foreign quality. This happens as soon as they pass from the original importer into the hands of the purchasers of the original packages, or as soon as they have been broken up for retail by the original importer. (Brown *v.* Maryland, 12 Wheat. 419; Turpin *v.* Burgess, 117 U.S. 504. Burgess, Political Sci. ii. p. 135.)

Doctrine of Original Package.—An original package has been defined as the unbroken package, in the condition in which it was prepared by the exporter, received and transported by the carrier, and brought into the importing State. (McGregor *v.* Cone, 1898, 73 N.W. Rep. 1041.) Thus boxes and barrels are original packages. In some cases it has been held that where bottles of liquor were packed in barrels and boxes, and transported into a State, the bottles were the original packages and were within the protection of the Federal commercial law, after they had been removed from the barrels and boxes. These cases, however, have been overruled, and it is now held that the barrels or boxes, and not the bottles, are the original packages. (Prentice and Egan, Commerce Clause, p. 82.) It has been further held that the question, what constitutes an original package, is partly one of good faith, and that the importer may determine for himself the form and size of the package which he buys. (Guckenheimer *v.* Sellers, 81 Fed. Rep. 997.) The importer may sell his goods in the original package, by wholesale or by retail. (Schollenberger *v.* Pennsylvania, 171 U.S. 1.) An original package becomes subject to State jurisdiction as soon as it is broken. (Brown *v.* Maryland, 12 Wheat. 419; Leisy *v.* Hardin, 135 U.S. 100.) The original package is not broken merely by the fact of lifting the lid for the examination of its contents. (*Re* McAllister, 51 Fed. Rep. 282.) The drawing of a bung from a barrel, in order to obtain a small quantity of its contents for testing purposes, does not constitute a breaking of the package. (Wind *v.* Iler, 93 Iowa, 316.)

Methods of Fettering Inter-State Commerce.—The principal methods resorted to by some of the States of America, in order to avoid the rule of freedom of trade, may be thus classified—(1) By the imposition of taxes on imported goods, after their entry into the State, this being done in the pretended exercise by the State of the right to tax all property within its jurisdiction. (2) By requiring persons engaged in selling goods introduced or coming from another State to pay for licenses to sell, this being also done in the pretended exercise of State taxing power. (3) By restricting the actual introduction of goods from another State, on alleged sanitary or moral grounds, this being done in the pretended exercise of the police power of the State.

Taxes on Inter-State Commerce.—The following are instances of taxes on inter-state commerce, violating the law of commercial freedom:—A tax on goods coming from other States unaccompanied by equal taxes on similar local goods, held to be unconstitutional and void (Brown *v.* Houston, 114 U.S. 622); a tax on the earnings of carriers conveying freight and passengers, from one State into another, held unconstitutional (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196); a tax on persons selling goods manufactured out of the taxing State, and no similar tax exacted from those engaged in the sale of like goods manufactured in that State, held unconstitutional (Walling *v.* Michigan, 116 U.S. 446); a tax on cars belonging to a carrying company which run from point to point within the taxing State to points without the State, held unconstitutional (Pickard *v.* Pullman Car Co., 117 U.S. 34); a tax on every ton of freight, carried by a railway in and through a State, held unconstitutional (The State Freight Tax Case, 15 Wall. 232); a tax on all messages sent by a telegraph company, so far as it applied to messages sent to or received from points in other States, held unconstitutional (Telegraph Co. *v.* Texas, 105 U.S. 460); a tax on all persons soliciting orders for goods, so far as it applied to those canvassing for

persons outside the State, held unconstitutional (Asher *v.* Texas, 128 U S. 129) ; a tax on all non-residents who sold liquors, held unconstitutional (Walling *v.* Michigan, 116 U.S. 446) ; a tax on a carrying company for every alien passenger brought by it to the ports of a State, held unconstitutional (People *v.* Compagnie Generale, 107 U.S. 59 ; Henderson *v.* Mayor of New York, 92 U.S. 259) ; a tax on the gross receipts of common carriers, so so far as it applied to receipts from inter-state business, held unconstitutional (Fargo *v.* Michigan, 121 U.S. 230) ; a tax on all vessels touching the wharves of a State, so far as it applied to vessels engaged in inter-state business, held unconstitutional (Inman S.S. Co. *v.* Tinker, 94 U.S. 238) ; a tax on the franchise of a railroad company which had been granted by the Federal legislature, held unconstitutional (California *v.* Central Pacific R. Co., 127 U.S. 1) ; a tax on the tonnage of vessels, even though such tax was exacted in aid of quarantine inspection, held unconstitutional ; a tax collected from auctioneers on their sales of imported goods in their original packages, held unconstitutional (Cook *v.* Pennsylvania, 97 U.S. 566) : a tax on bills of lading for the transportation of gold or silver from one State to another, held unconstitutional (Almy *v.* California, 24 How. 169) ; a tax of 5 dollars on each vessel entering a port of a State, such tax being supplied to support the Port Wardens, and collected, whether the vessel required their services or not, held unconstitutional (Steamship Co. *v.* Port Wardens, 6 Wall. 31) ; a tax on a non-resident railway company engaged in inter-state traffic, for the right to maintain an office in the taxing State, in order to promote its business, held unconstitutional (Norfolk and Western R. Co. *v.* Pennsylvania, 136 U.S. 114).

Licenses to Engage in Inter-State Commerce.—The following are instances in which State laws taxing persons engaged in inter-state commerce have been held to violate the rule of commercial freedom, viz., laws requiring pedlars selling goods not grown or manufactured in the taxing State to hold licenses, whilst no licenses were required of persons selling similar articles grown or manufactured in the State, held unconstitutional (Welton *v.* Missouri, 91 U.S. 275) ; requiring commercial travellers canvassing for the sale, by sample, of goods at the time outside the State to hold licenses, held unconstitutional (Asher *v.* Texas, 128 U.S. 129 ; Robbins *v.* Shelby Taxing District, 120 U.S. 489 ; Stoutenburgh *v.* Hennick, 129 U.S. 141) ; requiring persons selling malt liquor, the product of another State, to hold licenses, held unconstitutional (Tiernan *v.* Rinker, 102 U.S. 123) ; requiring persons selling goods, not the product or manufacture of the vendors, to hold licenses, held unconstitutional (Corson *v.* Maryland, 120 U.S. 502) ; requiring the officers of foreign corporations engaged in inter-state commerce to hold licenses, held unconstitutional (McCall *v.* California, 136 U.S. 104) ; requiring persons engaged in inter-state occupations to hold licenses, held unconstitutional (Moran *v.* New Orleans, 112 U.S. 69) ; requiring the owners of inter-state ferry boats touching the wharves of a State to hold licenses, held unconstitutional (St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423) ; requiring a telegraph company established by the federal legislature to hold a license, held unconstitutional (Leloup *v.* Port of Mobile, 127 U.S. 640) ; requiring a license to be held by an agent of a foreign express company, held unconstitutional (Crutcher *v.* Kentucky, 141 U S. 47) ; requiring an agent of a company having a railway in a distant State, and soliciting business for that railway, to hold a license, held unconstitutional (McCall *v.* California, 136 U.S. 104) ; requiring a license fee for the use of a stream in prosecuting inter-state commerce, held unconstitutional (Harman *v.* Chicago, 147 U.S. 396).

Police Powers Exercised to Restrict Inter-State Commerce.—The following are examples of State laws, passed in the exercise of police powers, which obstruct and restrict inter-state commerce, and which consequently violate the rule of commercial freedom, viz., a law prohibiting the introduction into a State of cattle or goods during certain periods of the year, ostensibly for sanitary purposes, but in reality for State protective purposes, held unconstitutional (Railroad Co. *v.* Husen, 95 U.S. 465) ; prohibiting the introduction into a State of certain kinds of human food, unless inspected before its preparation, ostensibly for sanitary reasons, but in reality for State protective

purposes, held unconstitutional (Minnesota *v.* Barber, 136 U.S. 313); prohibiting the introduction of certain goods, such as intoxicating liquors, ostensibly to preserve the morals of the people, held unconstitutional (Bowman *v.* Chicago, &c., R. Co., 125 U.S. 465; Leisy *v.* Hardin, 135 U.S. 100; see, however, the Wilson Act (America), and sec. 113 of this Constitution.)

Taxes by States in Exercise of Their Taxing Powers.—In the cases cited, in which taxes imposed by States were held to be unconstitutional and void, the taxes were for the most part of a discriminating character, in taxing the means of commerce and the subjects of commerce coming from other States, or they were so thinly veiled as to be reasonably suspected of an intention to tax inter-state commerce and so impair its freedom. Discrimination is one of the principal tests applied in determining the constitutionality of a State tax. (Tiernan *v.* Rinker, 102 U.S. 123.) A discriminative tax on imported goods would be unconstitutional, even if imposed on the goods after they had left the hands of their original importers, and even after their original packages had been broken. But discrimination is not the only test. A tax on inter-state trade and traffic may be blended in a tax on domestic trade and traffic. In such a case the discrimination intended might not be apparent, and yet the Courts might discern the intention to tax inter-state trade and traffic, so lurking in the plan of taxation as to bring it within the prohibition. The people of a State might find it compatible with their views and interests to impose a tax on a portion of their own trade and business, in order to have the privilege of taxing the larger volume of inter-state trade and business of the same kind. Consequently in the State Freight Tax Case (15 Wall. 232) a tax imposed by a State on all the freight, both domestic and inter-state, conveyed by a railway company in and through a State was held unconstitutional. A similar principle was affirmed in Telegraph Co. v. Texas, 105 U.S. 460.

There are several cases, however, in which it has been distinctly held that a State may adopt a general system of taxation which may indirectly affect every branch of commerce, and yet be within its constitutional right. The first was that of Brown *v.* Houston, 114 U.S. 622, which is described by Dr. Pomeroy as one of the most interesting and delicate cases involving the power of a State to tax goods of an inter-state origin. In this case coal was mined in the State of Pennsylvania, and then shipped to New Orleans in the State of Louisiana to be sold in the open market for the Pennsylvanian owners. The coal was not landed at New Orleans, but remained on board the vessel in which it arrived in port, and was sold whilst on board that vessel, the purchasers intending to take it out of the country in a foreign bound vessel. The city corporation of New Orleans claimed a tax on the coal under the terms of a general law taxing property within the State. It was held by the Court that the coal had become intermingled with the general property of the State; that it was properly taxable according to the recognized rule, that after goods have arrived at their place of destination in a State, either for use or for trade, they become subject to any general tax laid on all property alike, without discrimination, in the State. The decision in Brown *v.* Houston is not considered to be in conflict with the rule of the immunity of original packages, because the bulk had been broken and the first sale had taken place.

In the case of Emert *v.* Missouri, 156 U.S. 296, it was held that a State can levy a tax or demand a license fee for the right to sell goods in the possession of the seller, and by him offered for sale, even if they are the products of another State. In the case of Pittsburg Coal Co. *v.* Bates, 156 U.S. 577, coal sent by river from Pennsylvania to Louisiana, while kept on the boats by which it had been transported, was offered for sale and part was sold; held that it was liable to State taxation.

In Myers *v.* Commissioners of Baltimore county, 35 Atl. Rep. 144, a tax was imposed by a State upon an average number of cattle, owned by a dealer within a State, which had been received by him during the year from the Western States, held usually for one day, and afterwards sold for export. It was held that, like other property situated within the State, they were liable to State taxation.

These cases, however, will require very careful consideration before any opinion can be expressed as to how far they would be applicable in the interpretation of the Constitution of the Commonwealth.

A State has a right to tax all the domestic trades and occupations of its citizens. In Ficklen *v.* Shelby Taxing District, 145 U.S. 1, where a resident citizen, engaged in a general business, was subject to a particular tax, it was held that the fact that, for the time being, the business happened to consist in whole or in part of negotiating sales between residents and non-residents of goods made in another State, did not make such a tax an imposition on inter-state commerce.

A State may tax personal property employed in inter-state commerce, like other personal property within its jurisdiction. (Marye *v.* Baltimore and Ohio R. Co., 127 U.S. 117; Western Union Tel. Co. *v.* Massachusetts, 125 U.S. 530; Western Union Tel. Co. *v.* Taggart, 163 U.S. 1. Cooley's Const. Law, p. 80.)

In the case of Pullman's Palace Car Co. *v.* Pennsylvania, 141 U.S. 18, a statute of Pennsylvania imposed a tax on the capital stock of every railroad and car company, in the proportion which the number of miles operated by it within the State bore to the whole number everywhere. It was upheld as to the non-resident Pullman Car Company, because it had within the State constantly engaged in its business, though mainly operated in inter-state journeys, a certain number of cars which thus acquired a *situs* there for taxation, the tax being in reality upon the cars as property. The majority of the judges distinguished the tax on capital stock in this case from an occupation tax, a license tax, or a tax on transit, and they applied the doctrine of Western Union Tel. Co. *v.* Massachusetts, 125 U.S. 530, in which a tax on specified property was upheld. (Cooley Const. Law, 80-1.) In the State Tax on Gross Receipts Case (15 Wall. 284), the Courts upheld a State tax on the gross receipts of a carrying company, including receipts from inter-state business. This doctrine has since been questioned in Philadelphia Steamship Co. *v.* Pennsylvania, 122 U.S. 326. In that case the question was as to the validity of a tax levied by Pennsylvania upon the gross receipts of a company, derived from the carriage of persons and property by sea between different States, and it was held that the tax was unconstitutional.

In Maine *v.* Grand Trunk R. Co., 142 U.S. 217, a State statute provided that every person working a railroad, within the State, should pay to the State treasurer an annual excise tax, to be determined by reference to the gross receipts of the company, in proportion to its mileage within and without the State. The statute was sustained on the ground that it was a tax on a foreign corporation for the privilege of exercising its franchises within the State. The decision in this case seems to be in conflict with that in the Philadelphia Steamship Co. *v.* Pennsylvania, 122 U.S. 326.

Other State Fees and Charges Allowable.—In the following cases it has been decided that the fees, charges, and licenses required by State laws do not violate the rule of commercial freedom, viz., a stamp fee on snuff intended for domestic use, such stamp being required simply to distinguish it from snuff designed for export, held constitutional (Pace *v.* Burgess, 92 U.S. 372); a stamp fee on tobacco before its removal from the manufactory, held constitutional (Turpin *v.* Burgess, 117 U.S. 504); a charge for storage and outage collected on tobacco shipped out of a State and inspected at the State warehouse, held constitutional (Turner *v.* Maryland, 107 U.S. 38); a tax on peddlers of sewing machines, applied alike to those manufactured in and out of a State, held constitutional (Machine Co. *v.* Gage, 100 U.S. 675, but this case was afterwards overruled); a license fee collected from a foreign corporation, provided such corporation is not engaged in carrying on foreign or inter-state commerce within the State (Pembina Mining Co. *v.* Pennsylvania, 125 U.S. 181); a license fee exacted from the agent of a corporation organized under a law of another State for the right to solicit insurance business on buildings within the State, held constitutional (Paul *v.* Virginia, 8 Wall. 168); tolls for the use of improvements in connection with navigable streams and highways (Mobile *v.* Kimball, 102 U.S. 691; Harman *v.* Chicago, 147 U.S. 396, but the Federal

legislature could interpose and declare such tolls illegal); a charge for a license for all engineers to pay the expenses of examination as to their competency to undertake employment on inter-state railroads (Nashville Railroad Co. *v.* Alabama, 128 U.S. 96); a charge on all vessels touching at quarantine stations, such charge to be applied to pay the expenses of inspection (Morgan's S.S. Co. *v.* Louisiana Board of Health, 118 U.S. 455); a charge based on the tonnage of a vessel for the use of a wharf owned by a State, provided such charge is not of a discriminating character (Packet Co. *v.* Keokuk, 95 U.S. 80; Transportation Co. *v.* Parkersburg, 107 U.S. 691); a charge for the use of the improved internal waterways of a State, provided that such charge is not of a discriminating character. (Huse *v.* Glover, 119 U.S. 543; Sands *v.* Manistee R. Improvement Co., 123 U.S. 288.)

State Police Laws Allowable.—In the License Tax Cases, 5 Wall. 462, Chief Justice Taney said that the police powers of a State were nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions. Chancellor Kent has given, as examples of the legitimate subjects of State legislation, the following: unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead. (Comm. ii. 340.) In Patterson *v.* Kentucky, 97 U.S. 501, Mr. Justice Harlan stated that by the settled doctrines of the court the police powers extend, at least, to the protection of the laws, the health, and the property of the community, against the injurious exercise by a citizen of his own rights. It was said by Chief Justice Fuller, in Leisy *v.* Hardin, 135 U.S. 108, that the power to pass laws in respect to internal commerce, inspection, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local inter-communication, to the progress and development of local prosperity, and to the protection, safety, and welfare of society—powers originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as they fell within the scope of a power confided to the General Government.

The primary objects of the police power of a State are the protection of health, the prevention of fraud, and the preservation of morals. This rule is clear, but great difficulty is sometimes experienced in its application.

The legislature of Louisiana incorporated the Slaughter-House Company, which was empowered to construct and maintain stock-landings and yards and a grand abattoir or slaughter-house at a specified place near New Orleans, and all live stock brought to that city for food were required to be landed and kept at these yards, and slaughtered at this abattoir, the company being authorized to demand compensation, the maximum rates of which were fixed by the statute. Landing or slaughtering such animals elsewhere was prohibited by heavy penalties. The exclusive privilege thus conferred was to continue for twenty-five years. Certain persons, engaged in the trade of butchering, residents of New Orleans and citizens of the United States, brought appropriate actions in the State courts to test the validity of the statute. These suits were finally carried to the Supreme Court of the United States. (Pomeroy's Const Law, p. 174.) By a bare majority the Supreme Court affirmed the validity of the Statute, as clearly within the competence of the State legislature in the exercise of its police power. (Slaughter-House Cases, 16 Wall. 36.)

In Powell *v.* Pennsylvania, 127 U.S. 678, a State law prohibited the manufacture and sale of oleomargarine. Powell was indicted for selling the prohibited article. It was strongly suspected that the law was passed in the interests of the dairymen of the State, as it was understood that oleomargarine, properly manufactured, was not injurious

to health. Yet the court sustained the law as a proper exercise of the police power. In Plumley *v.* Massachusetts, 155 U.S. 461, a State law prohibited the sale of oleomargarine artificially coloured to resemble butter. The law was sustained in its application to an article imported from another State, on the ground that the resemblance of oleomargarine so coloured to butter, led to deception and was in the nature of a fraud. The importation of an article coloured to resemble butter could, in the opinion of the court, be prohibited so long as the introduction of uncoloured oleomargarine was not interfered with. This doctrine was carried a step further in the Armour Packing Co. *v.* Snyder, 84 Fed. Rep. 136. In that case a law of Minnesota forbade the sale of oleomargarine unless coloured bright pink. An attempt was made to apply this law to goods which had been shipped from Kansas into Minnesota, and which were marked as required by federal law, and sold only in original packages. It was contended that the State law prevented deception in the retail sale, and on this ground the requirement as to colour was sustained. This reasoning was, however, disapproved of in the case of Collins *v.* New Hampshire, 171 U.S. 30, in which it was held that a State could not prohibit the sale of an article of inter-state commerce, nor attach to it a condition which would render it unsaleable. In Brimmer *v.* Rebman, 138 U.S. 78, the court clearly expressed the opinion that a State could not pass regulations excluding articles of commerce which are actually fit for and belong to the domain of commerce. In the late case of Schollenberger *v.* Pennsylvania, 171 U.S. 1, decided by the Federal Supreme Court in 1898, a statute of Pennsylvania was challenged which forbade the introduction, in its pure and unadulterated condition, of oleomargarine from another State, and its sale in original packages. It was held that the statute was invalid so far as it applied to inter-state commerce. The difference in principle between Plumley *v.* Massachusetts and Schollenberger *v.* Pennsylvania is obvious; in the former case the article prohibited was coloured in imitation of butter, and consequently was liable to deceive the public; in the latter case it was a pure and harmless article of commerce which could not be either honestly or legally excluded by the State. In The People *v.* Hawkins, 31 N.Y. Suppl. 115, it was held that a State law requiring goods made by convict labour in other States to be so labelled when exposed for sale was unconstitutional.

Police Powers Affecting Commerce.—The following laws passed by States have been held to be a proper exercise of their police powers, viz., a law excluding passengers, animals, and goods infected with disease, passengers known to be convicted criminals, paupers, idiots, lunatics, and persons likely to become burdens on the State, held constitutional (Bowman *v.* Chicago R. Co., 125 U.S. 465); a law forbidding the entrance into a State of cattle likely to communicate fever, unless carried in cars subject to certain precautions, held constitutional (Grimes *v.* Eddy, 126 Missouri, 168); a law for the protection of persons and property, regulating the introduction and transportation of nitro-glycerine and other dangerous explosives, held constitutional (Patterson *v.* Kentucky, 97 U.S. 501); a law imposing a license tax for the purpose of excluding an obscene paper, held constitutional (Preston *v.* Finley, 72 Fed. Rep. 850); a law forbidding the transportation or exportation of diseased sheep, cattle, and meats; a law forbidding the importation of goods tending to spread disease, held constitutional (Leisy *v.* Hardin, 135 U.S. 100). The reasons and principles of these decisions are, that such persons, animals, and commodities are not legitimate subjects of commerce.

"The several States have power to pass laws regulating the internal police of their own territories, which territories include navigable rivers and harbours, as well as unnavigable streams, and the land itself. These police measures are not, in any true sense of the term, regulations of commerce, although they may sometimes have direct reference to shipping, to the condition of harbours, and other instruments by which commerce is carried on, or to the commodities themselves which are the objects of interchange and traffic. They are simply a part of the general system by which each State endeavours to protect the good morals, lives, health, persons, and property of its inhabitants. Thus, if a State legislature, deeming it dangerous to permit poisons to be sold without restriction, should pass a statute requiring a license from the druggist, or placing him under any other species of restraint, such law would be unobjectionable,

although certain poisonous substances, as opium, are chiefly or wholly the products of foreign countries, and therefore the objects of commerce. Again, most of the States have enacted statutes prohibiting the sale of spirituous liquors in certain quantities and at certain times and places, except by those persons who have complied with the provisions of the statute, and have received licenses for that purpose. Such laws are within the power of the States to pass. This entire class of statutes establishing police regulations is within the purview of State legislation, whether Congress has legislated for the same or similar purposes or not. Among them may be mentioned laws establishing quarantine, licensing and controlling pilots, declaring the order in which ships shall come to wharves and docks, regulating the use of wharves and docks, managing the internal order of harbours, licensing the sale of spirituous liquors, poisons, and the like." (Pomeroy's Const. Law, 10th ed. p. 275.)

Other Examples of Police Power.—Munn *v.* Illinois, 94 U.S. 113, decided in 1876, is a leading case illustrative of the police supervisory power of the States in matters which may indirectly affect commerce, but which do not amount to an interference or obstruction. The General Assembly of Illinois passed a law fixing the maximum charges for the storage of grain in warehouses at Chicago, and other places in the State, in which grain was stored in bulk and in which the grain of different owners was mixed together, or stored in such a manner that the identity of different lots or parcels could not be accurately preserved. The warehouses of the plaintiff were used as instruments of commerce by those engaged in trade solely within the State, as well as by those engaged in inter-state trade. It was held that this was a regulation of domestic concerns, quite legal until displaced by Federal legislation.

In the case of Escanaba Co. *v.* Chicago, 107 U.S. 678 (1882), the facts were as follows: The municipal authorities of Chicago had passed regulations declaring it to be unlawful to open any bridge within the city of Chicago during an appointed hour of the morning and evening, Sundays excepted, or to keep any such bridge open during the daytime for more than ten minutes at a time. The plaintiff's steam vessels were enrolled and licensed to carry goods from the port of Escanaba, Michigan, to docks on a branch of the Chicago River in the city of Chicago. In their course up the river to the docks, they had to pass through draws of several bridges constructed over the stream by the city of Chicago. They complained of the regulations as being an obstruction to navigation. The Supreme Court held that the power to control the bridges within the city had been properly and fairly exercised; that if the power had been used unnecessarily to obstruct navigation the Federal legislature could have interfered and removed the obstruction; that if the power of the State and the power of the Federal legislature came into conflict in such a case, the latter must control and the former yield. (Per Field, J., 107 U.S. 679.)

The control of bridges, dams, and ferries within a State and between two States is generally left to the supervision of the local authorities, so long as they do not use those works and agencies to obstruct the free flow of inter-state commerce. Bridges and ferries may be improved and utilized as aids to commerce. The States may establish ferries across navigable rivers, within or adjacent to their jurisdiction, and they may require the owners of boats to take out licenses and pay fees. (Wiggins Ferry Co. *v.* East St. Louis, 107 U.S. 365.) But this is justifiable only as a compensation for the right of wharfage on the State territory. A ferry between States is a means of commerce and cannot be taxed. (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196.) As to dams and bridges, see Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Wheeling Bridge Case, 18 How. 421, and Gilman *v.* Philadelphia, 3 Wall. 713.)

The States may improve navigable streams within their limits, and impose tolls on those using them in order to defray expenses. (Mobile *v.* Kimball, 102 U.S. 691.) But a license fee exacted for the use of the stream and not as a toll or compensation for specified improvements and services is invalid. (Harman *v.* Chicago, 147 U.S. 396.) The Federal legislature can interpose and supersede the authority of the State in all these cases, whenever it deems it necessary to do so, in order to remove obstructions, abate nuisances, stop exactions, carry out improvements or establish uniform regulations. (Monongahela Nav. Co. *v.* United States, 148 U.S. 312; Wisconsin *v.* Duluth, 96 U.S. 379.)

The municipal authorities of a State can regulate laundries, and prohibit washing and ironing within defined districts during certain hours of the night. (Barbier *v.* Connolly, 113 U.S. 27; Soon Hing *v.* Crowley, 113 U.S. 703.) Such authorities can also abolish bone factories in specified districts (Fertilizing Co. *v.* Hyde Park, 97 U.S. 659); and breweries (Bartemeyer *v.* Iowa, 14 Wall. 26; Foster *v.* Kansas, 112 U.S. 201). See, however, Leisy *v.* Hardin, 135 U.S. 100; Wilson Act (America), and sec. 113 of this Constitution.

A State can pass a law providing that any person introducing cattle which have not wintered north of a certain line shall be liable to an action for damage done by the introduced cattle, in spreading and communicating disease to other cattle. (Kimmish *v.* Ball, 129 U.S. 217.)

Dr. Von Holst, referring to the commerce clause of the American Constitution, says: "In inter-state or international commerce, neither the goods nor the transportation of property or persons can be taxed by the States. But the business as such and the capital used in it are subject to the State's right of taxation. The correctness of this principle certainly cannot be attacked, but just as little can it be disputed that it gives the States the power of encroaching very seriously upon the congressional domain, if they are only careful about the way in which they do so. The Courts, indeed, are in no wise bound to permit the simple question of the sufficiency of the form, in which a State carries out its right of taxation, to determine their decisions; and they do not do so. As soon as they enter upon the question, whether the tax-laws of a State materially encroach upon the right of regulating international and inter-state commerce, subjective views are given more or less away." (Const. Law of the U.S., p. 143.) In support of his suggestion as to the power of the States to encroach on the Federal domain the learned author cites the decision in the case of Liverpool Insurance Co. *v.* Massachusetts, 10 Wall. 566, according to which a State can tax foreign corporations at a higher rate than similar corporations created by its own laws. That was the case of an insurance company, and it has been held that insurance is not commerce, and is consequently not within the protection of the commerce clause. No such discrimination would be permissible in the case of a commercial corporation, either in America or in the Australian Commonwealth.

Limits of the Police Powers.—The right of exclusion is founded on the vital necessity of self-defence and self-protection. A State could not exclude persons, animals, or merchandise unobjectionable in character, health, and quality, and fit subjects of commerce. (Brimmer *v.* Rebman, 138 U.S. 78.) In Henderson *v.* Mayor of New York, 92 U.S. 259, the extent to which a State could exclude paupers and criminals was not clearly decided. A State law which forbids the entrance into the State of persons who are not paupers, vagabonds, and criminals, and who are not unsound in body or mind, is not a right exercise of the police power. (State *v.* Steamship "Constitution," 42 Calif. 579.)

Ports, Harbours, and Pilotage.—Until the Federal Parliament assumes the control and management of ports, harbours, wharves, beacons, buoys, lights, and pilotage, the State authorities, boards, and trusts, at present charged with the administration of these works, will continue to exercise their functions and powers within the limits assigned to them by State laws. Harbour and port dues, wharfage rates, light dues, will be collected by the local authorities according to local laws; they are not taxes on commerce or in any way affecting the freedom of commerce, but merely compensations for services rendered. (*Re* Rahrer, 140 U.S. 545; Steamship Co. *v.* Jollife, 2 Wall. 450; Cooley *v.* Port Wardens, 12 How. 299.) States may regulate wharves at which vessels receive passengers and cargo, and disembark and discharge same, and may impose dues and rates sufficient to pay the expenses of executing the wharfage regulations. (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196-214; Transportation Co. *v.* Parkersburg, 107 U.S. 691.) But the wharfage charges must be imposed and collected without discrimination, and according to the value of the services rendered, or they will

come within the constitutional prohibition. (Inman *v.* Tinker, 95 U.S. 238.) It has been held that a tax on every boat is a tax on boats, not on commerce (St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423); but a tax on a vessel every time she enters a certain harbour is not a tax on the vessel, but a tax on the business conducted by the vessel on entering the harbour. (Steamship Co. *v.* Port Wardens, 6 Wall. 31.) The reasonableness of the rates charged for wharfage may be enquired into by the Federal Courts, to ascertain whether in effect they amount to a duty on tonnage. (St. Louis *v.* Telegraph Co., 139 U.S. 463.)

Quarantine.—Until the control over the various departments of quarantine is assumed by the Federal Government, the States will continue to manage the quarantine stations and to enforce the quarantine laws. Such laws may require persons engaged in commerce to submit to medical examinations, and, if necessary, to remain isolated for statutory periods. They may impose a charge on each vessel to defray the expenses of inspection. In Train *v.* Boston Disinfectant Co., 144 Mass. 523, it was decided that a State may, by its officers, disinfect all rags arriving at a port, and compel the owner to pay the cost of disinfection. An ordinance of St. Louis provides that steamboats coming from below Memphis, having had on board more than a specified number of passengers during the voyage, should remain in quarantine for not less than 48 hours and not more than 20 days. It was held that this was a valid sanitary and quarantine law. (St. Louis *v.* McCoy, 18 Missouri, 238.)

The question whether wharfage, quarantine, and other such dues, fees and charges, demanded by a State, are *bona fide* compensations for services rendered, or are mere obstructions to commerce, must be determined according to the facts and circumstances in each case. Such exactions must be fair, reasonable and uniform, and must not exceed the requirements of the occasion. Charges which in the opinion of the Federal Courts are excessive or discriminating could be declared unconstitutional, as involving violations of the rule of inter-state commercial freedom.

Fisheries and Game Laws.—Control over game and fisheries within the limits of a State is reserved to the State. In the enforcement of its game laws, a State could prohibit all traffic in the meat of game within its limits, without reference to the place where the animal was captured. (Magner *v.* People, 97 Ill. 33.) As to whether a State could prohibit the exportation of animals protected by its game laws, there is a conflict of authority. (Geer *v.* Connecticut, 161 U.S. 519.) A State law prohibiting the sale of fish and game, at a time when they could not, under the law, be caught within the limits of the State, has been held to be operative upon the sale of goods shipped from another State, the reason given being that the statute could not be enforced with reference alone to fish or game caught in the State. (Prentice and Egan, Commerce Clause, p. 152.)

Excise Duties.—It has been already stated that, in the Constitution of the Commonwealth, freedom of inter-state trade and commerce is secured by two constitutional provisions: (1) by the express declaration of sec. 92, that trade and commerce between the States shall be absolutely free; and (2) by the withdrawal from the States of the power to impose duties of customs and excise (sec. 92). In discussing the foregoing cases we have been considering merely the probable effect of the constitutional affirmation of absolute commercial freedom between the States. It remains to consider how far the immunity of inter-state trade and commerce from State taxation is secured through the exclusive control of excise being vested in the Federal Parliament. This depends upon the meaning to be assigned to "excise." In our notes to sec. 90, the various meanings of "excise" have been referred to; the first and original one being that in which it is restricted to duties on the manufacture and production of commodities in a State; whilst in another sense it has been extended to cover a host of additional imposts—such as licenses to auctioneers, pawnbrokers, peddlers, dealers, and persons permitted to carry guns and run carriages. The bulk of authority is in favour of the limited connotation of the term; and if that view be correct the States of the Commonwealth will retain almost the same powers of taxation as those of the American

Union, and the doctrine established by the leading cases, such as Brown *v.* Houston, 114 U.S. 622, will be of some assistance in determining the extent to which State taxation of mixed inter-state and domestic commerce could go. On the other hand, if "excise" were held to be capable of the wider signification alluded to, including all kinds of inland licenses, then the States of the Commonwealth would be deprived of vast powers and sources of local revenue, not contemplated by the framers of the Constitution. If such an extended meaning were annexed to the term "excise" none of the American cases would, in the interpretation of sec. 92, apply, except those supporting the principle of State taxation of incomes derived from domestic and inter-state business combined, and the taxation of incomes derived from properties employed in both domestic and inter-state business.

Inspection Laws.—Charges covering the cost of inspecting goods, on their entrance into a State, may be imposed and collected under the authority of State laws. (See sec. 112.)

State Business, Internal and Local.—The Federal Legislature has nothing to do with the purely internal commerce of a State, carried on between different parts of the same State, and confined exclusively to the jurisdiction and territory of the State without affecting other nations or States. (Lord *v.* Steamship Co., 102 U.S. 541; Telegraph Co. *v.* Texas, 105 U.S. 460. Baker, Annot. Const. p. 33.)

Commerce upon lakes lying within a State is not within federal regulation. The internal commerce and navigation of a State is exclusively subject to State regulation. (Moore *v.* American Transp. Co., 24 How. 1. *Id.* p. 38.)

A law of Iowa authorizes the manufacture of alcohol within the State for the purposes of sale for mechanical, medicinal, culinary, and sacramental purposes; and prohibits its manufacture within the State for the purpose of exportation to, and sale within, other States and foreign countries. Held, that the statute is not repugnant to the commerce clause. (Kidd *v.* Pearson, 128 U.S. 1, 19. *Id.* p. 40. See Note, "State Tax on a State Business or Profession," *infra.*)

Landing Passengers and Freight.—Foreign or inter-state commerce cannot be carried on with a State without a wharf or other place within its limits on which passengers and freights can be landed. The use of such a landing place in a State does not confer upon the State a right to tax the capital of corporations engaged in such commerce, unless the same are domiciled within the jurisdiction of the State. The only permissible interference by a State with such commerce is confined to port regulations, and such measures as will ensure safety and prevent confusion in landing and receiving freight and passengers. (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196. *Id.* p. 37.)

State Tax on Passengers.—A State cannot impose a tax on passengers arriving in its ports from a foreign country; such tax is a regulation of commerce and void. (Passenger Cases. 7 How. 283; Baker, Annot. Const. p. 26.)

Where the object of a State law is to force the owners of vessels carrying passengers from foreign countries to the ports of the State to pay a tax on such passengers, its effect is to tax commerce, and so it is void. (Henderson *v.* Mayor of New York, 92 U.S. 259; Chy Lung *v.* Freeman, 92 U.S. 275. *Id.* p. 27.)

The constitutional disability is not removed by calling the law an inspection law to prevent the admission of criminals, paupers, lunatics, &c. (People *v.* Compagnie Gen. Transatlantique, 107 U.S. 59. *Id.* p. 28.)

Transportation means the taking up of persons or property at one point and putting them down at another. A tax upon such transportation between two States is a tax upon inter-state commerce. The character of this commerce between two States is not changed by the character of the means of transportation. The power to regulate inter-state and foreign commerce includes the power to determine when it shall be free and when subject to duties or exactions. (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196. *Id.* p. 28.)

State Tax on Freight.—A tax on freight transported from one State to another State is a regulation of inter-state commerce; when levied by a State, it is void so far as it applies to articles carried through the State, or to articles carried into the State, or to articles taken up within the State and carried to points without. (State Freight Tax Cases. 15 Wall. 232; Baker, Annot. Const. p. 26.) But a tax levied on the gross receipts of a railroad company is not a tax on inter-state transportation, and is not in conflict with the commerce clause. (State Tax on Railway Gross Receipts Case, 15 Wall. 282, 284. *Id.* p. 26.)

A tax imposed by a State upon a carrying company incorporated under its laws, and levied directly upon the fares and freights received by the company for the carriage of persons and goods between different States, and between the States and foreign countries, is a tax upon inter-state and foreign commerce, and is unconstitutional. (Philadelphia Steamship Co. *v.* Pennsylvania, 122 U.S. 326; Baker, Annot. Const. p. 29.)

State Tax on a State Business or Profession.—A State has a right to tax its own citizens for permission to prosecute any particular business or profession within the State. (Nathan *v.* Louisiana, 8 How. 73. *Id.* p. 26.)

A license tax imposed by a city for the privilege of selling beer in casks manufactured in the same State is not obnoxious to the Constitution. (Downham *v.* Alexandria Council, 10 Wall. 173. *Id.* p. 26.)

A by-law of a city requiring every railroad company or express company transacting business in such city, and having a business extending beyond the limits of the State, to pay an annual license fee, and imposing penalties for violation, is not repugnant to the commerce clause. (Osborne *v.* Mobile, 16 Wall. 479. *Id.* p. 26.)

A law of Texas levied a tax on persons selling wine and beer manufactured out of the State, but exacted no such tax from those engaged in the sale of similar liquors manufactured within the State: Held unconstitutional. (Tiernan *v.* Rinker, 102 U.S. 123. *Id.* p. 27.)

When a State grants to a city the right to license, tax and regulate ferries, the city may impose a license tax on the keeping of ferries, although their boats ply between landings lying in two different States. This is one of the undelegated powers reserved to the States. (Wiggins Ferry Co. *v.* East St. Louis, 107 U.S. 365. *Id.* p. 29.)

The taxation of goods coming into a State from other States is inconsistent with freedom of trade. But if after their arrival in the State, either for use or for trade, they are subject to any general tax laid alike on all property, such taxation is not unconstitutional. (Brown *v.* Houston, 114 U.S. 622. *Id.* p. 28.)

A State tax on persons engaged in selling liquors not manufactured in the State, when no such tax is imposed on persons selling such liquors manufactured in the State, is a discriminating tax, contrary to freedom of commerce among the States, and therefore void. (Affirming Welton *v.* Missouri, 91 U.S. 275; Walling *v.* Michigan, 116 U.S. 446. *Id.* p. 29.)

A law of Tennessee imposed a tax of $50 upon each sleeping-car used by any railroad company within the State and not owned by the company; it was made unlawful for railroad companies to use such cars unless such tax was paid. Held, that the Act was a regulation of inter-state commerce, in so far as it applied to sleeping-cars used upon trains which ran between points within the State and points without the State, or which ran through the State. (Pickard *v.* Pullman Car Co., 117 U.S. 34. Tennessee *v.* Pullman Southern Car Co., 117 U.S. 51. *Id.* p. 29.)

The commerce clause is not violated by a law of a State which exacts a license fee from a corporation organized under the laws of another State, to enable such corporation to have an office within the limits of the State enacting such law, provided such corporation is neither engaged in carrying on foreign or inter-state commerce, nor employed by the Government of the United States. (Pembina Mining Company *v.* Pennsylvania, 125 U.S. 181. *Id.* p. 30.)

A State cannot, for the purpose of protecting its people against intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained. (Bowman *v.* Chicago and N.W.R. Co., 125 U.S. 465. *Id.* p. 36.)

Railways, State Control of.—A State law requiring railway companies operating within its territory to fix their rates, annually, and to keep printed copies thereof posted at all stations, is not unconstitutional; it is a valid exercise of the police powers of the State. (Railroad Co. *v.* Fuller, 17 Wall. 560. Baker, Annot. Const. p. 38.)

The power to regulate commerce among the several States was vested in the Federal legislature in order to secure equality, and freedom in commercial intercourse against discriminating State legislation; it was never intended to interfere with private contracts not designed at the time they were made to impede such intercourse. (Railroad Co. *v.* Richmond, 19 Wall. 584. *Id.* p. 38.)

A law which fixes the minimum rates on a railroad extending from one State to another is not repugnant to the commerce clause, although incidentally it may reach beyond the limits of the State. (Peik *v.* Chicago and N W.R. Co., 94 U.S. 164. Overruled in part by Wabash Railway Co. *v.* Illinois, 118 U.S. 557. *Id.* p. 39.)

A railroad company whose charter of incorporation does not exempt it from State control may be required by State legislation to convey when called upon, and to charge no more than a reasonable compensation, which may be limited by statute. (Winona, &c., R. Co. *v.* Blake, 94 U.S. 180. *Id.* p. 39.)

A statute of Illinois, enacting that any railroad company within that State which charges for transporting passengers or freight of the same class, the same or a greater sum for any distance than for a longer distance, shall be liable to a penalty for unjust discrimination, is, when applied to contracts for shipment beyond the State limits, a regulation of commerce among the States, and is so far void. (Munn *v.* Illinois, 94 U.S. 113; Chicago Burlington, &c., R. Co. *v.* Iowa, *id.* 155; Peik *v.* Chicago and N.W.R. Co., *id.* 164, examined and explained and partly over-ruled; Wabash, &c., R. Co. *v.* Illinois, 118 U.S. 587. Baker Annot. Const. p. 39.)

Canvassing Agencies.—An agency for a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line from Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in inter-state commerce; and a municipal license tax sought to be imposed upon such agency is unconstitutional. (McCall *v.* California, 136 U.S. 104; Norfolk and W.R. *v.* Pennsylvania, 136 U.S. 114. Baker, Annot. Const. p. 42.)

Locomotive Engineers.—A State statute which requires locomotive engineers, engaged in running locomotive engines on railroads which are operated in and through different States, to be examined as to their power of distinguishing the colours of signals, and which requires the corporation whose trains are so operated to pay a fee for such examination, is not repugnant to the commerce clause until Congress legislates upon the subject. (Nashville, &c., R. Co. *v.* Alabama, 128 U.S. 96. Baker, Annot. Const. p. 36.)

Quarantine Regulations.—A statute of Missouri which prohibited Mexican, Texas, or Indian cattle from being driven or conveyed through the State between March and December of each year is in conflict with the commerce clause. It is more than a quarantine law, which a State in the exercise of its police powers may enact. (Railroad Co. *v.* Husen, 95 U.S. 465. Baker, Annot. Const, p. 29.)

A law of Iowa, which provides that a person having in his possession within the State "Texas cattle" which have not been wintered north of the northern boundary of Missouri and Kansas shall be liable for any damage which may accrue from spreading the disease known as "Texas cattle fever," is not in conflict with the commerce clause. (Kimmish *v.* Ball, 129 U.S. 217. Baker, Annot. Const. p. 40.)

The laws of the States on the subject of quarantine, while they may in some of their rules amount to a regulation of commerce, though not so designed, belong to that class of laws which a State may enact until Congress interposes by legislation over the subject, or forbids State laws in relation thereto. Congress has not done this, but has adopted the State laws upon that subject. (Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U.S 455. Baker, Annot. Const. p. 40.)

The statute of Minnesota providing for inspection within the State of animals designed for meat, by its necessary operation practically excludes from the markets of that State all fresh meat slaughtered in other States, and directly tends to restrict the slaughtering of animals whose meat is to be sold in Minnesota to persons engaged in such business in that State. This discrimination is an incumbrance on commerce among the States, and is unconstitutional. It is not a rightful exercise of the police power of the State. (Minnesota *v.* Barber, 136 U.S. 313. Baker, Annot. Const. p. 41.)

State Tax on Commercial Agents.—A State law imposing a license-tax upon peddlers selling goods not grown or manufactured in the State is in conflict with the commerce clause. (Following and re-affirming Welton *v.* Missouri. Morrill *v.* Wisconsin, Book 23, p. 1009, L.C.P. Co. Ed. U.S. Sup. Ct. Rep. Baker, Annot. Const. p. 28.)

No State may impose upon the products of other States brought therein for sale or use, or upon citizens engaged in the sale therein or the transportation thereto of the products of other States, more onerous public burdens or taxes than are imposed upon like products of its own territory. (Guy *v.* Baltimore, 100 U.S. 434. *Id.* p. 28.)

A law of a State requiring a person engaged in peddling goods, wares, and merchandise, not produced in the State, to take out a license and pay a tax thereon, where no such license or tax is required of persons selling similar articles which are the growth, produce or manufacture of the State, is in conflict with the commerce clause. (Welton *v.* Missouri, 91 U.S. 275. *Id.* p. 27.)

A tax on the amount of sales made by an auctioneer is a tax on the goods sold. And if the tax is upon sales of imported goods sold in the original packages, and for the importer, it is a regulation of commerce; and such tax, if laid by a State or under its authority, is invalid. (Cook *v.* Pennsylvania, 97 U.S. 566. *Id.* p. 27.)

A State law which exacts a license from persons to enable them to take orders for the sale of goods for persons residing in another State is repugnant to the commerce clause. (Asher *v.* Texas, 128 U.S. 129. *Id.* p. 30.)

State Tax on Vessels.—A vessel is subject to taxation only in its port of register. That is its situs. A law of another State, therefore, which assumes to levy a tax on such vessel, is void as a regulation of commerce. (Hays *v.* Pacific Mail Steamship Co., 17 How. 596. Baker, Annot. Const. p. 26.)

A State tax on a vessel by a State other than that in which it has its home port and situs, when the vessel is lawfully engaged in inter-state transportation over the navigable waters of the nation, is an interference with commerce. (Morgan *v.* Parham, 16 Wall. 471. *Id.* p. 26.)

Dams and Bridges across Navigable Streams.—In the absence of Federal legislation upon the subject a State may authorize the construction of a dam across a navigable stream within the State. (Pound *v.* Turck, 95 U.S. 459. Baker, Annot. Const. p. 35.)

A State Legislature may, in the absence of a federal law, authorize the construction of a bridge across a navigable river wholly within the State; such law being local in its nature and a mere aid to commerce. But when the Federal Legislature intervenes, its authority is supreme and its regulations are exclusive. (Cardwell *v.* Bridge Co., 113 U.S. 205. *Id.* p. 35.)

A State Legislature may determine the form, character, and height of railroad bridges crossing its navigable waters. Until the Federal Legislature intervenes, the State's powers in such cases is plenary. (Hamilton *v.* Vicksburg, &c., R. Co., 119 U.S. 280. *Id.* p. 38.)

The power to authorize the building of bridges is not to be found in the Federal Constitution; it has not been taken from the States. (Gilman *v.* Philadelphia, 3 Wall. 713. *Id.* p. 38.)

Pending a suit to have a bridge across the Mississippi River declared a nuisance, it was competent for the Federal Legislature, under the power conferred by the commerce clause, to interfere and legalize the bridge. (The Clinton Bridge, 10 Wall. 454. *Id.* p. 38.)

Other State Taxes.—A State cannot, for the purpose of defraying the expenses of quarantine regulations, levy a tax on a vessel entering her harbours in pursuit of commerce, and owned in foreign ports. (Peete *v.* Morgan, 19 Wall. 581. *Id.* p. 106.)

State tonnage duties upon all ships plying in the navigable waters of the State are a breach of the commerce clause. The prohibition applies to all ships engaged in the coasting trade, whether trading between ports in different States, or between ports in the same State. Tonnage duties are taxes, and are within the prohibition against State duties on imports and exports. (State Tonnage Tax Cases, 12 Wall. 204. *Id.*)

State taxes imposed on ships, owned by its citizens, as property, and upon a property valuation, are not in conflict with the commerce clause. The enrolment of a ship does not exempt the owner from taxation of his interest as property. (Transportation Co. *v.* Wheeling, 99 U.S. 273. *Id.*)

A duty, or tax, or burden imposed upon vessels under the authority of the State, and measured by the capacity of the vessel, and which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition against State duties on imports and exports. (Cannon *v.* New Orleans, 20 Wall. 577. *Id.*)

A law of Pennsylvania providing that vessels neglecting or refusing to take a pilot shall forfeit a certain sum for the use of the society for relief of distressed and decayed pilots, &c., is not within that prohibition. (Cooley *v.* Port Wardens, 12 How. 299. *Id.*)

§ 390. "Goods Imported before the Imposition of Uniform Duties of Customs."

The object of the second paragraph of this section is to prevent merchants, before the imposition of the uniform tariff, from "loading up" imported goods in a Colony or State where there are no duties, or where the duties are light, in the expectation that as soon as the border customs are abolished such goods will be free of the whole Commonwealth. With the present free-trade tariff of New South Wales, importers in every colony would have been able, but for this provision, to evade customs duties on general merchandise altogether, for the first year or so of the uniform tariff, by

warehousing everything at Sydney in advance of the tariff, and not distributing into the State of destination until the intercolonial customs barriers were down. This section checkmates any such device by retaining the intercolonial barriers for two years after the uniform tariff, so far as imported goods are concerned, to the extent to which those goods have not paid the Commonwealth tariff.

This section only prevents the "loading up," in one State, of goods for distribution in another; it does not prevent, for instance, the importation into New South Wales, in the expectation of an increased tariff, of goods to supply the New South Wales market. That is an operation which is always possible when there is a prospect of increased customs taxation; and it can only be met by the recognized constitutional practice of collecting the new duties from the date on which the House of Representatives passes the preliminary resolution to impose the duties, and making the subsequent Customs Act take effect retrospectively from that day. As to this practice, see *Exp.* Wallace and Co., 13 N.S.W. L.R. 1, and the authorities there cited. In that case the applicants, before the passing of the Customs Act, applied for a writ of mandamus to compel the Collector of Customs to sign bills of entry for certain goods without payment of the new duties. The court, in the exercise of its discretion, refused the writ on the ground of established constitutional practice; though it was admitted that, pending the passing of the Customs Act, an action would lie against the Government. (See Stevenson *v.* The Queen, 2 W.W. and A'B., L. [Vic.] 143.)

Imported.—After the establishment of the Commonwealth the Constitution does not speak of "imports" or "exports" from one State to another, but only of imports into, or exports from, the Commonwealth; and in the case of inter-state trade the phrases used are "goods passing into," or "goods passing out of" a State. (See p. 845, *supra*; and secs. 93, 95, 104, 112.) In other words, the Constitution is careful to regard the Commonwealth, so far as imports and exports are concerned, as a single whole, and to regard the movement of trade within the Commonwealth as internal trade merely.

The word "imported" in this section is not confined to imports after the establishment of the Commonwealth, but includes all goods imported before the imposition of the uniform tariff. That it is intended to apply to goods imported before as well as after the establishment of the Commonwealth, is shown by the words "or into any colony which, whilst the goods remain therein, becomes a State." This application of the section to imports made before the commencement of the Constitution is not really retrospective in character; it merely means that certain intercolonial duties previously chargeable continue to be chargeable on certain goods.

Questions may arise as to the meaning of the word "imported," and as to the precise time when the importation of goods is to be deemed completed. On this point some assistance may be derived from the decision of the Privy Council in the case of the Canada Sugar Refinery Co. *v.* The Queen (1898), App. Ca. 735. By the Canadian Tariff Act, 1895, which came into force on 3rd May of that year, a duty of one-half cent per pound was imposed on raw sugar "imported into Canada." On 29th April the *Cynthiana*, from Antwerp, carrying a cargo of sugar consigned to Montreal, put into the port of North Sydney, Cape Breton, Canada, in order to coal, and the master made his report inwards of his ship and cargo in compliance with the 25th sec. of the Customs Act. On the same day he made his report outwards and obtained the Customs certificate of clearance for Montreal. On 2nd May the importers of the sugar made an entry at the Montreal Customs House of the sugar, and a warrant was issued for its landing duty free. On 3rd May the new duty came into force. The *Cynthiana* reached the wharf in the port of Montreal on 4th May. The Collector of Customs then cancelled the free entry, and claimed that the goods were liable to duty. On his behalf it was contended that the goods were not imported into Canada until they were landed, or at any rate until they arrived within the port of Montreal; that the goods were not imported into Canada by the mere fact of the vessel entering a port of call within the

Dominion on her way to her ultimate destination; that "imported" meant at least arrival in the port of discharge. This view was sustained by the Privy Council on appeal.

§ 391. "On Thence Passing into Another State."

Duty under this section is only payable on the passage of the goods "thence"—*i.e.*, from the State into which they were imported before the uniform tariff, and in which they were at the imposition of the uniform tariff—into another State. On their first passage across a State border after the imposition of the tariff, if they have originally paid no duty at all, they will be liable to pay the whole amount of the duty chargeable on importation; if they have already paid a smaller duty, they will be liable for the difference; whilst if they have paid an equal or larger duty, they will not be liable at all. Having once crossed a border, and paid the balance of duty, they are then free of the Commonwealth.

It will doubtless be difficult in some cases to identify the goods which are chargeable under this section; but all that is required is that rough justice should be done to the revenues of the several States, and a possible leakage on small consignments and broken packages will be a trifling matter. Very little duty is likely to be collected under the section, for the simple reason that its existence will effectually prevent the transactions which it is designed to meet.

On the expiration of two years from the imposition of uniform customs, the provision will lapse altogether. By that time the danger will be past, because no importer is likely to lay in large stocks more than two years before they can be disposed of.

Payment to States for five years after uniform tariffs.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides[392]—

(i.) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption[393], and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected[394] not in the former but in the latter State:

(ii.) Subject to the last sub-section[395], the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

Historical Note.—The provisions of the 1891 Bill with respect to distribution before the uniform tariff (see Hist. Note, sec. 89), were to apply after the uniform tariff "until the Parliament otherwise provides," except that there was a book-keeping adjustment with regard to customs and excise, and a provision for debiting the States with any bounties taken over. (See pp. 134, 139, *supra*.)

Briefly, all revenue was to be credited to the State in which it was collected, and all expenditure was to be debited *per capita*; but only until the Parliament should make different provision. From the date of the imposition of the federal tariff, the Parliament was to have an absolutely free hand. (Conv. Deb., 1891, pp. 802-833.)

Adelaide Session, 1897 (Debates, pp, 877-908, 1067-70).—The system of distribution recommended by the Finance Committee, and embodied in the first draft, provided for three periods:—(1) Before the uniform tariff, the provision was the same as in 1891. (2) For five years after the uniform tariff, the same basis was to be retained, subject to the book-keeping adjustments necessitated by intercolonial free-trade. (3) After five years, revenue was to be credited and expenditure debited on a *per capita* basis. (See pp. 169-170, *supra.*)

These provisions were debated (pp. 877-908) on the consideration of the clause dealing with distribution *before* the uniform tariff. Mr. McMillan pointed out that the difficulty of distribution arose from the fact that the federal tariff and its operation were unknown quantities. The problem was to secure fair distribution without unnecessary taxation in any colony, and yet without leaving an undue shortage of revenue in any colony. There were two aspects of the problem: the question of guarantees (see Historical Note, sec. 87) and the question of distribution. As to the latter, the *per capita* system would be unfair to New South Wales for some years Mr. Reid had wished to postpone it for ten years, but the Finance Committee had compromised with five. The "detestable book-keeping system" on the borders was an unwelcome necessity, to be abolished as soon as possible. Mr. Holder, Sir George Turner, and Mr. Reid all agreed that if the book-keeping could be done away with it would be a great blessing; and eventually the clause was postponed to enable the Treasurers to consult on the subject. Subsequently (Debates, pp. 1067-70) the Treasurers brought up the sliding-scale system, which only involved book-keeping for one year, and a subsequent scaling down, by equal gradations, from the contribution basis of the test year to a *per capita* basis at the end of five years. The sliding scale, on the recommendation of the Treasurers, was adopted with hardly any debate, though Mr. McMillan feared that, owing to probable "loading up" of dutiable goods, the test year would be a bad one for New South Wales. (See pp. 176-8, *supra*).

Sydney Convention, 1898 (Debates, pp. 35-222).—The sliding scale was unfavourably criticized in New South Wales, as well as in all the other colonies except South Australia, where it was lucidly explained and strongly championed by Mr. Holder. In the general debate at the Sydney Convention it did not receive much support, and a new Finance Committee was appointed, to which the whole question was referred. (See p. 188, *supra.*)

Melbourne Convention, 1898 (Debates, pp. 775 *et seqq.*, 1041-84).—In accordance with the report of the Finance Committee, the sliding scale and the ultimate *per capita* distribution were struck out, and the book-keeping system was restored for five years and "thereafter until the Parliament otherwise provides" (see p. 197, *supra.*)

The basis of charging expenditure was also altered (see Historical Note, sec. 89). There was little debate upon the mode of distribution—the discussion turning chiefly on the question of guarantees. Drafting amendments were made before the first Report and after the fourth Report.

§ 392. "During the First Five Years . . . . and Thereafter until the Parliament Otherwise Provides."

This section provides for the distribution of the surplus revenue during the second of the three periods marked out by the Constitution (see secs. 89, 94). The characteristic of this period is that there is now a uniform tariff for the whole Commonwealth, and absolute freedom of trade between the States (with the temporary revenue-protecting exception in the second paragraph of sec. 92). Secs. 90 and 92, whose

operation has been suspended "until the imposition of uniform duties of customs," are now in operation, and the commercial unity of Australia is an accomplished fact.

This is the period during which the financial provisions of the Constitution will be put to their first and severest test. So long as each State retained its own tariff, the disturbance of pre-existing conditions was slight; the basis of revenue and expenditure in each State was very much as it had been during the old provincial regime, except for the inconsiderable item of new federal expenditure, borne in proportion to population. But now the provincial tariffs have disappeared; customs taxation throughout the Commonwealth is on a uniform basis; and each State must accordingly regulate its budget, both as regards local expenditure and local taxation, to the new circumstances. The difficulty of establishing a common tariff has been the "lion in the path" for many years, and its final establishment must inevitably be followed by extensive financial rearrangements.

This period has a minimum duration of five years; and at the expiration of those five years it will still continue until the Parliament, under sec. 94, has substituted some other basis of distribution. The expiration of the five years does not annul this section, but merely annuls its sanctity as a constitutional provision, and makes it alterable by the Parliament, subject of course to the provisions of sec. 94.

Any disagreement between the Houses on the question of the new basis will not leave the Commonwealth without a financial system, but will merely prolong the operation of this section.

§ 393. "For Consumption."

"Consumption" is a term of Economics, applied to denote the absorption, by use, of all kinds of wealth. It is the converse of production; production having reference to the creation of wealth, and consumption to its utilization. "As production is the first stage in economics, consumption is the last. Consumption is the chief end of industry, for everything that is produced and exchanged is intended in some way to be consumed." (Chambers' Encycl. *sub tit.* "Consumption."

The process of consumption, in the case of many articles, may be a very prolonged one. The consumption of food or fuel is immediate; but the consumption of a waggon, or a steam-engine, or a work of art, or a jewel, many extend over many years, or indefinitely. The expression "passing into another State for consumption" is not intended to imply that complete consumption within the State should be contemplated, but merely that distribution to consumers within the State is contemplated. Goods are "for consumption" in a State if it is intended that they shall be retailed in that State.

§ 394. "Shall be Taken to have been Collected."

Notwithstanding the great difference between this and the preceding period as regards the mode of raising revenue, the alteration in the mode of distributing the surplus is very slight. The object is still the same—to give to each State credit for the revenue which it has contributed, and to charge each State with its fair share of the federal expenditure. Accordingly the provisions for debiting expenditure remain as before (see sec. 89, *supra*); but with regard to crediting revenue one further adjustment is needed. With free trade between the States, the State in which imports pay customs duty, or products pay excise duty, is not necessarily the State in which the goods are retailed or consumed; and, on the assumption that these duties are paid by the consumer—or at least by the people of the State in which the goods are retailed—it is necessary to make an adjustment in respect of goods which have paid duty in one State, but which afterwards pass into another State for consumption.

To obtain the necessary facts upon which to base this adjustment, it will be necessary, during the whole of this period, to keep an account of the passing from one State

to another of all goods on which customs or excise duty has been paid. That this can be done with absolute completeness and accuracy is not to be expected; but small omissions will not seriously interfere with the efficiency of the provision—especially as they are likely to occur on both sides of the ledger, and so cancel one another. There will be no motive on the part of traders to evade observation, because no duty is chargeable to them; it is merely a matter of book-keeping entries for and against the several States.

§ 395. "Subject to the last Sub-section," &c.

The adjustment mentioned in sub-s. i. is the only difference, as regards the mode of distribution, between this and the preceding period. It is obvious, however, that owing to the great difference in the incidence of customs taxation—and, in a less degree, of excise taxation—the amounts and proportions actually distributed to the several States will probably differ very considerably from those of the years immediately preceding. It is for the purpose of meeting any temporary dislocation of State finances which may thus be caused that sec. 96 has been added. (See Notes to that section.)

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs[396], the Parliament may provide[397], on such basis as it deems fair[398], for the monthly payment to the several States of all surplus revenue of the Commonwealth[399].

Historical Note.—Under the Bill of 1891 a similar provision took effect immediately after the imposition of uniform duties (see Historical Note, sec. 93).

Adelaide Session, 1897 (Debates, p. 1070).—The clause as drafted in Adelaide provided that after the five years "all surplus revenue over the expenditure of the Commonwealth shall be distributed month by month among the several States in proportion to the numbers of their people as shown by the latest statistics of the Commonwealth." In Committee, Mr. Reid secured the insertion of the explanatory words "Each State shall be deemed to contribute to the revenue an equal sum per head of the population."

Melbourne Session, 1898 (Debates, pp. 775, &c., 1085-99, 2380-1).—The provision for ultimate distribution, as embodied in the Finance Committee's Report, was "on such basis as shall be fair to the several States, and in a proportion and after a method to be determined by the Parliament." To make it clear that the Parliament alone was to be the judge of what was fair, these words were altered to "on the basis which the Parliament deems fair." Sir George Turner still wished to keep to the *per capita* basis; and Mr. Glynn wished the discretion of the Parliament to be limited to postponing the *per capita* basis for, at most, another five years. However, the Finance Committee's proposal was carried by 25 to 17—the New South Wales representatives who were present voting solid for it, and the Victorians solid against it. Mr. Glynn then moved to add a further provision that after ten years the distribution should be *per capita*. The debate showed a general desire for ultimate *per capita* distribution—with the single exception of Sir John Forrest, who saw no prospect of its being fair to Western Australia. But Mr. Holder, Mr. Reid, and others wished it left open, being confident that the *per capita* system would be adopted as early as possible, but unwilling to tie the hands of the Parliament. The amendment was lost by 31 to 16—New South Wales and Victoria again voting solid with the majority and the minority respectively.

On the second recommittal Mr. Glynn again moved an amendment with the same object; but it was defeated by 23 to 14. Drafting amendments were made before the first Report, and after the fouth Report.

§ 396. "After Five Years from the Imposition of Uniform Duties of Customs."

This section provides for the termination of the second period marked out by the Constitution for the distribution of revenue according to principles fixed by the Constitution, and inaugurates the third and last period, from the commencement of which the monthly distribution will be left to the Parliament to determine on such basis as it deems fair. From the moment when this section comes into operation—that is to say, at the expiration of the five years mentioned—the Parliament will have a new power of legislation—the power to supersede sec. 93 by legislation of its own under this section.

§ 397. "The Parliament may Provide."

The Parliament, being a body with purely legislative powers, can only "provide" by means of a law. (See sec. 51—xxxvi.) The power to make this law does not attach until the expiration of the five years mentioned. The section clearly requires, not only that the provision by the Parliament shall not *take effect* until after that time, but that it shall not be *made* until after that time. It seems therefore that the Parliament cannot, before the expiration of the five years, pass a law under this section to take effect on or after such expiration.

This disability is intentional. The object of postponing the legislative power of the Parliament until the expiration of five years is that the Parliament should not be empowered to take any action until it has sufficient data and material before it to enable it to fix the basis of distribution. (See Conv. Deb., Melb., pp. 1085-9.) The object of the Convention was that the basis prescribed in sec. 93 should remain in force until the Federal Parliament, with five years' experience behind it, should agree upon a better basis. The Convention recognized themselves unable, owing to the absence of data, to determine the ultimate basis, and were careful to ensure that the basis which was to supersede their provisional basis should not be determined upon until the data of five years' experience were available.

Any provision which Parliament may make under this section will not be unalterable, and therefore will not necessarily be final. The legislative power under which any such law is made will continue in existence after the law is made, and will justify different provision being made from time to time as circumstances may demand. It would undoubtedly be undesirable for the financial basis of the Constitution to be frequently altered; but it might be still more undesirable for a financial basis which had been ill-conceived, or had outlived its usefulness, to be made unalterable, except by an amendment of the Constitution.

§ 398. "On such Basis as it Deems Fair."

The words as originally proposed by the Finance Committee were "on such basis as shall be fair;" but these words were altered to prevent any possibility of its being contended that any assumed unfairness might be made the subject of an appeal to the High Court, thereby making that tribunal the arbiter of a purely political matter. (See Conv. Deb., Melb., pp. 1085-9.) The Parliament is therefore laid under a solemn constitutional obligation to provide a "fair" basis, but it is made the sole judge of what is fair. The command is addressed to the conscience of the Parliament and of the people; and such a command, embodied in the Constitution, is not likely to be disregarded.

But leaving intentional unfairness out of the question, the question what is fair may lead to considerable differences of opinion. It is submitted that the constitutional command that the basis shall be "fair" will strengthen the claims of a basis founded on a broad principle. The only basis which the Convention—from the standpoint of existing provincial conditions—could agree upon as "fair" was the basis of the contributions

made and the benefits received by the people of each State. But the basis which nearly every member of the Convention regarded—from the federal standpoint—as being ultimately fair, was the basis of distribution in proportion to population. The contribution basis was regarded as fair for the present—but somewhat unfederal. The population basis was regarded as being unfair for the present, owing to the conditions which had been created by the provincial system, and which would take some time to remove; but as being the ideal which, under federal conditions, it would be possible to approach, and finally to reach. The first Adelaide draft, and afterwards the Adelaide sliding scale, proposed to reach the *per capita* basis, by different roads, at the end of five years; and the final decision of the Convention represents, not so much a doubt that the *per capita* basis will be ultimately fair, but a doubt whether the circumstances which made it unfair for the present will not take more than five years to eliminate. The Convention certainly expected that the basis chosen by the Parliament would be, if not the *per capita* basis, at least an approximation to it—a compromise; in fact, between the *per capita* basis and the contribution basis. Somewhere between these two principles it is likely that the ultimate solution will be found.

§ 399. "For the Monthly Payment to the Several States of all Surplus Revenue of the Commonwealth."

Although the basis of fair apportionment is left to the Commonwealth, two things are laid down by the Constitution: (1) that all surplus revenue must be paid to the States; (2) that such payments must be made monthly. The proportions in which payments are to be made to each State are to be controlled by the Parliament; the provisions for crediting revenue and debiting expenditure may be superseded by any other means of arriving at the respective shares of the surplus; but on one basis or another, the whole surplus must be distributed monthly among the several States.

Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution[400], the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years[401] after the imposition of uniform duties of customs, impose duties of customs[402] on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed[403] during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Historical Note.—Throughout the sittings of the Convention of 1897-8, it was recognized that the abnormal position of Western Australia would for some years necessitate special treatment. With her large unsettled mining population, and her resources in other directions comparatively undeveloped, she was compelled to rely more largely than any other colony on her customs revenue, and direct taxation to any great extent was out of the question. Moreover, a large part of her customs revenue was levied on produce from the other colonies ; and it was estimated that her receipts from the federal tariff, on imports from abroad only, would be inadequate for her needs. The expected shortage, though large per head of the population, and therefore a serious matter for Western Australia, was not a very large matter from the point of view of the Commonwealth.

At the Melbourne session, the Finance Committee, in their report, brought up a somewhat complicated clause to provide compensation to Western Australia for five years after the imposition of the uniform tariff. It provided that an account should be kept of Western Australia's "net loss" of revenue due to the substitution of the federal for the provincial tariff. This "net loss" was to be calculated on the difference between the amount of customs and excise revenue *actually collected* in Western Australia during each year under the federal tariff, and the amount which would have been collected if the old provincial tariff of Western Australia had been applied to the *actual* imports, produce, and manufactures of that year. The "proportionate net loss" of Western Australia was to be the ratio between the amount of the "net loss" and the amount of revenue collected in Western Australia. The "proportionate net loss" (if any) of each of the other States was to be similarly calculated, and if the "proportionate net loss" of Western Australia was greater than the *average*, the Commonwealth was to pay to that State a sum which would equalize her proportionate net loss with such average. That is to say, an arbitrary method was fixed for determining the ratio in which the customs and excise revenue of Western Australia was reduced ; and if that ratio exceeded the average of similar ratios in the other States, Western Australia was to receive such a subsidy as would equalize her with the average.

Sir John Forrest objected to this because it made a special case of his colony, and he would have preferred a clause of general application. A general "financial assistance" clause moved by Mr. Henry had already been defeated (see Historical Note, sec. 96), and Sir John Forrest now proposed to extend the benefit of the Finance Committee's provision to every State whose "proportionate net loss" was above the average. Moreover, he proposed, in striking the average, to take account of "net gains" as well as "net losses"—which would greatly decrease the average "proportionate net loss," and so increase the amount to be made good. After some discussion, Sir John Forrest withdrew his amendment in favour of one by Sir George Turner, providing that the Commonwealth should pay to each State the whole amount of its absolute net loss. The discussion thus drifted from the question of a provision for Western Australia to the general question of guarantees to the States—and guarantees on the highly artificial basis of applying a non-existing tariff to actual imports and manufactures. Accordingly Sir John Forrest, to diminish the artificiality, proposed to add to Sir Geo. Turner's clause a proviso that no payment should be made, under the clause, to any State in which the customs and excise revenue collected was greater after the uniform tariff than before. The whole proposition, however, was strongly opposed by the New South Wales

representatives on the ground that the whole series of payments must come out of the pockets of that colony—a contention in which they were borne out by Mr. Holder and others. Sir John Forrest's mitigating amendment was rejected by 25 to 19, and Sir George Turner then withdrew his clause.

Meanwhile the Finance Committee's West Australian clause had been criticized as being based on a false principle. The loss of revenue to Western Australia would be purely a Treasury loss, resulting from the remission of customs taxation in that colony; and it was contended that it ought in fairness to be borne, not by the Commonwealth, but by the tax-payers of Western Australia. Direct taxation being for the present impracticable, it had been suggested in the Finance Committee, and was again suggested in debate, that Western Australia should be allowed for a time to levy customs duties on a provincial tariff, in addition to those levied by the Commonwealth. There was a difficulty about this, however. Taxation on imports from abroad would not, Sir John Forrest averred, produce the revenue required; whilst the proposal to allow Western Australia to levy duties on intercolonial imports might give rise to a similar demand on the part of other colonies, and so endanger the vital principle of intercolonial freetrade. Besides, the free markets of Western Australia were one of the substantial benefits of Federation to which her next-door neighbour, South Australia, looked forward.

Sir Geo. Turner's clause being disposed of, Mr. Deakin proposed a clause allowing the Commonwealth, by agreement with Western Australia, to levy additional duties on imports from abroad into that colony; and also allowing the intercolonial duties of that colony to remain in force, subject to the reduction of one-fifth every year, till they disappeared at the end of five years. Western Australia did not like the first part of this proposal, and South Australia did not like the second. It was pointed out that if the intercolonial duty were higher than the Commonwealth duty, there would be a preference to foreign over Australian goods; and also that there ought to be some more elastic provision which would enable Western Australia to deal independently with every item of the tariff, in the way of making further reductions. After a long debate, and the defeat of several amendments, Mr. Deakin's clause was carried by 30 to 10, it being understood that the Drafting Committee would modify it to meet some of the objections raised. (Conv. Deb., Melb., pp. 779, 1122-1243.)

On the first recommittal the redraft was submitted and carried, practically in the form of the first two paragraphs of the section. The third paragraph, preventing a preference to foreign imports, was added on the second recommittal, at Mr. Holder's suggestion; and after the fourth Report some final drafting amendments were made.

In the Bill as introduced in the Imperial Parliament, the words "if that State be an Original State" were inserted.

§ 400. "Notwithstanding Anything in this Constitution."

This section is an exception to sections 90 and 92, which provide that the Federal Parliament shall have exclusive power to impose customs duties, and that trade, commerce and intercourse among the States shall be absolutely free.

For an account of the reasons which led the Convention to make this exception in favour of Western Australia see Historical Note. The concession was the more easily agreed to because the isolation of the settled districts of Western Australia, the comparatively small population of the colony, and the absence of land communication with the rest of Australia, combined to make it a matter of minor importance to the Commonwealth that that colony should be temporarily exempt from the provision for inter-state freetrade.

§ 401. "During the First Five Years."

The section as framed by the Convention was not limited to the event of Western Australia joining the Commonwealth as an Original State. If she had joined at any time within five years after the imposition of the uniform tariff, it would have operated

for the balance of that period. When the Commonwealth Bill was before the Imperial Parliament, it was apparently taken for granted that this provision was framed on the assumption that Western Australia would be an Original State, and as that event was then doubtful, the words "if that State be an Original State" were inserted. Now that Western Australia is an Original State, the amendment is immaterial.

§ 402. "Impose Duties of Customs."

The power so given to the Parliament of Western Australia is a power to supplement the customs revenue collected in that State upon imports from abroad by a second tariff on goods "passing into that State" from the other States. Such duties, like other customs duties, are to be collected by the Commonwealth, and will, under the provisions of sec. 93, be credited to the State of Western Australia, and so go to increase, by the whole amount of such duties, the share of the surplus payable to Western Australia.

§ 403. "But Any Duty so Imposed on Any Goods Shall Not Exceed."

Subject to the conditions here laid down, the Parliament of Western Australia will have full control, during the five year period, over every item of this inter-colonial tariff, and may at any time amend it or repeal it if desired. The one condition is that no duty on any article shall exceed in any year the specified proportion of the duty chargeable on the same article under the West Australian tariff in force at the date of the imposition of uniform duties.

§ 404. "If . . . . . the Duty on Any Goods Under this Section is Higher than the Duty Imposed by the Commonwealth."

Without this provision, it might have happened in some cases that a preference would be given to goods imported from abroad over similar goods produced within the Commonwealth. To prevent this, it is provided that in such a case the duty collected under the federal tariff shall be on the higher scale. The result is that, notwithstanding sec. 51—ii., a federal law with respect to taxation may, in effect, discriminate between the State of Western Australia and the rest of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides[405], the Parliament may grant financial assistance to any State[406] on such terms and conditions[407] as the Parliament thinks fit.

Historical Note.—An objection raised both to the contribution basis and to the population basis of distributing revenue was that they altogether ignored the needs of the States, and would result in some States getting back more than they wanted, whilst others would get back less. In fact, all the alarming forecasts of the need of an excessive tariff had arisen from the assumed obligation of increasing the contributions of the "necessitous" States—an unfortunate epithet which, when first used, meant the States to whom a high tariff was a necessity, but which was twisted by critics into a supposed confession of bankruptcy. These considerations had led Mr. R. M. Johnston,

the Government Statistician of Tasmania, to propound an "Inopimeter Method," or basis of distribution according to needs. "If there be any surplus to return let it be distributed on the basis of the Inopimeter Method—that is, to distribute such surplus on the ascertained proportion of the percentage which each State's loss of income caused by abolition of the local tariff and excise bears to the corresponding aggregate loss of the six colonies." (Federal Finance: Observations on the Difficulties of the Problem, R. M. Johnston, 1897.) As a general system of distribution, this scheme had no chance of adoption—the fear in New South Wales being that it would be worked for the benefit not of the neediest, but of the greediest States. However, there was a strong feeling that there ought to be some scope for mitigating the strict severity of the mathematical basis of distribution laid down in the Bill. Accordingly, at the Melbourne session, Mr. Henry proposed the following clause:—"The Parliament may, upon such terms and conditions and in such manner as it thinks fit, render financial aid to any State." This was supported by a few members, but was generally objected to as being too indefinite, as making the Commonwealth a "rich uncle" for the States and casting a slur on their solvency, as opening the door to continual applications for "better terms," and as being a disastrous commentary on the efficiency of the financial clauses. It was contended on the one hand, and stoutly denied on the other, that by necessary implication from the nature of the union the Commonwealth would have power to come to the assistance of the States whenever necessary. A limitation to five years was suggested, but eventually the clause was negatived. The proposals which then followed, by way of amendments to the West Australian clause (see Notes to sec. 95), were all based on the Tasmanian idea of distribution according to needs, or "net losses," but they were all rejected. (Conv. Deb., Melb., pp. 1100-22.)

Premiers' Conference, 1899.—In New South Wales there were forebodings of the necessity, under the draft Bill of the Convention, for a high tariff—deduced sometimes from the basis of distribution, sometimes from the Braddon clause. At the Premiers' Conference the clause as it stands was inserted as a part of the financial adjustment; partly as a compensation to the smaller States for the amendment in the Braddon clause, but chiefly to meet the difficulties that might be caused, in the first few years of the uniform tariff, by the unyielding requirements of the distribution clauses, and to remove any possible necessity for an excessive tariff.

§ 405. "During a Period of Ten Years . . . and thereafter until the Parliament otherwise Provides."

These words are identical with the introductory words of sec. 87 (the "Braddon clause"), where they were inserted—as this section was inserted—by the Premiers' Conference of 1899. In this section, however, it is very hard to give them any meaning. The phrase "until the Parliament otherwise provides" is used, everywhere except in this section, in connection with some specific provision made by the Constitution—not in connection with a power given to the Parliament. Its effect is to lower such provision to the level of a mere law of the Federal Parliament, and to give the Federal Parliament full power to deal with the whole question. In order to place the legislative power of the Parliament in such cases beyond question, sec. 51—xxxvi. provides that the legislative power shall extend to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides." But here, the Constitution of itself makes no specific provision. It merely empowers the Parliament to make a provision—and adds that the power may be exercised for ten years, and thereafter "until the Parliament otherwise provides." According to the grammatical implication, it would appear that if the Parliament at any time after ten years "otherwise provides," it cuts away its legislative power under the section altogether; so that the Parliament, by passing a law, can destroy its own power for the future. On the other hand, the close connection which this clause has, historically, with the Braddon clause, makes it seem probable

that the Premiers intended that it should survive while the Braddon clause survived, but no longer. The one thing clear is that until the Parliament does otherwise provide, the power will remain in force; and therefore, as the Parliament is not likely to pass a self-denying ordinance to diminish its own powers, this section may be considered, for all practical purposes, as a permanent part of the Constitution.

§ 406. "Grant Financial Assistance to any State."

The interpretation of these very wide and general words is a matter of great importance, and also of considerable difficulty; and before discussing the words themselves, and their relation to the rest of the Constitution, it will be well to examine the intentions of the framers. Although added to the Constitution at the Premiers' Conference in 1899, the section is based on the clause proposed by Mr. Henry at Melbourne (see Historical Note) empowering the Parliament to "render financial aid to any State." Probably Mr. Henry's proposal in its turn may be traced back to a suggestion by both Houses of the Tasmanian Parliament, providing that "The Commonwealth may from time to time lend to any State, on such terms and conditions as the Parliament may prescribe, any sum or sums of money borrowed on the public credit of the Commonwealth."

From the debate on Mr. Henry's proposal (Conv. Deb., Melb., pp. 1100-22) it is clear that the mover and most of the speakers understood that assistance might be given by an absolute vote out of revenue; though Mr. Holder argued (p. 1113) that no such gift would be possible because the revenue was all appropriated under the clauses dealing with the distribution of revenue. Mr. Lewis claimed (p. 1112) that the clause would go much further, and would "include the power of the Parliament to guarantee a loan to a State, or to lend the money to a State, having raised it on its own security." The only official explanation of the views of the Premiers on the clause as it stands is contained in the report of their Conference, where they state that it is intended to give effect to the opinion that "power should be granted to the Parliament to deal with any exceptional circumstances which may from time to time arise in the financial position of any of the States." It seems clear, however, from Mr. Reid's subsequent speeches on the clause, that he contemplated that there would be power, in an emergency, to apply revenue to this purpose. See, for instance, his speech on the Address in Reply in the Legislative Assembly of New South Wales on 21st February, 1899.

"There is a new clause inserted next to the Braddon clause which gives the Commonwealth Constitution a very valuable feature of elasticity in connection with the finances. As the Constitution stood, this might happen: Take Tasmania. A small amount of money might be required by Tasmania from the Commonwealth for a limited time to place her in the same position financially as she was in before Federation; but, under the Bill as it stood, there was no power to come to the assistance of that or any other colony in a necessity of that sort; and coming to the assistance of such colonies during this transitional period of finance would in itself be a valuable power on the part of the Federal Treasurer, and all in the direction of making the taxes more reasonable—more elastic That provision has been inserted, and I think it is a distinct improvement in the Bill." (N.S.W. Parl. Debates, vol. 97, p. 48.)

That the section empowers the Commonwealth to guarantee loans of the States, and to borrow money on the credit of the Commonwealth and lend it to the States, can hardly be doubted. Any such operation would, or at least might, involve charges on the revenue, in order to pay interest and redeem principal, or make good the guarantee; and any such charges would, it seems, be included in the general expenditure of the Commonwealth, and debited *per capita* against the credits to the several States.

But does the section enable the Commonwealth to ease the inelasticity of the distribution clauses by making absolute grants directly out of revenue? It is hard to see on what grounds this power can be denied; though undoubtedly it is a power which is not intended to be used, and ought not to be used, except in cases of emergency. Such a grant would certainly be "financial assistance" of the most direct and substantial kind; and financial assistance of precisely the kind required to guard against the burden

of unnecessary taxation which has been prophesied as the inevitable result of the inelastic provisions of the distribution clauses. It would in fact be, to a certain extent, a recognition that, in cases of emergency, the principle of distribution according to contributions might be tempered in the direction of distribution according to needs. The argument that there is no fund out of which to make such payments is fallacious. If the Constitution authorizes expenditure for this purpose, it is "expenditure of the Commonwealth" which can be made out of the Consolidated Revenue Fund, and debited to the States in proportion to population under sec. 89.

A more serious difficulty is to construe the bearing of sec. 87 (the Braddon clause) upon this provision. If a payment out of revenue, in aid of a State, is "expenditure of the Commonwealth" within the meaning of sec. 89, is it, for the purposes of sec. 87, to be taken out of revenues which may be applied to the expenditure of the Commonwealth, or may it be taken out of the three-fourths of the net customs and excise revenue which must be "paid to the several States?" At first sight, it seems to come equally well within either category; to be paid to a State, in accordance with the Constitution, and to be expenditure of the Commonwealth. But a closer consideration of the general scope of sec. 87, as well as of its language, seems to lead to the conclusion that payment to a State under this section does not fall within the balance which, under section 87, "shall in accordance with this Constitution" be paid to the States. That expression seems to refer to the "balances" payable under section 89, and not to include deductions which have already been made in calculating those balances.

If this construction be correct, the result is shortly as follows:—(1) Financial assistance may be granted to a State out of revenue. (2) The amount so granted is "expenditure of the Commonwealth" which is to be debited *per capita* against all the States - including the State to which the grant is made. (3) The Commonwealth cannot make such grant out of the three-fourths of the net customs and excise revenue which, under sec. 87, is to be paid to or on behalf of the several States.

To this it may be added that the section is intended as "the medicine, not the daily food," of the Constitution; and that it is not to supersede or render nugatory the distribution clauses by allowing distribution according to the will of the Parliament. The Braddon clause, so long as it remains in force, is an efficient check against abuse of the financial assistance clause; but the financial assistance clause will not necessarily perish with the Braddon clause—though it may be that the Premiers' Conference meant that it should.

§ 407. "On such Terms and Conditions."

Even without the express mention of terms and conditions, the Parliament, as the party in whose discretion it is to either grant or refuse assistance, would have been able to make its own terms. But though apparently superfluous, the words are not really so. They help to place beyond doubt the intention of the section, and to make it clear that the discretion of the Parliament is absolute, and that no duty is imposed upon it of giving assistance without demur and without enquiry, whenever assistance may be asked. The section is not intended to diminish the responsibility of State Treasurers, or to introduce a regular system of grants in aid. Its object is to strengthen the financial position of the Commonwealth in view of possible contingencies, by affording an escape from any excessive rigidity of the financial clauses. It is for use as a safety-valve, not as an open vent; and it does not contemplate financial difficulties, any more than a safety-valve contemplates explosions.

Audit.

97. Until the Parliament otherwise provides[408], the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

CANADA.— . . . subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.—B.N.A. Act, 1867, sec. 103.

HISTORICAL NOTE.—This clause, in substantially the same form, was in the Bill of 1891. At the Adelaide Session, 1897, the draft of 1891 was adopted *verbatim*. At Melbourne, after the fourth Report, verbal amendments were made.

§ 408. "Until the Parliament Otherwise Provides."

This section merely makes temporary provision as to the review and audit of the federal accounts until such time as the Federal Parliament passes an Act for that purpose. It provides that, until the Parliament deals with the matter, the audit laws of each State shall apply, *mutatis mutandis*, to the receipt of revenue and the expenditure of money in that State. These Acts are:—in New South Wales, the Audit Act, 1898; in Victoria, the Audit Act, 1890; in Queensland, the Audit Act, 1874; and Amendment Acts, 1890 and 1895; in South Australia, the Audit Act, 1882, and Amendment Act, 1895; in Western Australia, the Audit Act, 1891; in Tasmania, the Audit Act, 1888, and Amendment Acts, 1890 and 1894.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends[409] to navigation and shipping[410], and to railways the property of any State[411].

CANADA.—The exclusive legislative authority of the Parliament of Canada extends to . . . (10) Navigation and shipping.—B.N.A. Act, 1867, sec. 91.
In each Province the Legislature may exclusively make laws in relation to . . . (10) local works and undertakings, other than such as are of the following classes:—
(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.
(*b*) Lines of steamships between the Province and any British or foreign country.—*Id.* sec. 92.

HISTORICAL NOTE.—In the Bill of 1891 "Navigation and Shipping" was included among the subjects to which the legislative power of the Federal Parliament extended.

At the Adelaide Session, 1897, the Draft of 1891 was followed. None of the Legislatures made any suggestion, and at the Sydney Session the sub-clause was passed without discussion.

At the Melbourne Session, upon the discussion of the "railway rate" clauses, Sir George Turner proposed a new clause, of which the first part ran:—"The Parliament may make laws to provide for the execution and maintenance upon railways within the Commonwealth of the provisions of this Constitution relating to trade and commerce;" and the second part empowered the Parliament to prohibit unjust preferences (see Hist. Note to sec. 101). The long debate which followed was chiefly on the question of preferences; but Mr. Barton pointed out that the Parliament already had power to execute federal laws. The clause was carried by 25 to 16. (Conv. Deb., Melb., pp. 1372-1408.)

On the second recommittal Mr. Barton secured the recasting of Sir Geo. Turner's clause in a declaratory form, to provide that "The power of the Parliament to make laws with respect to the regulation of trade and commerce shall be taken to extend to railways the property of any State." The object of substituting the declaratory for the enabling form was to prevent any limitation of the trade and commerce power being implied; and the object of the provision itself was to remove doubts as to whether State-owned railways were subject to the trade and commerce power. (Conv. Deb., Melb., pp. 2386-90.)

After the fourth Report the Federal control of "navigation and shipping" was for similar reasons expressed in a declaratory form by being omitted from the "legislative power" clause and inserted in its present position. Other drafting amendments were also made, and the effect of the clause was finally discussed. (Conv. Deb., Melb., pp. 2449-50.)

§ 409. "The Power of the Parliament . . . Extends."

This section is purely declaratory; it does not purport to give any new power to the Parliament, but merely to authoritatively explain and interpret the extent of the power already given by sec. 51—i. It is in effect a definition clause, declaring that trade and commerce includes traffic by water as well as by land, and also includes traffic on railways owned by the Government of a State.

The power of the Parliament to make laws with respect to trade and commerce is expressly limited, by sec. 51, to "trade and commerce with other countries, and among the States." It follows that the application of that power to navigation and shipping, and to State railways, is limited in the same way, and does not extend to shipping or railways which are employed in the purely domestic traffic of a State. In this respect the powers defined in this section resemble the powers which in the United States are held to flow, without any such definition, from the trade and commerce power itself. (Cooley *v.* Port Wardens, 12 How. 299.) Less closely they resemble the powers given in Canada; for although s. 91 of the British North America Act gives the Dominion exclusive power to legislate in respect of "navigation and shipping," with no limitation to foreign and inter-provincial trade, yet some such limitation is subsequently imposed by sec 92 of that Act.

§ 410. "Navigation and Shipping."

In the United States, it has been held that the power to regulate trade and commerce necessarily implies and includes the power to regulate navigation and shipping, as a part of the means by which trade and commerce are carried on; and that such regulation comprehends the power to prescribe rules in conformity with which navigation must be carried on. (Cooley *v.* Port Wardens, 12 How. 299.) The commerce power not only extends to the goods transported, but "also embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." (Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196.) Accordingly vessels, as well as the articles which they bring, are subject to regulation. (The Brig *Wilson v.* United States, 1 Brock, 423; cited Baker, Annot. Const. p. 20. See

p. 540, *supra.*) The express declaration in this Constitution that the power to regulate trade and commerce extends to navigation and shipping incorporates the effect of the American decisions, and puts their applicability beyond doubt.

A law providing for the recording of any mortgage, hypothecation, or conveyance of a ship has been held in the United States to be a regulation of commerce, and therefore within the power of Congress. (White's Bank *v.* Smith, 7 Wall. 646.) But "the right of ferriage which a State grants upon a boundary stream, it is said, is in respect of the landing and not of the water. The right of navigation does not authorize appropriation of the banks of the river, or the receipt of tolls for transporting passengers across it." (Prentice and Egan, Commerce Clause, p. 159.)

The power to regulate navigation covers not only goods, vessels, and carriers, but also the highway upon which navigation is carried on. "The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams." (The *Lottawanna*, 21 Wall. 558, where it was decided that Congress has power to establish a lien on vessels in favour of material men.) For the federal power of control over navigable rivers, see notes to sec. 100.

It does not follow from this section that the Commonwealth can have no authority over navigation and shipping except what flows from the power to regulate commerce; shipping may be affected and controlled, in some cases, by laws within the other powers of the Parliament. For instance, in the United States it has been held that the extension of the admiralty jurisdiction over all the navigable waters of the United States necessarily involved and implied an extension of the legislative power of Congress. "It was not possible that the body of (maritime) law should remain for ever unalterable, nor that such changes as were necessary should be introduced only by judicial decisions. . . . It was clear, however, that no legislative power would be adequate unless it was as extensive as the admiralty jurisdiction given to the courts. The necessities of the case, therefore, required legislation by Congress, and this legislation the courts finally supported. The federal legislative power, the court said, 'is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.'" (Prentice and Egan, Commerce Clause, p. 97. *Re* Garnett, 141 U.S. 1.)

"The jurisdiction of the United States over transportation by water and over the waters themselves is derived, therefore, not only from the commerce clause, but also from the admiralty powers of the general Government, which includes the control of national waterways and of national vessels. Federal jurisdiction over these subjects is, therefore, far more extensive than its jurisdiction over carriers and transportation by land." (Prentice and Egan, Commerce Clause, p. 98.)

The corresponding provision in the British North America Act (s. 91) is a gift of exclusive legislative authority to the Dominion Parliament in respect of navigation and shipping, without any limitation to foreign and inter-provincial commerce. The gift is, however, qualified in sec. 92, which gives the Provinces exclusive power with respect to local works and undertakings.

"This conferred on the Parliament of Canada legislative authority over all matters occurring in Canadian waters within the subjects Navigation and Shipping, and its co-operation was required to give effect to the same rules of navigation as has (*sic*) been used in England. (See *Eliza Keith*, 6 April, 1877; 3 Quebec L.R. 143.) There, the Canadian Act of 1868, 31 Vic. c. 58, which provided that where two ships were each to blame for a collision in Canadian waters, both were precluded from recovering its damages, was held to be operative, although the Admiralty rule which divides the loss prevails in England, and has been applied in a case of collision on Canadian waters in an appeal to the Privy Council." (Wheeler, Confed. Law of Canada, pp. 70-71.)

§ 411. "Railways the Property of any State."

In the United States it has been consistently held that railways are public highways, and subject as such to control by Congress under the trade and commerce power. (Cherokee Nation *v.* Southern Kansas R. Co., 135 U.S. 641; Smyth *v.* Ames, 169

U.S. 466.) In the United States, however, as in England, the railways are constructed and owned by companies or individuals. In Australia they are, with few exceptions, constructed and owned by the States; and a doubt arose in the Convention, whether the commerce clause by itself would be construed to extend the authority of the Commonwealth to the Government railways of the States. This express provision removes all doubts on that head.

That "railways the property of any State" are the only railways here mentioned is due to the fact that those are the only railways as to which there could be any doubt, and as to which it was therefore necessary to make an express declaration. That the authority of the Commonwealth extends to private railways—so far as they are engaged in inter-state or foreign commerce—is taken for granted.

Under the federal power to acquire and construct railways, it is probable that railways owned by the Commonwealth will come into existence. That such railways will be subject to control by the Federal Parliament is obvious; but the Commonwealth in working such railways will itself be subject to the stringent provisions of sec. 99, forbidding the Commonwealth to give preference to any State over any other State. (See Notes to that section.)

The extent of the federal power over State railways is limited by other provisions of the Constitution. Thus the power given to the Commonwealth by sec. 51—xxxiii., xxxiv., to acquire the railways of any State with the consent of the State, and to construct railways in a State with the consent of the State, would seem by implication to exclude the exercise of any such power without the consent of the State. Apart from these provisions, it is by no means clear that such a power would not have existed. Thus in the United States it is contended by writers of repute—and the contention rests upon principles settled by judicial authority—that Congress under the wide scope of the commerce clause has power both to acquire and to construct railways, and to create a great national corporation with a monopoly of the railroad business. (See Lewis, National Consolidation of the Railways of the U.S., pp. 282-304.) That writer maintains that the cases of McCulloch *v.* Maryland, 4 Wheat. 316, and Osborn *v.* U.S. Bank, 9 Wheat. 738, establish the principle that "Congress has authority to create a great national corporation to carry out any powers given by the Constitution to the Federal Government."

A further limitation of the federal power over State railways is contained in secs. 101 and 103, by which the powers of the Parliament as to preferences and discriminations are defined. (See Notes to those sections.)

Commonwealth not to give preference.

99. The Commonwealth shall not[412], by any law or regulation of trade, commerce, or revenue[413], give preference[414] to one State or any part thereof[415] over another State or any part thereof.

UNITED STATES.—No preference shall be given, by any regulation of commerce, or revenue, to the ports of one State over those of another.—Const. Art. 1, sec. 9, sub-sec. 5.

HISTORICAL NOTE.—The Clause in the Bill of 1891 provided that "Preference shall not be given by any law or regulation of commerce, or revenue, to the ports of one part of the Commonwealth over those of another part of the Commonwealth." A second paragraph (also from the United States Constitution) that vessels bound to or from one port of the Commonwealth need not enter, clear, or pay duty in another port, was struck out in Committee. (Conv. Deb., Syd., 1891, pp. 833-5.)

Adelaide Session, 1897.—At Adelaide, the preference clause was adopted almost in the words of 1891, but having appended to it a provision (which had previously formed

a separate clause; see Hist. Note to sec. 92) that federal or State laws derogating from freedom of inter-state trade should be void. There was little objection raised to the prohibition of preferences by the Commonwealth, the debate being almost wholly on preferences by States. (Conv. Deb., Adel., pp. 1070-85.)

Melbourne Session, 1898.—At Melbourne, Mr. Barton proposed the clause in a sweeping form, providing that all Federal or State laws giving a preference to one State over another should be void. The debate again turned almost wholly on preferences by States. (See Hist. Note to sec. 102.) Finally Mr. Barton (Debates, pp. 1319, 1337) proposed the clause in its present form, forbidding the Commonwealth to give preferences. After various amendments dealing with State preferences had been dealt with, the clause was carried. (Conv. Deb., Melb., pp. 1250-1370, 1409-1506; *supra*, p. 199.)

§ 412. "The Commonwealth Shall Not."

This prohibition is directed not only against the Parliament of the Commonwealth, but against the Commonwealth itself—in which word is included every department of the public service of the Commonwealth.

A law which infringes this prohibition will be beyond the scope of the Constitution, and therefore unconstitutional and void. It may be assumed, however, that the courts, following the established rules of construction, will not hold any law to be void upon mere suspicion that it gives a preference, or where there is any doubt upon the matter.

§ 413. "By any Law or Regulation of Trade, Commerce, or Revenue."

The corresponding words of the United States Constitution, are "by any regulation of commerce or revenue."

Law or Regulation.—"Regulation" is a word which may be used in a general or a restricted sense. In its widest meaning it denotes any prescribed rule or order, and therefore includes every law; as, for instance, it does in the words of the United States Constitution quoted above. More particularly, it is often used to denote rules or regulations prescribed by the Executive under the authority of an Act of Parliament. Such rules, when within the scope of the authority given, have the force of law, and are in fact laws in every sense of the term. But the word "regulation" also includes purely administrative regulations, not made under the direct authority of an Act of Parliament, and not being laws in the proper sense of the term. The words 'law or regulation,' taken together, are wide enough to include every rule or order prescribed by the Parliament or by any department of the Government of the Commonwealth.

"Regulation" does not necessarily involve restriction; a regulation may be permissive.

"Regulation is not necessarily the imposition of a burden. The Federal statutes, for instance, authorize every railroad company in the United States, whose road is operated by steam, to carry passengers and property from State to State; to receive payment therefor, and to connect with roads of other States. This statute is a regulation of commerce made by Congress under the authority of the commerce clause, and yet is permissive only and imposes no burden." (Prentice and Egan, Commerce Clause, pp. 188-9.)

"To regulate commerce has often been defined as 'to prescribe the conditions under which commerce shall be conducted.' Such a definition as this clearly brings within its scope all regulation of instrumentalities as well as acts of commerce. It is not surprising, therefore, that this definition has been often qualified by the general statement that 'it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.'" (Prentice and Egan, p. 189; Henderson *v.* Mayor of New York, 92 U.S. at p. 270; Munn *v.* Illinois, 94 U.S. 135.)

Taxation of commerce is regulation of commerce—and indeed such taxation is often imposed with a view to regulation rather than with a view to revenue. (See Prentice and Egan, p. 198.)

Trade, Commerce, or Revenue.—This section is a limitation upon two powers of the Commonwealth: the trade and commerce power, conferred by sec. 51—i., and the revenue power, contained chiefly in sec. 51—ii., but also incident to many other legislative powers of the Commonwealth. "Law or regulation of revenue" includes laws which deal with the raising of revenue from any source whatever—whether by taxation, by fines or pecuniary penalties, or by fees for licenses, fee for services, &c. The fact that, under sec. 54, bills appropriating such penalties or fees are not to be taken, for the purposes of that section, to "appropriate revenue or moneys," does not mean that penalties and fees are not revenue—and indeed rather implies the contrary.

As regards taxation, the prohibition against preferences adds little, if anything, to the provision in sec. 51—i., that taxation laws must not "discriminate between States or parts of States." But the use of the wider word "revenue" extends the prohibition to all revenues other than those arising out of taxation, and prevents any preference being given by the Commonwealth in respect of any revenue charges whatsoever; such as fees for postal, telegraphic, and telephonic services, or rates on railways of the Commonwealth.

This section, therefore, extends to all laws and regulations of trade, commerce, and revenue, the condition which is elsewhere imposed with regard to laws dealing with taxation—viz., that they shall not discriminate between States or parts of States. It is a limitation upon the power of Parliament to regulate trade, commerce, and revenue, and is intended to prevent discriminations in favour of one State against others. (Passenger Cases, 7 How. 283.)

§ 414. "Give Preference."

The object of this prohibition is to prevent federal favoritism and partiality in commercial and other kindred regulations. As any law which gives a preference in contravention of this section will be unconstitutional, and therefore void, it becomes highly important to examine the meaning of the word.

A preference is a discrimination considered in relation to the person or State in whose favour such discrimination is. (See Note on "Preference or discrimination," § 430, *infra*.) The prohibition here is absolute and without qualification. In the case of preferences by the States there is merely a power given to the Parliament to forbid such preferences as are undue and unreasonable, or unjust to any State; in the case of the Commonwealth, every preference whatever is forbidden by the Constitution itself, irrespective of injustice or unreasonableness.

A preference involves a departure from the standard of equality; but it is not always easy to determine what that standard is. Where, in any two cases that may be compared, there is exact similarity of all material circumstances, any departure from equality of treatment is easily detected. But exact similarity of circumstances seldom occurs; and in comparing dissimilar circumstances it must often be difficult to determine what constitutes inequality of treatment, *i.e.*, a preference. Where the circumstances are dissimilar, a preference may arise either because the dissimilarity of treatment is excessive, or because the similarity of treatment is excessive. With regard to taxation, perhaps no serious difficulty is likely to arise; but with regard to charges for services, equal charges for different services may cause as great inequality as unequal charges for similar services. For instance if on a railway line there are three points, A, B, C, in that order, a rate for the long haul A C may be preferential by being lower than, or equal to, the rate for the short haul A B; or the rate for the short haul A B may be preferential by falling disproportionately short of the rate for the long haul A C.

The Constitution prescribes no definite test of equality under dissimilar circumstances. Cost of service will presumably be a main element; but if it were the only

element, it would lead to the illegality of "group rates" on railways of the Commonwealth—*i.e.*, equal rates from one point to all points within a "group" or "zone." It would also be inapplicable to postage rates, where equality of charges—even where the cost of service varies largely—is almost essential, and where any attempt to proportion the charge to the cost of service is both impracticable and undesirable. It is submitted that in deciding what is and what is not a preference the following principles should be applied:—

(1.) The section should be construed in a broad and liberal manner, with especial reference to the evil which it is intended to prevent, viz., arbitrary discriminations between States or localities. The rule that no law of the Parliament will be held invalid unless it appears clearly to infringe the Constitution requires that only a plain and substantial preference should justify judicial interference.

(2.) In determining what constitutes equality of treatment, recognition should be given to the practical necessities of the case, and to all the sound administrative or business principles involved. The cost of service should be a main element, but should not exclude other considerations; such as the expediency of a zone system on railways, or the expediency of a uniform charge for postal and telegraphic services.

It seems, in short, that though the section contains no such words as "undue or unreasonable," but prohibits preferences in general, yet in order to arrive at a decision as to what is a preference, the question of what is due and reasonable is to a certain extent involved. If a difference of treatment is arbitrary, or if its purpose is to advantage or prejudice a locality, it is undue and unreasonable, and is accordingly a preference. If on the other hand the difference of treatment is the reasonable result of the dissimilarity of circumstances – or if it is based on recognized and reasonable principles of administration - it is no preference. The intention and the effect must both be looked to in order to decide whether a preference exists; and in neither inquiry can reasonableness be ignored.

This does not mean that the words "undue or unreasonable" are to be read into the section. On the contrary, their absence would seem to materially increase its stringency. Reasonableness must be taken into consideration in ascertaining whether a preference exists; but a preference, though ascertained by that test to exist, need not necessarily be an unreasonable preference.

Preferences within the meaning of this section are not confined to fiscal regulations.

"We can easily conceive that, if the spirit of sectionalism ever should take possession of Congress, the dominant section might devise many little petty annoyances for boats entering the harbours of the other section which would amount to an unjust preference of the ports of the former. The mere improvement of a particular harbour, the clearing of the navigation of a river which involves the altering of its channel (South Carolina *v.* Georgia, 93 U.S. 4), the erection of a bridge which obstructs navigation (Pennsylvania *v.* Wheeling Bridge Co., 18 How. 421)—all these, while they may incidentally benefit one port more than another, are not preferences within the meaning of the prohibition. The people, in adopting the Constitution, intended to stop forever one State requiring exactions from the people of another for its own peculiar benefit; but they never intended to prevent the federal Government for the good of all the States from undertaking public works in a particular locality." (Lewis, Federal Power over Commerce, pp. 20-21.)

§ 415. "To one State or any Part thereof."

The corresponding words of the United States Constitution are "to the ports of one State over those of another." At the time when that Constitution was framed, navigation was the only means of carriage on a large scale, and the prohibition against preferences to ports seemed, to the Convention of 1787, to cover the whole field of necessary commercial regulation. Prentice and Egan (Commerce Clause, p. 306) suggest that—

"It is probable that the construction which will be given to the clause will be in accordance with this broad purpose. Freedom of transportation from conflicting,

discriminating, and burdensome restrictions was the purpose of the Constitution; and while the language employed was almost necessarily such as referred to the means of transportation then in existence and within the knowledge of the Convention, nevertheless the operation of the Constitution is not confined to the instrumentalities of commerce then known, but keeps pace with the progress of the country, and is adapted to new developments of time and circumstance. Within a hundred years the means of transportation has so changed that the commerce among the States conducted by land is more important than that conducted by water. Provisions of the Constitution which at first were applied only to navigation may therefore now be applied to railways, as in the case of the clause which forbids the States from laying any duty of tonnage; and the same view may also be taken of the preference clause."

In this section the scope thus contended for has been definitely expressed; and the words cover all commerce, whether by land or sea.

The preferences prohibited are preferences to localities. The other two kinds of preferences—preferences to particular persons. or to particular classes of traffic (see Note, § 430, *infra*) are not mentioned. Of course, however, a preference to a locality consists of a preference to persons or goods in that locality; and accordingly it would seem that a preference to particular persons or classes of traffic—even though no locality were expressly mentioned—might, if it specially favoured any State or part of a State against another State or part of a State, be within the section.

It is to be noticed also that a preference, to come within this section, must not only be a preference to one locality over another, but must be a preference to a locality in one State over a locality in another State. Discriminations between parts of the same State are not provided against by this section. The purpose is to safeguard the interests of the States as against one another, by prohibiting inter-state preferences. The section is "evidence of the intention of the framers of the Constitution to protect the freedom of commerce from the selfish interference of a State, through its influence in the National Government." (Lewis, Federal Power over Commerce, p. 20.)

Nor abridge right to use water.

100. The Commonwealth shall not[416], by any law or regulation of trade or commerce[417], abridge the right of a State or of the residents therein[418] to the reasonable use[419] of the waters of rivers[420] for conservation or irrigation[421].

Historical Note.—The only mention of rivers in the Bill of 1891 was in the clause enumerating the legislative powers of the Federal Parliament, which contained a sub-clause "River navigation with respect to the common purposes of two or more States or parts of the Commonwealth." (Conv. Deb., Syd., 1891, pp. 689-92; see p. 138, *supra*.)

Adelaide Session, 1897.—The sub-clause as proposed by the Constitutional Committee, and embodied in the first draft at Adelaide, empowered the Federal Parliament to legislate as to "The control and regulation of navigable streams and their tributaries within the Commonwealth and the use of the waters thereof." The debate is summarized at pp. 174-6, *supra*. The clause was ultimately cut down to "The control and regulation of the navigation of the River Murray, and the use of the waters thereof, from where it first forms the boundary between Victoria and New South Wales to the sea." (Conv. Deb., Adel., pp. 794-829.)

Melbourne Session, 1898.—Both Houses of the South Australian Parliament had proposed to extend the clause—the Assembly to all the tributaries of the Murray, and the Council to the rivers Darling, Murrumbidgee, and Lachlan. The result of the first debate (see pp. 194-6, *supra*) was that after a number of amendments had been proposed and rejected, the sub-clause was struck out altogether (Debates, p. 480), and all proposals

made in substitution for it were defeated; the question of river control being thus left, as in the United States, to the operation of the "trade and commerce" power. (Conv. Deb., Melb., pp. 31-150, 376-642.)

On the second recommittal (see pp. 196-7, *supra*) Mr. Glynn moved an addition to the "trade and commerce" sub-clause, defining "navigable rivers" on the broad basis of American decisions; but the question was eventually postponed until after the settlement of the navigation power. The New South Wales representatives feared that the paramountcy of the federal navigation power might injure State rights of water conservation and irrigation; and Mr. Carruthers proposed to add to the "Navigation and Shipping" sub-clause a proviso that the use of the river waters for navigation should be subordinate to conservation in the States. This was eventually withdrawn in favour of Mr. Reid's amendment to the effect that the navigation power should not "abridge the rights of a State or its citizens to the use of the waters of rivers for conservation and irrigation." Sir John Downer's amendment to add "reasonable" before "use" was carried, and the sub-clause as amended was agreed to. (Conv. Deb., Melb., pp. 1947-90.) After the fourth Report, it was amended to stand as a separate clause.

§ 416. "The Commonwealth shall Not."

(See Note on the same words in the preceding section, § 412, *supra*.) This section is a further limitation of the trade and commerce power. The necessity for the provision arose out of the twofold importance of the rivers—as highways of inter-state commerce, and as channels and reservoirs for the water which is essential for the development of the land. In the event of any conflict between these two purposes, the power of the Federal Parliament to regulate navigation would have prevailed absolutely against any claims by the States to the use of the water, and the object of this section is to limit the paramountcy of the navigation power so far as it may interfere with "the reasonable use" of the waters for State purposes.

The river systems of Australia bear a very close analogy, in many respects, to those of the arid portion of the United States, in which the rainfall is not sufficient for the production of the crops, and which covers about two-fifths of the whole area of the United States.

"Here the paramount interest is not navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity." (United States *v.* Rio Grande Dam and Irrigation Co., New Mexico, 51 Pac. Rep. 674; cited Prentice and Egan, pp. 116-7.)

In these arid regions difficulties arose not only between the States, but between higher and lower riparian owners in the same State. The riparian common law of England, which required every riparian owner to permit the flow of the water undiminished in quantity and unimpaired in quality, had grown up under totally different conditions, and was found inapplicable to the circumstances of the arid regions.

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there have been in all the western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which permits,

under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes." (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. at p. 704.)

But though each State of the American Union may, as between its own citizens, regulate the right to use the waters of rivers, the rights of the States are subject to the paramount power of Congress with respect to navigation. Thus in 1890, Congress passed a comprehensive Act prohibiting the creation of any unauthorized obstruction to the navigable capacity of waters over which the United States have jurisdiction; and under this Act it has been held that if the navigability of a navigable stream is substantially affected by impounding the waters of a non-navigable tributary—even though such tributary be wholly within one State—the Federal Government has power to interfere. When proceedings are taken by the United States for that purpose,

"It becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, to interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney-General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the State of New York for domestic purposes in the city of New York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson is disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise, and its power to restrain such appropriation be unquestioned: and within the purview of this section it would become the right of the Attorney-General to restrain such proceedings." (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. at p. 709.)

The above case was decided in October, 1898, after the Convention had finished its sittings: but the principles on which the decision is based were already well understood, and it was with the view of modifying to some extent the application of those principles that this section was framed. Under this Constitution the mere fact that navigability is substantially affected, or even destroyed, does not enable the Commonwealth to restrain the use of the water by a State or its residents unless such use is unreasonable.

§ 417. "By any Law or Regulation of Trade or Commerce."

(See Note to similar words, § 413 *supra*, § 427 *infra*.) The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping (sec. 98), and therefore to navigation upon rivers. That it extends not only to shipping, but to the highways themselves upon which the shipping is carried on, is expressly recognized by this section, which imposes a limitation on the Federal control of such highways; and it remains to discuss the extent of this power.

Navigable Waters of the Commonwealth.—Incident to the power to make laws in respect of navigation with other countries and among the States, is a power of control over all waters upon which such navigation may be carried on—which are, in fact, navigable for the purposes of inter-state and foreign commerce. In the Convention, there was some discussion, in connection with the words "navigable" and "navigability," which occurred in some proposed amendments (see Conv. Deb., Melb., pp. 111, 112, 409, &c.), whether navigability would be interpreted according to the English decisions—which make the ebb and flow of the tide the test of navigability, marking the line

where prerogative of the Crown ends and private ownership of the river-bed begins—or according to American decisions, which make actual capacity for navigation the test. As the Constitution stands, however, the word "navigable" does not occur. We have only to deal with "navigation;" and in discussing the extent of the jurisdiction with regard to navigation, we are free to use the word "navigable," not in the artificial sense of the English decisions, but in the natural sense which has received statutory and judicial recognition in America—a sense which it is convenient to adopt, because the area of federal jurisdiction over rivers in the United States has for the most part been decided in connection with the words "navigable waters of the United States" in Federal statutes. It will be useful to trace those decisions.

In the *Daniel Ball*, 10 Wall. 557, at p. 563, Mr. Justice Field, delivering the opinion of the Court, said:—

"The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In *The Montello*, 11 Wall. 411, it was held that if a river is not of itself a highway for commerce with other countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the same State, then it is not a navigable water of the United States, but only a navigable water of the State, and subject to the exclusive jurisdiction of the State. And see Lake Shore and Michigan R. Co. *v.* Ohio, 165 U.S. at pp. 367-8, where a doubt was expressed whether all navigable waters, even though wholly within a State, are "waterways of the United States." These decisions are upon the words of American statutes. It is clear, however, that inter-state commerce, wherever found, is subject to federal control, and that Parliament could legislate in respect of commerce upon the navigable waters of a State, if such commerce came from, or was destined for, other States.

In *The Montello*, 20 Wall. 430, it was said that navigability does not depend on the mode of navigation, but upon whether the river in its natural state is such that it affords a channel for useful commerce. "It is not, however, as Chief Justice Shaw said (21 Pickering, 344), every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

"The mere fact that logs, poles, and rafts are floated down a stream occasionally at times of high water does not make it a navigable river." (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. at p. 698, where it was held that the Rio Grande, between the points mentioned in the case, was not navigable.)

It seems clear from the principle of these cases that a river may be deemed navigable even though it is in fact only intermittently navigable, provided that it is really useful for commerce.

If, however, a stream be in fact connected with the waters of other States, it is immaterial that in its natural condition it was not an inter-state highway. Such a limited construction "cannot be adopted, for it would exclude many of the great rivers of this country, which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh water

rivers which did not originally present serious obstructions to an uninterrupted navigation." (*The Montello*, 20 Wall. at p. 439.) And it has even been held to be immaterial that the stream is entirely of artificial construction. (*Ex parte* Boyer, 109 U.S. 629.)

"The control vested in the general Government to regulate inter-state and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as may be necessary to ensure their free navigation, when by themselves or in connection with other waters they form a continuous channel for commerce among the States or with foreign countries." (Escanaba Co. *v.* Chicago, 107 U.S. at p. 682.) Accordingly the Chicago River and its branches, though lying within the limits of the State of Illinois, were held to be navigable waters of the United States, which Congress may control so far as to protect, preserve, and improve, free navigation.

Whether a river is or is not navigable at any point is ordinarily a matter of proof; though the fact that some rivers are navigable, and others not, may be a matter of common knowledge, and judicially noticed. (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. 690.)

Extent of Federal Authority.—The extent of the federal authority over navigable waters has in the United States been the subject of numerous decisions, and has been laid down in very wide terms. Thus it is held that the power to regulate navigation includes the power to improve the navigable channel (Wisconsin *v.* Duluth, 96 U.S. 379); to close one of several channels of a river in order to improve the navigability of another (South Carolina *v.* Georgia, 93 U.S. 4); and to make a new channel (Prentice and Egan, Commerce Clause, p. 110). In short the federal power includes authority to do everything necessary "to make and keep the highway open and safe (Prentice and Egan, Com. Clause, p. 109). "Congress can do anything which, in its reasonable effect, regulates inter-state or foreign commerce, or the instruments of commercial intercourse; and the word 'regulate,' as employed in the Constitution, not only covers all rules prescribing the way in which such commerce can be conducted, but also all real or supposed improvements of the means of communication. In this idea of the word *regulate* is found the judicial justification of all our internal improvements." (Lewis, Federal Power over Commerce, p. 19) The power of Congress to pass laws for the navigation of rivers, and to prevent all obstructions therein, cannot be disputed. (United States *v.* Bellingham Bay Boom Co., 176 U.S. 211.)

The words of this Constitution are even wider. The Parliament has power, not merely "to regulate commerce," but "to make laws with respect to trade and commerce," a phrase which would seem to be as wide as the most extended construction which the American courts have given to the word "regulate."

For the carrying out of these public purposes the Federal Parliament has all the incidental powers which are necessary. Thus it has been held in the United States that Congress has the power of eminent domain over the shores and the submerged soil. (Monongahela Navigation Co. *v.* United States, 148 U.S. 312; Stockton *v.* Baltimore, &c., R. Co., 32 Fed. Rep. 9; Prentice and Egan, Com. Clause, p. 110.) "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation; and although the title to the shore and submerged soil is in the various States, and individual owners under them, it is always subject to the servitude in respect of navigation created in favour of the Federal Government by the Constitution." (Gibson *v.* United States, 166 U.S. 269.) In that case it was held that riparian ownership of navigable rivers is subject to the obligation to suffer the consequences of an improvement of the navigation under an Act passed by Congress in the exercise of its dominant right, and that damages resulting from such improvement cannot be recovered. (See South Carolina *v.* Georgia, 93 U.S. 4; Shively *v.* Bowlby, 152 U.S. 1; Eldridge *v.* Trezevant, 160 U.S. 452.) In this Constitution, the power of acquiring the property of States or individuals for "any purpose in respect of which the Parliament has power to make laws" is expressly given by sec. 51—xxxi.

In Green Bay and Mississippi Co. *v.* Patten Paper Co., 172 U.S. 58, it was held that water power incidentally created by the erection and maintenance of a dam and canal by the United States was (under the facts in that case) subject to control and appropriation by the United States. The Court afterwards explained that this decision did not apply after the waters had flowed over the dam and through the sluices, and found their way to the unimproved bed; and held further that though State courts might legitimately take cognizance of controversies between riparian owners as to the use and apportionment of waters flowing in non-navigable parts of a stream, they could not interfere, by mandamus, injunction, or otherwise, with the control of the surplus power incidentally created by the Federal dam and canal. (Green Bay, &c , Co., *v.* Patten Paper Co., 173 U.S. 179.)

The Congress of the United States has power, not only to improve the navigability of waters, but to prevent their obstruction by any State or person, by means of bridges, dams, piers, or other structures which interfere with navigation. It follows as a corollary to the power to preserve free navigation that Congress has the paramount right to conclusively determine what shall be deemed, so far as commerce is concerned, an obstruction. (Miller *v.* Mayor of New York, 109 U.S. 385.) "Congress has the right to abate all bridges which obstruct the free passage of inter-state commerce on a river. The fact that a greater amount of inter-state commerce passes over than under the bridge is immaterial." (Lewis, Fed. Pow. over Comm. p. 18; Bridge Co. *v.* United States, 105 U.S. 470; The Clinton Bridge, 10 Wall. 454. For Federal legislation on this subject in the United States, see Prentice and Egan, Commerce Clause, pp. 112, 126.) It has even been held that a dam on a non-navigable tributary may, by diminishing the supply of water to a navigable river, become an obstruction. (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. 690.) In this Constitution the Federal power of interference in such cases is substantially limited by the prohibition contained in this section.

"An unlawful obstruction in public navigable waters which threatens irreparable injury to an individual may be the subject of relief in equity (Texas and Pac. R. Co. *v.* Inter-State Transportation Co., 155 U.S. 585), and, when constructed, may be a public nuisance which any interested person may abate." (Prentice and Egan, Comm. Clause, p. 112.)

Not only can Congress prevent obstructions by the States; it can, by virtue of its paramount power over trade and commerce, create or authorize the creation of obstructions such as bridges and dams. (See a long list of cases cited by Prentice and Egan, Comm. Clause, p. 111.)

Except as to the limitation in favour of user of the water by States and by residents therein, these decisions seem applicable to the trade and commerce power as conferred by this Constitution. It appears clearly from the debates of the Convention, and particularly the debates referred to in the Historical Note to this section, that the Convention was fully aware of the wide scope of the American decisions, and was content that they should be applied—with the limitation mentioned—to this Constitution.

In the case of railroads, indeed, the Constitution does seem to contemplate a more limited power of control than exists in the United States. The express powers given (sec. 51—xxxiii., xxxiv.) to acquire State railways with the consent of a State, and to control railways in a State with the consent of the State, not only imply that those powers may not be exercised without such consent, but perhaps imply also that the powers would not have existed, or that their existence might have been doubtful, without express words. It may be argued that the facts that it was deemed necessary to give such express powers at all, and that the powers so given were limited by requiring the consent of the States, show that a narrower scope was contemplated for the whole trade and commerce power. Such arguments from implication, however, are never very strong. If the Convention had meant the navigation power to be construed more narrowly than in the United States, the matter would hardly, in the face of the

American authorities, have been left to implication. Besides, the express gitt of the power of eminent domain (sec. 51—xxxi.) which enables the Commonwealth to acquire property "for any purpose in respect of which the Parliament has power to make laws," evidences a broad view not only of the trade and commerce power, but of all the legislative powers vested in the Commonwealth. It is submitted, therefore, that subject to exceptions expressed or arising by clear implication from the language of the Constitution—such as the exception expressed in this section in favour of the user of water, and the exception implied in sec. 51—xxxiii. and xxxiv. against the acquisition of the railways of a State, or the construction of Federal Railways in a State, without the consent of the State—the trade and commerce power, with respect to navigable waters, has as wide a scope as in the United States. In this view, the Commonwealth may create waterways for inter-state commerce, or any other kind of highway except railways; and for that purpose it may not only improve the navigability of navigable streams, but may create navigability in naturally non-navigable streams, and may cut canals where no streams previously existed.

Concurrent Powers of the States.—The navigation power, being part of the trade and commerce power, is not "exclusively" vested in the Parliament of the Commonwealth, and, therefore, the concurrent power of the States to deal with inter-state navigation and with navigable waters will continue, subject to be ousted, in part or in whole, by Federal legislation.

In the United States, the distinction between those parts of the commerce power which are in their nature exclusive, as requiring uniform legislation, and those which are concurrent, as admitting of auxiliary local legislation in the absence of Federal legislation (see pp. 527, 530, *supra*), has led to a subordinate distinction being drawn between streams which are wholly within the limits of a State, and streams which form the boundary between two States, or flow through two or more States. With regard to the former streams much wider concurrent powers of control have been conceded to the States than with regard to the latter.

"It has always been the rule that, in the absence of Federal legislation, the States may prevent obstruction of navigable waters within their limits; may regulate the placing of buoys and beacons; the construction of wharves; and may deepen channels; change outlets of lakes and rivers, construct dams and locks to increase the depths of water or for other purposes, care being taken not to create serious impediments to the navigation of important waters; may construct canals around falls and improve their harbours and rivers generally, and may collect a charge from vessels using the improved navigation, as a compensation for the facilities thus afforded." (Prentice and Egan, Comm. Clause, p. 113; Mobile *v.* Kendall, 102 U.S. 691; State *v.* Illinois Central Railway, 146 U.S. 387; Pound *v.* Turck, 95 U.S. 459; Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Sands *v.* Manistee R. Improvement Co., 123 U.S. 288; Monongahela Nav. Co *v.* United States, 148 U.S. 312; Huse *v.* Glover, 119 U.S. 543; Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196.)

Thus it was held in Huse *v.* Glover, 119 U.S. 543, that if, in the opinion of a State, its commerce will be more benefited by improving a navigable stream within its borders than by leaving it in its natural condition, it may authorize the improvements though individuals may be inconvenienced; and that a river does not change its legal character as a highway if crossings by bridges or ferries are allowed under reasonable conditions, or if dams are erected under like conditions. "The erection of bridges with dams and the establishment of ferries for the transit of persons and property, are consistent with the free navigation of rivers." (Huse *v.* Glover, at p. 547.)

In the same case it was held that a toll for the use of the improvements was not a tax. "The fact that if any surplus remains from the tolls, over what is used to keep the locks in repair, and for the collection, it is to be paid into the State Treasury as a part of the revenue of the State, does not change the character of the toll or impost." (Huse *v.* Glover, at p. 549.)

And a State may not only, in the absence of Federal legislation, improve the navigability of rivers, but may even obstruct navigability. Thus in Hamilton *v.* Vicksburg R. Co., 119 U.S. 280 (following Cardwell *v.* Bridge Co., 113 U.S. 205) it was held

that persons acting under the authority of a State may construct bridges over navigable streams. The opinion of the Court contains the following passage:—

"What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulation of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams. Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation. As has often been said by this Court, bridges are merely connecting links of turnpikes, streets, and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public, than the obstruction to navigation caused by a bridge with proper draws. In such cases, the local authority can best determine which of the two modes of transportation should be favoured and how far either should be made subservient to the other."

When a bridge is lawfully built over a navigable river, its owners may have recourse to the courts to protect it; and relief granted by the courts is not a regulation of commerce. (Texas and Pacific R. Co. *v.* Inter-state Transp. Co., 155 U.S. 585.)

The general principle, as finally settled by the courts of the United States, is summed up by Prentice and Egan (Comm. Clause, p. 117) as follows:—"The question whether or not an obstruction should be permitted in navigable waters wholly within a State is essentially legislative, and this, it is now held, in the absence of federal legislation, is controlled entirely by the States."

The principles which, in the absence of federal legislation, would govern inter-state streams, are less clearly defined in the United States—chiefly because federal legislation has, as a matter of fact, occupied the field, and made the question one of little practical importance. Authority seems to show, however, that the power of the Federal Government to authorize obstructions is in such cases regarded as exclusive. (Albany Bridge Case, 2 Wall. 403; Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518; Prentice and Egan, Comm. Clause, pp. 118-120; Lewis, Federal Power over Commerce, p. 56.)

It is contended, however, by Dr. Lewis (Fed. Pow. over Comm. pp. 58-9) that the question whether a stream is within the limits of a State, or flows through or between two or more States, is not the conclusive test of concurrent control.

"It is impossible to draw the boundary line between rivers which are under the concurrent control of the State, and those which are national in their character. Such a rule as the one above stated, concerning the national character of streams flowing on the boundaries of States, and the local character of those wholly within a State, is purely empirical. A stream is not national in character because of its geographical position; the national character depends upon the importance of its navigation to the people of the Union as a whole. . . . We do not wish to minimize the value of general rules indicating the class of rivers under the concurrent power of the State. Nevertheless, the Supreme Court will not have to overrule its previous decisions in order to change or modify empirical distinctions. They are invented for utility; whenever a strict adherence would result in a palpable absurdity they will be abandoned. To say that all rivers on the boundaries of States are national in character and require the exclusive control of Congress, or that a State can place physical obstructions in all navigable streams entirely within her boundaries, means, and can mean nothing more, than that the majority of rivers of a particular class are national or are local in character."

It thus appears that in the United States three classes of navigable waters are recognized:—

(1.) Waters which are wholly within a State, and do not connect with the waters of other States (either by ocean, lake, river, canal, or otherwise) to form a continuous inter-state waterway. These waters are under the exclusive control of the State.

(2.) Waters which are wholly within the limits of a State, but which connect with the waters of other States to form a continuous inter-state waterway. These may be controlled by the Union, but in the absence of Federal legislation are subject to the concurrent control of the States.

(3.) Waters flowing on the boundaries of States or through two or more States. These are under the exclusive control of the Union.

Or perhaps, following Dr. Lewis' principle of classification, it might be said that streams on which there can be no Federal navigation are exclusively controlled by the States; that streams on which Federal navigation is unimportant, may be controlled by the States until the Union chooses to exercise control; and that streams on which Federal navigation is important are exclusively controlled by the Union.

Application of American Decisions.—In considering the applicability of the American decisions, it must be borne in mind that the Australian Constitution is explicit on two points on which the Constitution of the United States is silent. It provides (sec. 92) that after the imposition of uniform duties, inter-state commerce shall be absolutely free; and it provides (sec. 107) that every power of the State Parliaments, unless *exclusively* vested in the Federal Parliament or withdrawn from the State Parliaments, shall continue. No part of the commerce power (except customs, excise and bounties), or of the navigation power which it includes, is "exclusively" vested in the Federal Parliament; and therefore—in the absence of Federal legislation—it would seem that the States may exercise concurrent control over all navigable waters within their jurisdiction, except so far as the power to obstruct may be "withdrawn" from the State Parliaments by the constitutional provision that trade among the States shall be "absolutely free" (sec. 92). That provision, it would seem, does not extend to prevent such incidental physical obstructions as may arise from the *bona fide* exercise by the States of the concurrent power to regulate inter-state commerce in the absence of Federal legislation. It is to be noted that the provision for freedom of trade is as binding on the Commonwealth as on the States. Any obstruction which would be unlawful under sec. 92, if created by a State, would be equally unlawful if created by the Commonwealth: so that no argument for an exclusive power can be founded on that section. It would seem therefore that, in the absence of Federal legislation, the States may exercise concurrent control over all navigable waters within their jurisdiction; subject of course to all the constitutional conditions—such as the prohibitions against interfering with freedom of trade (sec. 92) and against discriminating against the citizens of other States (sec. 117)—by which the exercise of State power is controlled.

§ 418. "Abridge the Right of a State or of the Residents Therein."

These words do not preserve the pre-existing rights of the States in their entirety. They forbid the Commonwealth to abridge the right of a State or its residents to the "reasonable" use of the waters for certain purposes; but they do not forbid the Commonwealth to abridge the right of a State or its citizens to the unreasonable use of the waters for those purposes, or to their use for other purposes. (See Notes §§ 419, 421, *infra*.)

Rights Before Federation.—Before Federation, it is clear that the legal rights of each Colony—or of the residents of that colony, as against residents of another colony—to the use of the waters of rivers flowing through the colony, were absolute. There is no such thing as a riparian law between independent States; and as regards their direct relations with each other the several colonies were practically independent. Each colony received, as a part of its heritage, the common law of England; and consequently each colony had, as part of its law, the riparian common law of England. But that law became the law of each colony separately, and not law between the colonies, nor the general law of all the colonies. Each colony had power, by legislation, to alter the common law with regard to the rights to use the waters. Accordingly the Parliament of Victoria, by the Irrigation Act, 1886, No. 898, amended by the Act No. 983, and now re-enacted in the Water Act, 1890, sec. 293, dealt in a comprehensive manner with the control of river waters and watercourses, and riparian rights in connection therewith.

And the Parliament of New South Wales, by the Water Rights Act, 1896, defined the rights of riparian proprietors in that colony, and, subject to those rights, vested in the Crown the right to the use and flow and to the control of water in all rivers and lakes. A precisely similar course of events happened in some of the American States. In each State the common law of riparian rights at first prevailed; but in the "arid region," where the use of the water is necessary for development, the common law, which entitled every riparian proprietor to the continued natural flow of the water, was found unsuitable, and by custom and State legislation a different rule was recognized, which permits, under certain circumstances, the appropriation of the waters of a flowing stream for mining, agricultural, and other purposes. (United States *v.* Rio Grande Dam and Irrigation Co., 174 U.S. 690; and see Conv. Deb., Melb., pp. 420-3; Prentice and Egan, Comm. Clause, p. 116.)

It was suggested at the Convention, by Mr. Gordon, Mr. Holder, and others, that there were some riparian rights between the colonies, based either upon common law, or upon international law, or upon international comity; and that relief might be had, if not in the colonial courts, at least by application to the Imperial Government. (See Conv. Deb., Adel., pp. 794, &c.; Melb., pp. 31, &c.; 405, &c.) So far, however, as these claims rest upon any suggestion of a legal right, they fail, not only, as was suggested in the Convention (for instance, Conv. Deb., Melb., p. 493), for want of a tribunal, but for want of a law which such tribunal should administer.

Nor does international law carry the matter any further. There is no principle which limits the rights of a State or its citizens to the use of waters flowing through the State. Free navigation of such waters, subject to certain conditions, is indeed generally a subject of treaty or convention between States, and it may be that a refusal to enter into any such convention might be a breach of international comity. (Pitt Cobbett, Cases on Internat. Law, p. 43; Walker, Pub. Internat. Law, p. 37; Hall, Internat. Law, § 39; Conv. Deb., Adel., p. 795; Melb., p. 419.) But there is certainly no principle of international law, and no conventional usage, which purports to apportion the rights of States to appropriate the waters of rivers. The rights of irrigation do not seem to have even formed the subject of international questions in Europe.

"The only irrigating rivers in Europe are those of France, Italy, and Spain, which flow wholly within the territory of the States concerned, and have as yet afforded no opportunity for any difference of opinion on this point. The rivers in regard to which international agreements have been made, and of which the River Danube is an excellent example, are not rivers used for the purpose of irrigation, even to an infinitesimal extent. As a matter of fact, the only river, so far as we know, in which different States are interested, and in which this question has assumed any importance, is the River Rio Grande, dividing Mexico from the United States of America, and there the Mexican Republic, so far as I know, has never been able to obtain any official recognition of its claims from the United States Government, although that river, in many portions, has been almost entirely deprived of its water at certain seasons of the year." (Mr. Deakin, Conv. Deb. Melb., pp. 1970-71.

Besides rivers flowing through two or more States, the question of boundary rivers needs to be discussed. In Australia the boundaries between States are mostly parallels of latitude and meridians of longitude; but there are two river boundaries—namely, that formed by the Murray River between New South Wales and Victoria, and that formed by the Dumaresq and MacIntyre Rivers between New South Wales and Queensland. The rule of international law as to boundary rivers is that "where it is not proved that either of the riparian States possesses a good title to the whole bed, their territories are separated by a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or, as it is usually called, the Thalweg, is taken as the boundary." (Hall, Internat. Law, § 38; and see Rorer, Inter-State Law, p. 438.)

In the case of the Dumaresq and MacIntyre Rivers (see Letters Patent of 6th June, 1859, p. 73, *supra*) this rule would undoubtedly apply; but in the case of the Murray River, special provision is made by the Australian Colonies Government Act (13 and 14

Vic. c. 59) and by the New South Wales Constitution Statute (18 and 19 Vic. c. 54). Sec. 4 of the Australian Colonies Government Act defined the territory of Victoria as "bounded on the North and North-East by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the eastern boundary of the colony of South Australia." Sec. 5 of the Constitution Statute recited that doubts had arisen as to the true meaning of this description of the boundary, and declared and enacted that—

"The whole water-course of the said River Murray from its source therein described to the eastern boundary of the colony of South Australia is and shall be within the territory of New South Wales. Provided nevertheless that it shall be lawful for the Legislatures and for the proper officers of customs of both the said colonies of New South Wales and Victoria to make regulations for the levying of customs duties on articles imported into the said two colonies respectively by way of the River Murray, and for the punishment of offenders against the customs laws of the said two colonies respectively committed on the said river, and for the regulation of the navigation of the said river by vessels belonging to the said two colonies respectively. Provided also that it shall be competent for the Legislatures of the said two colonies by laws passed in concurrence with each other to define in any different manner the boundary line of the said two colonies along the course of the River Murray and to alter the other provisions of this section."

Under this section the whole watercourse of the Murray, so far as that river forms the boundary, is within the territory of New South Wales; and it has been contended on behalf of New South Wales that this grant carries with it the entire control of the river, except so far as concurrent jurisdiction is expressly given to Victoria. The jurisdiction as to customs duties and customs offences will become obsolete on the imposition of a uniform tariff, and need not be considered. The only remaining jurisdiction of Victoria, it would seem, is "to make regulations . . . for the regulation of the navigation of the said river by vessels belonging to Victoria." This power to regulate the navigation of the river by particular vessels is clearly a much more limited right than the power to regulate navigation generally; it appears to mean the licensing and general control of the vessels themselves, and not to extend to physical control of the river except as regards wharves or landing places on the Victorian side.

"Upon whatever ground property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream." (Hall, Internat. Law, § 38.) A water-course consists of the bed, the two banks, and the water; the bank being the uttermost part of the bed in which the river naturally flows. (Angell on Water-courses; Conv. Deb., Melb., p. 440.) The whole water-course being within the territory of New South Wales, it would seem that that colony had—subject to the Victorian right to regulate the navigation by Victorian vessels—the same control over its waters as over the waters of a river flowing through the colony.

In respect of boundary streams, to which the title of both colonies depends on an Imperial grant, it may be that, notwithstanding the absence of an inter-colonial riparian law, there may be mutual rights to the appropriation of the water, which may be the subject of adjudication in a court. See Stillman *v.* White Rock Manuf. Co., 3 Wood. and M. 538 (cited Rorer, Inter-State Law, p. 446) an interesting case decided in a Circuit Court of the United States. The parties owned mills on opposite sides of the River Pawcatuck, the centre of which is the boundary line between Connecticut and Rhode Island. Both were supplied with water-power from the river, and one of them, by a canal, diverted more than one undivided half of the water. Notwithstanding that the two mills were situated in different States, and in different circuits, it was held that an injury was committed for which an injunction could be had in the Circuit Court which had jurisdiction on the side on which the canal was cut. The decision was based on the principle that each party, as against the other, had a corporeal easement or right to an undivided half of the water of the whole stream, or a tenancy in common therein; and that there was therefore a remedy both for the direct injury to the easement and to the consequential injury to the lands adjoining. This, of course, is altogether different

to the proposition that the common law right to an undiminished flow has any inter-state application. If good law, the case might possibly be applicable to a boundary stream, such as the MacIntyre, between two colonies.

Rights after Federation.—The establishment of the Commonwealth, though it confers on the Federal Parliament new, and to some extent dominant, legislative powers, does not, in the absence of federal legislation, greatly alter pre-existing rights. There are indeed the provisions that the citizens of other States must not be discriminated against (sec. 117), and that after uniform duties trade must be free; but it seems quite clear that each State retains its own riparian law, and that no inter-state riparian law arises, nor—except as to navigation—can arise. The Federal Parliament has power to legislate as to inter-state navigation, and it may incidentally—subject to the restriction as to reasonable use—control the waters for that purpose; but it has no power to dispose of the water for any other purpose, such as irrigation or conservation. Nor can there be any Federal common law regulating such appropriation; for that would lead to the absurdity that there was a part of the common law which could not be altered either by the Federal Parliament or by the State Parliament. There can be no federal common law on matters outside the legislative power of the Federal Parliament; so that after federation—as before—the claim to an undiminished flow, as between States or citizens of different States, would seem still to fall on the ground that there is no law applicable to the case.

§ 419. "The Reasonable Use."

Reasonable Use.—As originally proposed by Mr. Reid, without the word "reasonable," this provision would have prevented any interference whatever by the Federal Parliament, under the trade and commerce power, with the absolute right of the States to appropriate the waters of rivers for the purposes named. On the other hand, the omission of the whole provision would have left the navigation power supreme over the rights of the States, and would have made it legally possible for the Federal Parliament to ignore the requirements of conservation and irrigation altogether. The words as they stand recognize the supremacy of the navigation power only so far as it does not conflict with "reasonable use" for conservation and irrigation—thus subordinating navigation to the reasonable requirements of the States for such purposes.

Before discussing the interpretation of the word "reasonable," it will be well to point out how, in the United States, in spite of the legal supremacy of the navigation power, the actual necessities of the "arid region" have secured some slight recognition at the hands of the courts.

In Broder *v.* Water Co., 101 U.S. 274, 276, the court said: "It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

This was a recognition of a right of "reasonable use," based on encouragement on the one side and expectation on the other, apart altogether from federal legislation.

In United States *v.* Rio Grande Dam and Irrigation Co., New Mex., 51 Pac. Rep. 674, it was held in the Court of the Territory of New Mexico that where a stream is of small value for navigation, and of great importance for irrigation, a State may destroy its navigability in the interests of irrigation. In the Supreme Court, however, this doctrine was not upheld. It was admitted that every State has the power, within its

dominion, to alter the common law rule as to the appropriation of flowing waters, and to permit their appropriation for such purposes as the State deems desirable. It was also admitted that by Acts of Congress (cited in the opinion) Congress had recognized and assented to such appropriation; but it was not to be inferred that Congress thereby meant to confer on any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse, in derogation of the interests of the people of the United States. (United States *v.* Rio Grande Dam and Irrigation Co, 174 U.S. 690.)

This Constitution, however, gives explicitly what Congress and the Courts of the United States have only partially conceded—the right of the States and their residents to the reasonable use of the water for certain purposes, notwithstanding that navigability may be interfered with.

What is Reasonable.—The difficulty of conceding absolute paramountcy to either navigation on the one hand, or conservation and irrigation on the other hand, has been met by the word "reasonable," which gives the "reasonable use" for conservation or irrigation a priority over navigation, but which gives navigation a priority over the unreasonable use for conservation or irrigation. That is to say, the question of priority is not determined absolutely by the Constitution, but is left to be determined in each case according to the circumstances, by the application of principles laid down by the Constitution.

What is "reasonable" must depend on the facts of each case; but the facts in each case ought to be considered and balanced in accordance with fixed principles. To secure uniformity and certainty in the law, it is important that the elements of reasonableness —the principles upon which any use is declared reasonable or unreasonable—should be clearly laid down. This can only be done authoritatively by the Courts; but a short discussion of some aspects of the question will perhaps be useful.

From whose point of view is "reasonableness" to be decided? Are the requirements of the conserving or irrigating State or citizen to be taken into account alone, irrespective of the needs of navigation; or are the public interests as a whole to be considered, by balancing the requirements for both purposes, and regulating the use of the water according to the relative importance of the two purposes? On the first assumption, the fair requirements of cultivation have to be estimated independently, whether the damage to navigation be great or small; on the second assumption, the amount of water which may reasonably be used for cultivation will vary according to its importance for navigation. Neither assumption is wholly free from difficulty. On the one hand, if the amount which the cultivator may appropriate is to be determined irrespective of navigation, it would seem "reasonable" for him to drain the river dry, if he derived the least profit from doing so, although the damage to navigation might be immensely greater than his gain. From his point of view, every use would be reasonable which benefited him, no matter how much it might cost others. On the other hand, if navigation and cultivation are to be weighed equally in the balance, according to their respective value to the community, the reasonable priority of user may vanish altogether, and the importance of navigation may make it unreasonable, in some cases, to take a single drop for cultivation.

Or again it may be argued that the spirit and intention of the clause require an intermediate basis—one which would not determine "reasonable use" without reference to the requirements of navigation, but which would, whilst considering both requirements, give a "reasonable" degree of priority to the rights of cultivators. It may be said that the section refers to existing rights, and forbids any abridgment of those rights so far as they involve reasonable use; and that the spirit of this prohibition requires a liberal construction of existing rights, and a strict construction of the abridging power. The reasonableness of use may involve questions, not only of the amount of water taken, but of the season at which it is taken, the utility of the purpose to which it is applied, and the manner of its application to that purpose. It may

be unreasonable to conserve or divert any water when the river is low, but reasonable to conserve or divert large quantities when the river is high; it may be reasonable to irrigate, but unreasonable to adopt a needlessly wasteful mode of irrigation; and so on.

Analogy with the Common Law.—The limitation placed by this section on federal legislation bears an interesting analogy with the rules of the common law on the subject of riparian rights. The common law recognizes, and is obliged to some extent to compromise between, the right of the lower riparian proprietor to an undiminished flow, and the right of the upper riparian proprietor to use the water. The compromise it makes is to require, on the one hand, that the flow shall not be *substantially* diminished, and on the other that the consumption of water must be *reasonable*. (Embrey *v.* Owen, 6 Exch. 353.)

"If a lower proprietor has a right to the free flow of the water without diminution or alteration, a right to consume the water before it reaches him is apparently irreconcilable with it; but such inconsistencies are to be met with in all natural rights, and the law reconciles them by holding that each is only to be enjoyed *reasonably*, that they are not absolute rights without limit, but that they are rights modified by all the rights of others. The right to uninterrupted flow of water is therefore subject to limit by the right to reasonable use and consumption of the water by others, and the right to use and consume must be exercised so reasonably and moderately that others may not be immoderately deprived of the quantity of water they are entitled to." (Encycl. of the Laws of Eng. *sub tit.* "Watercourse.")

"On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream could be permitted to irrigate them continually by canals and drains, and to cause a serious diminution of the quantity of water; . . . . on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree." (Per Parke, B., Embrey *v.* Owen, 6 Exch. at p. 372.)

The distinction has been drawn in another way by saying that every proprietor has a right to the "ordinary" use of the waters without regard to the effect on other proprietors, but he is not entitled to the "extraordinary" use if he thereby interferes with the rights of others. (Miner *v.* Gilmour, 12 Moo. P.C. 156; Ormerod *v.* Todmorden Joint Stock Mill Co., 11 Q.B.D. 155.)

The principle of modifying the right to the uninterrupted flow by a countervailing right to "reasonable use" is therefore a part of the common law of England; but its application, under English conditions, has been to restrict the "reasonable use" within very narrow limits—to allow a riparian proprietor to "dip a watering-pot," but to insist on a substantially undiminished flow. (See Medway Navigation Co. *v.* Romney, 9 C.B.N.S. 575; Wilts and Berks Canal Co. *v.* Swindon Waterworks Co., L.R. 9 Ch. 451.) In Australia the use of the water for cultivation is vastly more important; and though the principle of 'reasonable use" is the same, its application must be widely different. Parke, B., in the case cited, chose irrigation as a striking example of an unpermissible and unreasonable use; but in Australia the wholesale appropriation of the water may be not only reasonable, but often essential to pastoral and agricultural settlement.

Analogy with Railways.—The section also presents an interesting analogy with the sections dealing with unreasonable preferences on railways. The interests of cultivation and navigation in the one case may be compared with the interests of the railways and the ports in the other; and the State-right of user of water with the State-right of making developmental rates. In the case of the rivers, however, the protection given to State-rights is not so complete as in the case of the railways. The right to make developmental rates—if they apply equally to goods from other States—is absolutely preserved, no matter what may be their effect on inter-state commerce; but the right to the user of water may be abridged so far as it is unreasonable.

In the case of rivers, the Constitution does not provide, as in the case of railways, that a use may not be deemed unreasonable unless the Inter-State Commission decide that it is so. The question of unreasonableness, however, would seem to be more proper

for the Commission than for the courts; and under sec. 101 the Parliament may give the Inter-State Commission such powers of adjudication and administration as it deems necessary for the execution of this, as every other, part of the trade and commerce law.

§ 420. "The Waters of Rivers."

A river is a stream flowing in a defined channel; and the waters of a river are the waters flowing over its bed and between its banks. Rainwater flowing over or percolating through the soil, but not flowing in a defined channel, is not the water of a river (see McNab *v.* Robertson [1897], App. Ca. 134). Artesian water is therefore not the water of a river; nor, it would seem, is flood-water which has escaped from the banks of a river and overflowed the surrounding country. One interesting question that arises is whether the great lakes and billabongs into which the Darling River spreads in flood-time can be called part of the river, or whether the waters which they then contain can be called the waters of the river. As defined by text-book writers, the bed of a river is, generally speaking, all the soil below the high-water mark of the ordinary tides and the ordinary floods. How far the bed and banks of such a river as the Darling extend is a question of fact; and it may be that the unique conditions of that river make a strict adherence to the definitions of English judges and text-book writers impracticable.

In connection with this question, the further question may arise whether the Federal Parliament, in the exercise of its navigation power, can in any way prevent the appropriation of waters which are not the waters of rivers. In the gift of the navigation power (sec. 51—i. 98) no mention is made of rivers, but this section prohibits the abridgment, by trade and commerce laws, of the State-rights of reasonable use of the waters of rivers. This section seems to show that the Constitution did not contemplate federal control of other inland waters. No riparian law in the world, it is believed, extends to waters not within the *ripae*, or banks, of a stream. The American cases extend the authority of the Union, in respect of navigation, to all the tributary streams of a navigable river; and it would seem that this is the utmost limit of control. This distinction may be important in connection with the conservation of waters in flooded areas.

§ 421. "For Conservation or Irrigation."

The scope of the section is limited to reasonable use for these two purposes. Any use by a State or its residents which does not come within one of these heads is not protected by these sections, but is subject to the dominant power of the Federal Parliament with respect to navigation. Conservation and irrigation were the two modes of use which engaged the special attention of the Convention, as being the only modes of use which were contemplated on a large scale, and which seemed to threaten the navigability of the rivers. It is clear, however, that they do not exhaust the ways in which, or the purposes to which, water may be appropriated. Water may be diverted as a source of power, or for sluicing purposes, or in many other ways.

Conservation.—Conservation means the retention and storage, in a natural or artificial reservoir, of waters which would naturally flow down the channel of a river. Every dam which backs up the waters of a river conserves water in a reservoir formed partly by the bed and banks of the river, and partly by the dam. But conservation within the meaning of this section need not, it is conceived, be within the bed of the river, but would include the diversion of the waters of a river to a reservoir wholly outside the bed.

"The use of waters for conservation" is a somewhat indefinite phrase. Conservation, unlike irrigation, is rather a means of use than an actual use. It is in fact the storage of water, with a view to subsequent use in any way whatever—for irrigation, or for pastoral purposes, or for driving machinery, or for the water-supply of a town.

"The use for conservation" would seem to mean rather "the conservation for use." The right to conserve must imply the right to use the water conserved, otherwise it would be useless; and as no particular use is specified, it follows that conservation for any purpose—provided the use is reasonable—is authorized by the section. Thus the conservation of waters from the Nepean in the Prospect Reservoir, for the supply of the city of Sydney—or the conservation in the Yan Yean Reservoir of waters from the Watt River, a tributary of the Yarra, for the supply of the city of Melbourne—cannot be interfered with by the Federal Parliament so far as it is a reasonable use; though it seems that in the United States, in such a case, if the navigability of the river lower down were interfered with, not only might Congress interpose, but the Attorney-General under laws already made by Congress might obtain an injunction. (See United States *v.* Rio Grande Dam and Irrigation Co., 174 U S. 690, cited p. 890 *supra*; and also Wilts and Berks Canal Co. *v.* Swindon Waterworks Co., L.R. 9 Ch. 451.)

From the above analysis the curious result would seem to follow that a use of waters which does not come directly under the protection of the section may come indirectly under that protection by the storage of the water before use. The great conservation schemes which have been projected in regard to Australian rivers, as well as the actual conservation schemes already carried out, are almost wholly for the purposes of pastoral and agricultural settlement. (See speeches by Mr. J. H. Carruthers, Conv. Deb., Adel., pp. 802-5; Melb., pp. 52-6, 388-399, 468-472, 1955-8; Report of Colonel Frederick J. Home, R.E., on the Prospects of Irrigation and Water Conservation, N.S.W. Parl. Papers, 1897, Vol. 5, p. 249.)

Irrigation.—Irrigation is the distribution of water through artificial channels over cultivated land. Unlike conservation, it involves the use of water for a single definite purpose—that of supplying moisture for plant life. Irrigation is extensively practised in many European countries, and also in India and America. In Australia it is largely in the experimental stage, the most important irrigation works at present being in the colony of Victoria. (See Australian Handbook, 1900, p. 236; Mr. A. Deakin's speeches, Conv. Deb., Adel., pp. 805-9; Melb., pp. 38-45, 452-60, 636-40, 1970-4; Colonel Home's Report, N.S.W. Parl. Papers, 1897, Vol. 5, p. 249.)

One of the essential requirements of a profitable system of irrigation is a continual and regular supply of water; and therefore on the intermittent rivers irrigation works can hardly be undertaken except in combination with conservation schemes which will secure that regular supply. Close settlement is another essential condition; and it appears from the report of Colonel Home (cited above), that whilst conservation is an immediately practical question, irrigation is likely to be confined for many years to the more closely-settled districts.

Probable Effect on Navigation.—Irrigation and navigation may, owing to the insufficiency of water for both, involve a conflict between the two uses; but the present prospects of irrigation do not point to any immediate danger to navigability. Conservation, on the other hand, is not necessarily antagonistic to navigation. The conservation of flood waters will render it possible to maintain a more regular flow and to increase the continuity of navigability. (See Mr. A. Deakin's speeches, Conv. Deb., Syd., 1891, p. 691; Melb., 1898, p. 40.) Whether there will ultimately be any serious conflict between the rights of navigation and the rights of conservation and irrigation is therefore problematical.

Inter-State Commission.

101. There shall be[422] an Inter-State Commission[423], with such powers of adjudication and administration[424] as the Parliament deems necessary[425] for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

UNITED STATES.—A Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners.—Inter-State Commerce Act, 1887, sec. 11.

HISTORICAL NOTE.—The provision for an Inter-State Commission was first suggested at the Adelaide session, 1897, when the Bill as first drafted contained the following clauses :—

"93. The Parliament may make laws constituting an Inter-State Commission to execute and maintain the provisions of this Constitution relating to trade and commerce upon railways within the Commonwealth, and upon rivers flowing through, in, or between, two or more States."

"95. The Commission shall have such powers of adjudication and administration as may be necessary for its purposes, and as the Parliament may from time to time determine." (Then followed a limitation as to railway rates; see Hist. Note to sec. 102.)

As to the expediency of constituting a commission, there was hardly any debate; and the only amendment made was the omission of the limitation alluded to in brackets. (Conv. Deb., Adel., pp. 1113-5, 1117-40.)

At the Melbourne session, 1898, a suggestion by the Legislative Assembly of South Australia, to provide that the Parliament "shall" constitute an Inter-State Commission, was discussed. In view of the decision just arrived at (see Hist. Notes to secs. 102, 104) to make the Inter-State Commission the arbiter of unfairly preferential rates, this proposal gained strong support; though some of the Victorian representatives argued that its creation should be optional with the Parliament. The amendment was eventually withdrawn in favour of a proposal by Mr. Kingston, to substitute "There shall be" a Commission. The Convention desired to secure to the Commission a large measure of independence from Parliamentary control, and this amendment was agreed to. The words limiting the scope of the Commission to railways and rivers were then omitted, in order that the Parliament might be free to give the Commission the widest powers of administering the trade and commerce provisions. (Conv. Deb., Melb., pp. 1512-39.)

Before the first report, the two clauses were redrafted into one, as follows :—"There shall be an Inter-State Commission with such powers of adjudication and administration as the Parliament from time to time deems necessary, *but so that the Commission shall be charged with* the execution and maintenance," &c. On the second re-committal, Sir Geo. Turner objected to the independence of the Commission, as regards its constitution and powers, and proposed to substitute "Parliament may constitute" the Commission. This was negatived by 23 to 13, but Mr. Barton met Sir Geo. Turner half way by giving Parliament full control over the powers of the Commission. (Conv. Deb., Melb., pp. 2393-6.) Two verbal amendments were made after the fourth report.

§ 422. "There shall be."

The Constitution stops short of actually organizing an Inter-State Commission; it merely gives a definite direction to the Parliament that there "shall be" such a Commission. Until the Parliament provides for the number of members and their salary, the Commission cannot exist at all; and until the Parliament determines what powers of adjudication and administration are necessary to it, it can have no powers at all.

The Parliament cannot, of course, be compelled—except by its constituents—to constitute a Commission, or to give it any powers when constituted. The imperative words of this section, however, receive some support from the fact that sec. 102 will be inoperative until such a Commission is constituted and given certain powers of adjudicating as to preferences and discriminations.

§ 423. "An Inter-State Commission."

The establishment of an Inter-State Commission for the Commonwealth was directly suggested by the Inter-State Commerce Commission created in the United States by an Act of Congress in 1887; but in some respects it bears a closer resemblance to the Commission constituted by the English Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25). The functions of the American Inter-State Commerce Commission were in turn based to some extent on those of the English Railway Commissioners appointed under the Regulation of Railways Act, 1873 (36 and 37 Vic. c. 48); and the original prototype of all these commissions is the Committee of the Queen's Privy Council, familiarly known as "the Board of Trade"—that very "Committee on Trade and Plantations" which in 1849 devised the first crude scheme of Australian Federation (see p. 83, *supra*). A short account of the English and American Commissions thus formed will help to an understanding of the nature of the Inter-State Commission, and the part which it is intended to play in this Constitution.

English Commissions.—The idea of a railway commission dates back as far as 1840. "In that year powers were given to the Board of Trade not unlike those now exercised by the Massachusetts Railroad Commission [*i.e.*, powers to report and secure publicity]. These powers were further defined in 1842. The Board of Trade was as well adapted to the work as any body then existing. It had for years past performed similar functions in connection with shipping. It failed where the Massachusetts Commission succeeded, not because of a difference in the law, but because the English public sentiment with regard to railroads was not sufficiently active to give such a body the necessary moral support to make up for lack of legal authority." (Hadley, Railroad Transportation, p. 171.) A railway Commission was appointed in 1844 with more specific powers, but the following year it "died of too much work and too little pay." It was succeeded in 1846 by another abortive Commission with no powers at all, which "died of too much pay and too little work." (*Id.*)

The Railway and Canal Traffic Act, 1854 (17 and 18 Vic. c. 31), which first made definite provision against "undue preferences," and the withholding of "reasonable facilities" for through traffic (see Notes, § 430, *infra*), had been framed with a view to submitting questions arising under it to the Board of Trade. By the influence of the railway companies, it was so amended in the House, that these questions came under the jurisdiction of the Court of Common Pleas. Many of the questions raised, however, were of a technical character with which the Court declined to grapple, and in consequence the remedial scope of the Act was seriously narrowed.

At last, by the Regulation of Railways Act, 1873 (36 and 37 Vic. c. 48), this jurisdiction was transferred to Railway Commissioners, with judicial powers to hear and determine complaints arising under the Act of 1854 (sec. 6). The Commissioners were empowered, and at the request of a party were required, to state a case for the Court of Appeal upon any question of law; but otherwise their decisions were final.

"The Railway Commission was a Court. Not an executive body, but to all intents and purposes a court of law. And in establishing this new Court, in addition to those already existing, Parliament had two ends in view: (1) To have a tribunal which would and could act, when others would or could not. (2) To avoid the expense, delay, and vexation incident to litigation under the old system. Neither end was well fulfilled." (Hadley, Railroad Transportation, p. 173.) The chief reasons for failure seem to have been that the jurisdiction of the Commission was too restricted, and that it had no executive power to enforce its decrees.

On the face of the Act of 1873, the decisions of the Commission, as to what were questions of fact or questions of law, appeared to be final. But by writ of mandamus from a court of appeal the decision on this point could at once be taken out of the hands of the Commission by compelling them to state a case, which could then be made the subject of action in the higher court. So this important power was made of no effect.

By the Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25), the Railway Commissioners were replaced by the Railway and Canal Commission, with greatly enlarged jurisdiction, and with power to award damages to complainants. Sec. 17 gave an appeal from the decisions of the Commission to the Court of Appeal, "but not on any question of fact or *locus standi*;" and provided that the Commission should not be restrained by prohibition, injunction, certiorari, or otherwise.

The American Inter-State Commerce Commission.—"In the United States, before the passing of the Inter-State Commerce Act, attempts had been made in many of the States to deal with the problem of railway rates by means of Commissions. Some of these Commissions were empowered to establish rates; others (the most successful of which was the Massachusetts Railroad Commission) had little or no power to act, but were simply established for the sake of securing publicity." (Hadley, Railroad Transportation, p. 136.)

In 1887, the Inter-State Commerce Act was passed by Congress. The provisions of that Act dealing with preferences and discriminations are dealt with in the Notes to sec. 102; here we are only concerned with the constitution and general powers of the Inter-State Commerce Commission created by the Act. Sec. 11 establishes the Commission, and provides for the appointment and tenure of its members. Sec. 12 authorizes the Commission to inquire into the management of the business of "all common carriers subject to the provisions of this Act" (*i.e.*, all common carriers engaged in inter-state or foreign commerce), to keep itself informed as to the manner and method in which such business is conducted, and to obtain from such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. The Commission is further authorized to require the attendance of witnesses and production of documents, and to invoke the aid of the federal courts in case of disobedience to its summons. Sec. 13 provides that any person complaining of any act done by a carrier in contravention of the Act may apply to the Commission by petition. The Commission is then to call upon the carrier to satisfy the complaint, or answer it. If the carrier does not satisfy the complaint, or if there appears to be reasonable ground for investigating the matters complained of, it is the duty of the Commission to investigate them. The Commission may also investigate any complaint forwarded by the Railroad Commission of any State, or may institute any inquiry on its own motion.

It is the duty of the Commission to make reports of all investigations, including the findings of fact on which its conclusions are based, and its recommendations, if any, as to what reparation should be made by the carrier to any persons injured; and such findings are in all judicial proceedings *prima facie* evidence as to the facts found. (Sec. 15.) If the Commission is satisfied that any carrier has violated the Act, or that any party has sustained injury by such violation, it must forward to the carrier a copy of its report, with a notice to desist from such violation, or to make reparation, or both. (Sec. 15.) If a common carrier violates or disobeys any order of the Commission, it is the duty of the Commission, and lawful for any person interested, to apply in a summary way, by petition, to the proper Circuit Court, alleging such violation or disobedience; and the Court must hear and determine the matter speedily, as a court of equity, but without formal pleadings or proceedings, and in such manner as to do justice, and may restrain the carrier by injunction or other process, mandatory or otherwise, and may enforce such process by attachment or fine, and may order the payment of costs. When the subject in dispute is of the value of $2000 or more, either party may appeal to the Supreme Court. (Sec. 16.)

The constitutionality of the gift of these powers to the Commission rests entirely upon the power to "regulate commerce," and has been the subject of much litigation. It has been clearly laid down that the Commission is a purely executive body, and neither judicial nor legislative. "It cannot be judicial, for its members are not appointed to hold office during good behaviour." (Prentice and Egan, Commerce Clause, p. 289; citing Kentucky Bridge Co. *v.* Louisville, &c., Co., 37 Fed. R. 567.) In Inter-State C.C. *v.* Brimson, 154 U.S. 447, it was argued that the power of investigation to determine whether an offence had been committed was essentially of a judicial nature, and could not be constitutionally exercised by the Commission. The majority of the Court held that the power to investigate and to summon witnesses was an executive power, which was validly vested in the Commission. It seems, however, that an enquiry as to the past—whether rates already collected are reasonable—is judicial (Inter-State C.C. *v.* Cincinnati, &c. Co., 167 U.S. 479); and such an enquiry is perhaps beyond the powers of the Commission (Prentice and Egan, Com. Cl. p. 390).

That the Commission is not a legislative body is equally clear. "Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering the tribunal to determine what in the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in future the railroad companies should follow the rates thus determined to have been in the past reasonable and just." (Inter-State C.C. *v.* Cincinnati, &c., R. Co., 167 U.S. 511; following Cincinnati, &c., R. Co. *v.* Inter-State C.C., 162 U.S. 184. Followed in Inter-State C.C. *v.* Alabama Midland R.Co., 168 U.S. 144.)

The American Commission is a corporate body, with power to sue and be sued in the federal courts. (Texas and Pacific R. Co. *v.* Inter-State C.C., 162 U.S. 197.)

The Inter-State Commission.—In this Constitution it was deemed advisable not to rely upon the trade and commerce power for the right to establish an Inter-State Commission, but to provide for its establishment in the Constitution itself. The first clause framed for this purpose was merely an enabling one, to remove any doubt that might exist as to the power of the Parliament to constitute such a Commission, with powers of adjudication and administration. But at Melbourne the case assumed a somewhat different complexion. The contest whether the Parliament or the Court was the proper judge of what constituted an unreasonable preference was compromised by referring the question of reasonableness absolutely to the Inter-State Commission. The Commission thus assumed the form of an arbiter between the States, exercising its judgment independently of Parliament; and it was accordingly determined not merely to empower, but to require the Parliament to execute it, and the independence of its members was adequately secured.

But although the establishment of the Inter-State Commission is directed by the Constitution itself, no powers are given to it by the Constitution. It is to have such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance of the law relating to inter-state and foreign trade and commerce. In one respect, however—namely, as regards the control of railway rates—the legislative power given to the Parliament cannot be carried into effect except through the agency of the Commission; so that whenever legislation under sec. 102 is resorted to, the power to adjudge a preference or discrimination be to undue or unreasonable, or unjust to a State, cannot be assigned to any other tribunal.

The Inter-State Commission thus provided for has points of resemblance to and difference from the Inter-State Commerce Commission in America and the Railway and Canal Commission in England. As an administrative body, to supervise the execution and prevent the violation of laws relating to inter-state and foreign commerce, it chiefly resembles the American Commission; as a body which is to have power to adjudicate, and whose decisions are to be final on questions of fact, it resembles the English Commission.

The powers of adjudication which may be given to the Inter-State Commission, and which cannot be given to any other body, mark a wide distinction between it and its American prototype. The American Commission can investigate and prosecute, but it cannot adjudicate; it is wholly dependent on the courts to confirm and enforce its decrees. Even its findings on fact are only *prima facie* evidence, which may be rebutted before the court. But though the powers which may be given to the Australian Commission are far wider than those which have been given to the American Commission, they are not so wide as those which may be given to the American Commission, if Congress chooses. The powers of the Australian Commission cannot exceed the limits prescribed by the Constitution itself. The Parliament cannot give it any powers except those of adjudication or administration, or authorize it to disregard the financial responsibilities incurred by a State, or make its decisions final on matters of law. The provisions of the Australian Constitution, by defining the scope of the Commission, limit the extension of that scope. On the other hand Congress, which passed the Inter-State Commerce Act, could if it wished pass an Act giving it widely-extended powers; could constitute the Commission in such a way that it might exercise judicial powers; and could even (so far as this did not involve a delegation of legislative power —see Prentice and Egan, pp. 309-313) empower the Commission to fix rates.

State Railways.—There is one important respect in which, owing to the difference in Australian conditions, the duties of the Inter-State Commission will differ widely from those of the English and American Commissions. In Australia, nearly the whole of the railways are owned by the Governments of the States; in England and America they are owned almost wholly by private corporations. The American Inter-State Commerce Commission is an arbiter between innumerable competing or monopolizing railway companies on the one hand, and the public on the other hand. It is only indirectly and occasionally that it becomes an arbiter between the States. But in Australia the railway companies are the States; and the Inter-State Commission—so far as railways are concerned—will be chiefly an arbiter between the States. In one aspect this circumstance will immensely simplify the work of the Commission. It will not have to cope with all the secret rebates and drawbacks, all the personal discriminations to favoured shippers, all the ingenious devices, born of the strain of commercial competition, for the purpose of evading the law. The competing interests will be fewer and less complex, and governments may be expected to obey at least the letter of the law. But if simplified in one way, the work of the Commission will be more responsible, and perhaps more difficult, in another. If the competing interests are fewer, they will be correspondingly greater, and will perhaps be involved with large political issues. The chief object of establishing the Commission was to secure an impartial and non-political tribunal to interpret and administer the laws of the Federal Parliament relating to rates on State railways. (See Notes to sec. 102.)

§ 424. "Such Powers of Adjudication and Administration."

Adjudication.—The power of adjudication is a judicial power. To adjudicate is "to adjudge; to try and determine, as a court; to settle by judicial decree." (Webster's Internat. Dic.) Sec. 102 shows that the Inter-State Commission is intended to exercise powers of an essentially judicial nature, and indeed, in one class of subjects, is given exclusive jurisdiction, and a final decision on questions of fact. Unlike the American Commission, which can only investigate and prosecute, the Inter-State Commission may be given—and no other tribunal can be given—power to decide as to the reasonableness of rates on State railways. A further index of the judicial nature of these duties is given by the provision for an appeal from the Inter-State Commission to the High Court on questions of law (sec. 73). An appeal is the removal of a matter from a lower judicial tribunal to a higher (see Note, § 301, *supra*); and the appellate jurisdiction of the High Court implies a judicial determination by the lower tribunal.

The Inter-State Commission, therefore, in respect of its powers of adjudication, is, like the English Railway and Canal Commission, a court. It is doubtful, however, whether it is one of the courts in which the judicial power of the Commonwealth is vested by sec. 71. It is apparently not a court "created by the Parliament;" for though the Parliament is left to organize and endow it with powers, it is virtually created by the Constitution itself. Moreover, to rank it as a court created by the Federal Parliament would be to introduce an inconsistency between sec. 103, which defines the tenure of the members of the Commission, and sec. 72, which defines the tenure of Justices of "Courts created by the Parliament." It may be contended, however, that the Inter-State Commission comes within the definition of courts which the Parliament invests with federal jurisdiction, though the courts especially contemplated by that phrase are the courts of the States; see sec. 77—iii. The Commission will have no jurisdiction until the Parliament invests it with jurisdiction; for, though the Constitution forbids the Parliament to vest elsewhere the jurisdiction as to the unreasonableness of preferences and discriminations, it does not vest that jurisdiction in the Commission—and in fact the jurisdiction will not exist until the Parliament has legislated under sec. 102.

The question whether the Inter-State Commission is one of the courts in which by sec. 71 the judicial power of the Commonwealth is vested may perhaps seem to be of theoretical interest rather than of practical importance; since this section clearly enables part of the actual judicial power of the Commonwealth to be vested in the Inter-State Commission. It might, however, arise in a very practical way; if, for example, the Parliament were to attempt to make the jurisdiction of the Inter-State Commission exclusive of that of the State Courts (see sec. 77), or if the Parliament were to make laws conferring rights to bring a State before the Commission, in some controversy relating to commerce but not connected with State railways. (See secs. 78, 98.)

Administration.—The functions of the Commission, however, are not to be solely judicial. It may also be invested with all administrative powers which are necessary for the execution of the federal trade and commerce law. In this capacity it can be entrusted with all the powers and duties of investigation, inquiry, and prosecution which belong to the American Commission. A solely judicial tribunal can take no steps until a complaint in the nature of a judicial proceeding is brought before it; but an administrative department, armed with the proper powers, can make inquiries and take action upon its own initiative. The Commission is intended to be policeman as well as judge.

Not a Legislative Body.—The Commission may have judicial powers, and executive powers, but no mention is made of legislative powers. The Constitution does not contemplate the existence of any legislative organ of the Federal Government other than the Federal Parliament itself. Apart altogether from the question whether the Federal Parliament can delegate any part of its legislative power to other bodies, it would seem that any such powers are by direct implication denied to the Inter-State Commission. The Parliament could no more confer legislative power upon the Inter-State Commission than upon the High Court. (See Cincinnati, &c., R. Co. *v.* Inter-State C.C., 162 U.S. 184; Texas and Pac. R. Co. *v.* Inter-State C.C., 162 U.S. 197; Inter-State C.C. *v.* Cincinnati, &c., R. Co., 167 U.S. 479.

This does not prevent power being given to the Commission to frame purely administrative regulations. If the Commission has power, of its own motion, to promulgate general orders, these must be confined to the obvious purposes and directions of the statute law, since it has no legislative powers. (Inter-State C.C. *v.* Cincinnati, &c., R.Co., 167 U.S. 479.)

§ 425. "As the Parliament Deems Necessary."

The Constitution, though it requires an Inter-State Commission to be established, does not itself endow the Commission with any powers—though some of the powers of the Parliament (see sec. 102) cannot be carried into effect except with the help of the Commission. The Commission can only have "such powers of adjudication and administration as the Parliament deems necessary" for the execution and maintenance of the trade and commerce provisions of the Constitution and of federal laws made thereunder. The power thus given to the Parliament is a very wide one. The extent of the power of the Parliament to make laws with respect to trade and commerce has already been discussed (sec. 51—i.); and the Parliament itself is the sole judge of the extent to which it is necessary to vest in the Inter-State Commission the power of adjudicating upon and administering such laws. Practically the whole administration of the law upon this vast subject, and a great part of the judicial work in connection therewith, could be entrusted to the Commission. The only express limitation upon the power of the Parliament in this respect is in the provision (sec. 73) that there is an appeal from the Inter-State Commission to the High Court on questions of law; and even this right of appeal is subject to exceptions and regulations prescribed by the Parliament. (See Notes, § 307, *supra*.)

The general functions which may be assigned to the Inter-State Commission are defined in this section; whilst certain special judicial functions with regard to preferences and discriminations on State railways are referred to in secs. 102, 104. It is perhaps unnecessary to repeat that the latter functions, though the Convention Debates concerning the Commission are almost wholly occupied with them, are only a part of the wide powers which can be conferred under this section.

Parliament may forbid preferences by States.

102. The Parliament may[426] by any law with respect to trade or commerce[427] forbid[428], as to railways[429], any preference or discrimination[430] by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State[431]; due regard being had[432] to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission[433].

Historical Note.—The only provision in the Bill of 1891 against preferences by States was a clause empowering the Parliament to annul any State law or regulation "having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth." Upon the "trade and commerce" sub-clause the question arose in the Sydney Convention of 1891 whether there was power to regulate railway rates on intercolonial lines; and upon the sub-clause dealing with "control of railways with respect to transport for the purposes of the Commonwealth," Mr. Gordon moved to add "and the regulation of traffic and traffic charges upon railways in any State in all cases in which such regulations are required for freedom of trade and commerce, and to prevent any undue preference to any particular locality

within the Commonwealth or to any description of traffic." The proposal was criticized as being too wide, and was negatived by 21 votes to 11. An amendment by Mr. Inglis Clark, for the prevention of discriminating rates giving any preference or advantage, was also negatived. (Conv. Deb., Syd., 1891, pp. 662-70, 692-8.)

Adelaide Session, 1897.—In the Bill as drafted at Adelaide there was added to the "preference" clause (see Hist. Note to sec. 99) a prohibition of State laws or regulations having the effect of derogating from freedom of inter-state trade. Mr. Gordon moved to add to this "or having the effect of inducing trade or commerce in any particular direction within the Commonwealth unfairly, and in particular by one part of the Commonwealth offering greater inducements than other parts wherever the inducement offered returns no direct profit as regards the particular trade or commerce induced to that part of the Commonwealth offering the inducement." This he afterwards withdrew. (See pp. 178-180, *supra*; Conv. Deb., Adel., pp. 1070-85, 1103-13, 1117-40.)

The clause dealing with the powers of the Inter-State Commission (see Hist. Note to sec. 101) provided, as originally drafted, that the Commission should have "no powers in reference to the rates or regulations of any railway in any State, except in cases of rates or regulations preferential in effect and made and used for the purpose of drawing traffic to that railway from the railway of a neighbouring State." Sir Geo. Turner feared that these words would check Victoria's "short haul" competition, but leave New South Wales absolutely untouched, and they were struck out. (See pp. 178-180, *supra.*)

Melbourne Session, 1898 (Debates, pp. 1250-1506, 1510-12, 2390-1).—Mr. Barton moved a comprehensive clause forbidding all preferences by the Commonwealth or a State (see notes to sec. 99). A long debate followed (see pp. 199-200, *supra*), in which distinctions were drawn between obstructive rates, which derogated from freedom of trade; unfairly attractive rates, which derogated from equality of trade; and fair development rates, which might be differential, but whose object was to promote trade, not to divert it. The problem was to prevent preferential or differential rates of an unfederal character, whilst allowing such differential rates as were necessary to an effective railway policy. Mr. Higgins (Debates, p. 1270) moved an amendment to prohibit rates made "with the view of attracting trade to ports of one State against ports of another State;" but this was negatived. A suggestion by the Legislative Council of South Australia (identical with Mr. Gordon's Adelaide amendment) was also negatived.

Finally the clause was struck out (Debates, p. 1335), and Mr. Barton proposed to substitute a simple prohibition of Commonwealth preferences (see Hist. Note to sec. 99).

An amendment by Sir John Downer, to extend the clause to preferences by States, was negatived. An amendment by Mr. Higgins, to prohibit rates made with a view of attracting trade, was carried by 18 votes to 15. Mr. Higgins' object was to prevent rates which, though not "preferential," were unfairly differential; but the New South Wales representatives complained that the words were far too wide, and Mr. Reid moved an amendment to prevent interference with rates arranged "so as to secure payment of working expenses and interest upon the cost of construction." The debate became heated, and the Convention found itself in a difficulty. Mr. Reid's amendment was negatived; but the proposition carried by Mr. Higgins caused so much dissatisfaction that it was decided to reconsider the whole question.

The clause was postponed, and Sir Geo. Turner (Debates, p. 1372) came to the rescue with a new clause empowering the Parliament to execute the trade and commerce provisions upon State railways, "and *particularly* to forbid such preferences and discriminations as it may deem to be undue and unreasonable, or unjust to any State." A long debate ensued, chiefly on the question whether Parliament was a suitable tribunal to decide this matter (see p. 200, *supra*); but eventually the clause—with the omission of the word "particularly"—was carried, by 25 votes to 16. Mr. Barton's clause was

then reconsidered, and the amendment carried by Mr. Higgins—being now superseded by Sir Geo. Turner's clause—was struck out. A series of amendments were then moved (see pp. 200-202, *supra*) which, after long discussion, were withdrawn to be proposed as separate clauses. Mr. Grant's "Development" clause (see Hist. Note to sec. 104) was carried; and then (Debates, pp. 1510-2) the following clause by Mr. Reid was agreed to:—

"Due consideration shall be given to the financial responsibility incurred in connection with the construction and working expenses of State railways."

On the second recommittal, Mr. Barton brought up a redraft of the clauses, practically in their present form. Mr. Glynn (for Mr. Higgins) moved to add "or differential rate" after "preference or discrimination," contending that "discrimination" applied only to persons and things; but Mr. O'Connor argued that it covered localities also, and the amendment was negatived. Sir Geo. Turner proposed to substitute "the Parliament" for "the Inter-State Commission," but this also was negatived by 22 votes to 15, and the clause was agreed to.

§ 426. "The Parliament May."

This section, though enabling in form, is really restrictive in effect. It was held in Inter-State C.C. *v.* Brimson, 154 U.S. 447, that the Congress of the United States has plenary power, subject to the limitations imposed by the Constitution, to prescribe the rule by which commerce among the several States was to be governed; and it was said to be indisputable that the prohibition of unjust charges, discriminations, or preferences by carriers engaged in inter-state commerce was a proper regulation. In this Constitution, State railways are expressly made subject to the trade and commerce power; so it would appear that the power to prohibit unjust charges would exist independently of this section.

The object of the section is partly to ensure the existence of such powers; but chiefly to ensure their limitation. At Adelaide (see Historical Note) the clause was originally drawn in a restrictive form; and when it was afterwards altered at Melbourne to an enabling form, it was hedged round with the restrictions, express and implied, contained in this section and sec. 104.

The express limitations are:—

(1.) That due regard must be had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways.

(2.) That no preference or discrimination shall be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

(3.) That a rate upon a State railway cannot be declared unlawful if it is deemed by the Inter-State Commission to be necessary for the development of the territory of a State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

The implied limitations seem to be:—

(1.) That the Parliament cannot, upon State railways, forbid any charge which is not either a preference or a discrimination.

(2.) That the Parliament cannot forbid a preference or discrimination except on the ground that it is undue and unreasonable, or unjust to a State.

§ 427. "By Any Law with Respect to Trade and Commerce."

The power defined by this section is a part of the general power to make laws with respect to trade and commerce, and is therefore restricted to "trade and commerce with other countries, and among the States." With rates or the purely internal traffic of a State the Federal Parliament has nothing to do.

A number of American authorities defining inter-state commerce have already been cited (Note, § 163, *supra*); but in none of the American cases did the distinction between inter-state and internal commerce arise in precisely the same way as it is likely to arise under this section; and it would seem that some of the definitions may have to be modified to carry out the true principle of the distinction. It will be convenient to repeat here a few of the leading definitions.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." (Per Marshall, C.J., Gibbons *v.* Ogden, 9 Wheat. 1.)

"When goods, the product of a State, have begun to be transported from that State to another State, and not till then, they have become the subjects of inter-state commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin." (Coe *v.* Errol, 116 U.S. 517.)

"Transportation of goods under one control and by one voyage from a point in one State to a point in another is inter-state commerce, and subject to the exclusive regulation of Congress. A statute of a State, intended to regulate or to tax or to restrict such traffic, cannot be enacted by a State, even in the absence of legislation by Congress; and such statutes are void even as to that part of the transmission which may be within the State." (Wabash, &c., R. Co., *v.* Illinois, 118 U.S. 557.)

One of the mischiefs which this section is intended to meet is undue competition, by means of discriminating rates on State railways, for the traffic of particular localities. Now, when the effect of such a rate, made upon railways of any State, is to secure the traffic for the ports of that State, and thus prevent its flowing to the ports of another State, it may be argued, from such dicta as those above quoted from Coe *v.* Errol, and Wabash R. Co. *v.* Illinois, that the trade thus retained within the limits of a State is not inter-state trade at all, because it has not "begun to be transported from that State to another State." It was clearly, however, the intention of the Convention that trade which by a discriminating rate was prevented from flowing to the ports of another State should be considered as inter-state trade; and it is equally clear that it comes within Chief Justice Marshall's broad definition, "commerce which concerns more States than one." The State which is discriminated against is concerned because the discriminating rate prevents transportation to that State from the other; and the State which prevents that transportation cannot be heard to say that the discrimination does not affect inter-state trade. Traffic which would, but for an undue discrimination, flow from one State to another, is clearly inter-state trade within the contemplation of this section. It is to be noticed that in none of the American decisions does the question arise whether the discriminating rate prevents the traffic from crossing a State boundary; the question in every case was whether the particular commerce in question was or was not subject to State taxation or State regulation.

§ 428. "Forbid."

The widest and simplest way in which the Parliament could exercise its power of prohibition would be by a law following the words of this section, and so occupying the whole field. It is clear, however, that the Parliament is not restricted to the alternatives of exercising all the power or none. It may legislate to prevent personal preferences and discriminations only, or preferences and discriminations only which are unjust to any State. It need not forbid *all* preferences and discriminations which are undue, &c.; it may forbid *any* preference or discrimination which is undue, &c.

It is equally clear, however, that the Parliament has no power to define or interpret what constitutes a preference. If the Parliament departs from the words of the section, and attempts to forbid, in general terms, particular kinds of rates, such as low long-haul rates, or group rates or terminal charges, it will be powerless to make such rates preferential unless they are, in fact and in law, preferential. And if the Parliament prohibits a general class of rates which, *qua* that class, are not necessarily preferential, it will run the risk of the whole law being declared void by the High Court. It does not seem, however, that any exception could be taken to a law which prohibited a special

kind of rate—for instance, a less charge for a long-haul than for a short-haul—"so far as the same may be a preference or discrimination which is undue and unreasonable, or unjust to any State."

§ 429. "As to Railways."

PRIVATE RAILWAYS.—That this section applies to the Government railways of the States, whether controlled directly by the Executive Government of the State, or vested in a corporate body of Railway Commissioners, is clear. It seems that the subsequent words, referring to preferences made "by any authority constituted under a State," are wide enough to include not only Railway Commissioners, but also railway companies incorporated by an Act of the Parliament of a State. The only importance of the question seems to be that if privately-owned railways are not included in this section, they will be subject to the full operation of the trade and commerce power, without limitations which are placed by this section upon the power of the Parliament.

RAILWAYS OF THE COMMONWEALTH.—This section does not apply to railways of the Commonwealth. In the event of railways being owned by the Federal Government, the Parliament could of course impose what prohibitions it pleased; but the Constitution itself imposes an absolute prohibition against any preference whatever being given by the Commonwealth to any State. (See sec. 99, and Notes, § 414, *supra.*)

§ 430. "Preference or Discrimination."

HISTORY OF THE WORDS.—The phrases "undue preference," "unjust discrimination," and so forth, have a history in English and American legislation, and in the judicial decisions of those countries, from which it is impossible to disassociate them, and which forms a valuable aid to the interpretation of the words in this Constitution. It has been held in the Supreme Court of the United States, with respect to these same words, that so far as Congress, in the Inter-State Commerce Act, adopted the language of the English Railway and Canal Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language, and intended to incorporate it into the Act. (Inter-State C.C. *v.* Baltimore, &c., R. Co., 145 U.S. 263. See Texas and Pacific R. Co. *v.* Inter-State C.C., 162 U.S. 197.)

English Legislation.—When railways were first authorized in England, it was expected that the railways would be public highways like turnpikes or canals; that the companies would merely provide the highway, and take toll for its use; and that the public, or carriers, would employ their own locomotives, carriages, and waggons—just as on roads and canals they employed their own horses, coaches, carts, and (sometimes) barges. (Grierson, Railway Rates, pp. 71, 94; Hadley, Railroad Transportation, p. 165.) It has been said by Wills, J., that "no proper understanding of a good deal of our railway legislation, and pre-eminently of clauses relating to tolls or charges, can be arrived at, unless it (this notion) is firmly grasped and kept steadily in view." (Hall *v.* London Brighton, &c., R. Co., 15 Q.B.D. at p. 536.) Accordingly the early railway Acts required equal mileage rates—the same charge per ton per mile, on all parts of the line, for the same class of goods.

It soon became clear, however, that this anticipation was a mistake, and that three cases had to be provided for, on railways, as on canals:—(1) where the railway companies simply provided the highway and took tolls for its use; (2) where the railway companies, without being carriers, provided trucks and locomotives; (3) where the companies were common carriers upon their own highway. (Grierson, Railway Rates, p. 94.) Accordingly by the Railway Clauses Consolidation Act, 1845 (8 and 9 Vic. c. 20, sec. 90) the prohibition against differential rates was repealed. It was recited to be expedient that companies should have power to vary the tolls upon their lines "so as to accommodate them to the circumstances of the traffic," but that this power "should not be used for the purpose of prejudicing or favouring particular parties, or for the

purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties." It was therefore enacted that companies might alter or vary the tolls authorized by their special Acts, either upon the whole or any part of the railway; "Provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

This section—the "equality clause," as it is called—only applies where circumstances are absolutely the same; and then it requires an absolutely rigid equality. It is immaterial that the allowance is made to meet competition. (London and N.W.R. Co. *v.* Evershed, 3 Q.B.D. 134; 3 App. Ca. 1029; and see Phipps *v.* London and N.W.R. Co. [1892] 2 Q.B at p. 249.) A carrier cannot be charged higher rates than other members of the public. (Great Western R. Co. *v.* Sutton, L.R. 4 H L. 226; see Ford *v.* London and S.W.R. Co., 60 L.J. Q.B. 130.) But the proviso only applies to goods carried between the same points of arrival and departure, and does not forbid a uniform charge from different points, or disproportionate rates for unequal distances. (Denaby Main Colliery Co. *v.* Manchester, &c. R. Co., 11 App. Ca. 97.)

The Railway and Canal Traffic Act, 1854 (17 and 18 Vic. c. 31, sec. 2), provides that no railway or canal company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever."

This section has been supplemented by the Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25). Sec. 27, sub-s. i. of that Act, provides that whenever it is shown that a railway company makes any difference in treatment to any trader or class of traders, or to the traders in any district in respect of the same or similar merchandise, or the same or similar services, the burden of proving that the difference in treatment is not an undue preference is on the company. Sub-sec. ii. enacts that in deciding whether a lower charge or difference in treatment is an undue preference, the Court or the Commissioners may, if they think it reasonable, take into consideration whether the lower charge, or difference in treatment, is necessary for securing, in the interests of the public, the traffic in respect of which it is made, and whether the inequality is not removable without unduly reducing the rates charged to the complainant; with the proviso that no railway shall make, nor shall the Court or the Commissioners sanction, any difference in the rates for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services. (For comparison with the "development" clause of this Constitution, see Note, § 437, *infra*). Sub-sec. iii. deals with the question of long and short hauls. It provides that "the Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quality of merchandise carried over a greater distance on the same line of railway." Sec. 29 deals with "group rates." It provides that any railway company may group together any places in the same district, situated at various distances from any point of destination or departure, and charge a uniform rate to and from any place in the group, provided that the distance shall not be unreasonable and that the group rates and the places grouped together shall not be such as to create an undue preference.

Sec. 55 defines an "undue preference" for the purpose of the Act, as including "an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons or any particular description of traffic."

The decisions on the Act of 1854, first by the Court of Common Pleas, and then by the Railway Commissioners and the Court of Appeal, show a considerable difficulty in fixing the principles upon which the reasonableness of a rate is to be determined. It has been clearly settled, however, that the fact that a trader has access to a competing route for his goods may be taken into consideration in deciding whether lower rates constitute an undue preference ; and that the question whether a preference is undue or unreasonable is a question of fact in each particular case. (Phipps *v.* London and N.W.R. Co. [1892], 2 Q B 229.) For the decisions of the Railway Commissioners, see Annual Reports of the Railway Commissioners (Parl. Papers) ; and for comments on some of them, see Grierson, Railway Rates, pp. 173-8 ; Hadley, Railroad Transportation, pp. 182-5. It will be convenient here to cite the decisions which bear on the interpretation of the Act of 1854, and to quote extracts from some of the judgments.

The Court may take into consideration the fair interests of the railway itself, and entertain such questions as whether the Company might not carry larger quantities, or for longer distances, at lower rates per ton per mile than smaller quantities, or for shorter distances, so as to derive equal profits to itself. A rate for one company's coal, to compete with coals of another merchant partly sea-borne, held an undue preference. Ransome *v.* Eastern Counties R. Co. [1857], 26 L.J. C.P. 91.)

A railway company made a special rate with certain merchants "in order to introduce the northern coke into Staffordshire." Held that this was no legitimate ground for a preference, and that lowering rates for that purpose, there being nothing to show that the pecuniary interests of the company were affected, was an undue preference. (Oxlade *v.* Eastern Counties R. Co. [1857], 26 L.J. C P. 129.)

A railway company is justified in carrying goods for one person at a less rate than for another if there be circumstances which render the cost of carrying for the former less than for the latter. (*Id.*)

Excluding the omnibus of one omnibus proprietor from within the station gates, and admitting another, no justifying circumstances being shown, held an undue and unreasonable preference. Inconvenience to passengers was relied on as one element. (Marriott *v.* London and N.W.R. Co. [1857], 26 L.J. C.P. 154.)

Where a company gave a cab proprietor, for a consideration, an exclusive right to stand at the station, no public inconvenience being shown, no injunction was granted. (Beadell *v.* Eastern Counties R. Co. [1857], 26 L.J. C.P. 250 ; and see cases cited Dig. Eng. Case Law, iii. 138.)

Carrying coals from one colliery at a lower rate than from another in the same locality, in consequence of a threat from the owner of the first colliery to construct another railway, is an undue preference. (Harris *v.* Cockermouth, &c., R. Co. [1858], 27 L.J. C.P. 162.)

A scale of charges for carriage of coal from two points, the effect of which was to diminish the natural advantages of dealers at one point, by annihilating, in point of expense of carriage, a portion of the distance, held an unreasonable preference. (Ransome *v.* Eastern Counties R. Co. [1858], 27 L.J. C.P. 166.)

"The effect of such a scale of charges is to diminish the natural advantages which the position of the dealers at Ipswich, by reason of its greater proximity, gives them over the dealers at Peterborough, in respect of the traffic at Thurston, &c., . . . by annihilating, in point of expense of carriage, a certain portion of the distance between Peterborough and those places ; and just in proportion by which that natural advantage is diminished, an undue preference is given to the Peterborough dealers, and an undue disadvantage is brought upon the complainants and the other Ipswich dealers." (Per Williams, J , *id.* at p. 169.)

The words "undue" and "unreasonable" imply that there may be advantage to one person or one class of traffic, and prejudice to another, which would not be within the Act. It is not undue or unreasonable for a railway company to carry goods for A at a lower rate than for B, in consideration of A's guarantee of large quantities and full loads at regular periods (provided that the object of the company be to obtain thereby a greater profit by the diminished cost of carriage) although the effect may be to exclude B from the lower rate. (Nicholson *v.* Great Western R. Co., 1859, 28 L.J. C.P. 89.)

A railway company may make special agreements securing advantages to individuals, where it clearly appears that the company has in view only the interests of the proprietors and the legitimate increase of the profits of the railway, and the consideration given to the company in return for the advantages is adequate, and the company is willing to afford the same facilities to all others upon equal terms. (*Id.*)

A preference to a customer who engaged to employ other lines of the company, for traffic distinct from and unconnected with the goods in question, was held unreasonable. (Baxendale *v.* Great Western R. Co., 1859, 28 L.J. C.P. 69.)

A company charged rates inclusive of delivery charges, in order to compel customers to employ them as carriers, apart from their line of railway. Held an undue preference to themselves. (Baxendale *v.* Great W.R. Co., 1859, 28 L.J. C.P. 81; Garton *v.* Great W.R. Co., *id.*, 158.)

A facility given to one carrier by receiving goods at a later hour is an undue prejudice to others. (Garton *v.* Bristol, &c., R. Co., 1859, 28 L.J. C.P. 306.)

A deduction to certain persons, in consideration of their contracting to consign all goods by the railway, and not by water or other means, is an undue preference, unless it be clearly shown that it is done to prevent a competition with the railway, or that there is secured thereby to the company such an amount of traffic as to compensate for the reduction. *Bona fide* competition, held out to the public generally, *might* be good. (*Id.*)

A reduced rate for a full trainload is good, though the company, for its own convenience, divides the trainload If the rate is valid, the mode of carriage is immaterial. (Ransome *v.* Eastern Counties R. Co., 1860, 29 L.J. C.P. 329.)

The gratuitous cartage of the goods of one firm, though done *bona fide* to meet competition and at a profit on the whole carriage, is an undue preference. (London and N.W.R. Co. *v.* Evershed, 1877, 2 Q.B.D. 254; 3 Q.B.D. 134; 3 App. Ca. 1029.)

"We are of opinion that the gratuitous cartage and the allowance of rebate granted by the defendants to the three brewing firms mentioned in the case, but not granted to the plaintiffs, although made *bona fide* for the simple purpose of attracting their traffic to the defendants' line of railway, in lieu of its being sent by competing lines, and although such traffic realized a profit to the defendants notwithstanding such an allowance or rebate, did under the circumstances amount to an undue preference or advantage given to them by the defendants' company, and is contrary to the language and meaning of the equality clause, 8 and 9 Vic. c. 20, s. 90, and also of 17 and 18 Vic. c. 31, s. 2." (Per Mellor, J., 2 Q.B.D. at p. 265.)

"We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favour of individual customers, unless, at all events, there is a sufficient reason for such reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic." (*Id.* at p. 267.)

Group Rates.—A railway company carried coals to a point, from a group of collieries at different distances along the same line, at the same rate. In an action for overcharge, it was held by the Court of Appeal and by the House of Lords, overruling the Queen's Bench Division, that this was not a breach of the equality clause, and that no action for an overcharge lay for an undue preference. (Denaby Main Colliery *v.* Manchester, &c., R. Co., 1883, 13 Q.B.D. 674, 14 Q.B.D. 209, 11 App. Ca. 97.)

By sec. 29 of the Railway and Canal Traffic Act, 1888 (see p. 906, *supra*), it is provided that a railway company may group together places in the same district, situated at various distances from any point of destination or departure, and charge uniform rates to and from all places within the group, provided that the distance is not unreasonable, and the group rates charged are not such as to create an undue preference.

The works of the applicant were on the line of the Furness R. Co., 18 miles from a junction. Other similar works were situated on the same line, 38 miles from the junction. The company grouped these works together and charged them a uniform rate, except that the applicants were charged sixpence a ton less for coke. Held, that so far as the rate for coke was concerned, the company had made sufficient allowance; but as regards the other rates, the places grouped were so far apart that there was an undue preference. (North Lonsdale Iron Co. *v.* Furness R. Co., 1891, 60 L.J. Q.B. 419. See also Newry *v.* Great Northern R. Co., 7 Ry. and Can. Traffic Cas. 184; cited Dig. Eng. Case Law, iii. 146.)

Competition.—The fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration in deciding whether lower rates charged to such trader are an undue preference. (Phipps *v.* London and N.W.R. Co, 1892, 2 Q.B. 229.)

"The second section of the Act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him, by having two competing routes to enforce upon the carrier by either of those routes a certain amount of compliance with

his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage which he derives from that favourable position of his works. All that I have to say is that I cannot find anything in the Act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds." (Per Lord Herschell, *id.* p. 242.)

"It seems to me that, whether you look at the Act of 1854 by itself, or whether you look at it in connection with the provisions of sub-sec. 2 of sec. 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law, which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is not necessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other. That may be so, but all that is matter for the tribunal to take into account, and certainly I think that they are entitled to take it into account, and to give weight to it as far as is reasonable. If that be so, it is of course sufficient to dispose of the present case." (Per Lord Herschell, *id.* pp. 245-6.)

"Now, the appeal here is put, as it must be put, upon a question of law—viz., whether there is any rule which compels us to say that the Commissioners had no right to take into their consideration the fact that Butlins and Islip had two routes of communication westward instead of one. It appears to me that there is no such rule, and I cannot help thinking it would be extremely unreasonable if there were. Upon what principle of good sense can any business man or anybody else exclude from his consideration the locality of either place? If there is a physical difference in favour of one or the other, or an artificial difference by reason of the facilities of traffic, whether by sea or by land, why is not everything which is material to be taken into account, and upon what principle can it be said that you are to exclude from consideration one of the main elements in the case?" (Per Lindley, L.J. *id.* pp. 250-1.)

"I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether in particular instances there has been an undue or unreasonable prejudice is a question of fact. In Palmer *v.* London and South Western Ry. Co., Erle, C.J., said: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused, being a question of fact depending on the matters proved in each case.' In Denaby Main Colliery Co. *v.* Manchester, &c., R. Co., when it was before the Court of Appeal, not in the action brought by the Denaby company against the railway company, but on an appeal arising out of the proceedings before the Railway Commissioners, Lord Selborne, then Lord Chancellor, said at p. 441: 'They gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but under the circumstances is not the reasonableness a question of fact? Is not it a question of fact and not of law whether such preference is due or undue? Unless you could point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact.' The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference within the

meaning of the Act, and further that whether there be such an undue preference or advantage is a question of fact, and of fact alone. No rule is given to guide the Court or the tribunal in the determination of cases or applications made under the 2nd section of the Act of 1854. The conclusion is one of fact, to be arrived at looking at the matter broadly and applying common sense to the facts that are proved I quite agree with Wills, J., that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at." (Per Lord Herschell, *id.* pp. 236-8.)

"What is an undue preference? Now, if you look at the sections which relate to this matter, beginning with the equality clause, s. 90 of the Act of 1845, s. 2 of the Act of 1854, and this s. 27 of the Act of 1888, you find these expressions used, all of which appear to me to point to the same sort of mischief. You have 'undue' or 'unreasonable,' or 'unfair' 'preference,' or 'prejudice,' or 'disadvantage,' or 'favour.' What is undue, &c., is a question of degree, and being a question of degree, it is obviously a question of fact, and if it is a question of fact, there is no appeal." (Per Lindley, L.J., *id.* pp. 251-2)

Home and Foreign Merchandise.—The Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25) s. 27 sub-s. 3, which empowers the Commissioners to take into consideration whether a rate is necessary "for securing, in the interests of the public, the traffic," contains a proviso "that no railway company shall make, nor shall . . . the Commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services." Held that the effect of this proviso is not to prohibit all inequalities in rates as between home and foreign merchandise, but that, if the railway company has proved facts which would justify the admitted differences, had the goods in question been home goods, the company is not debarred from relying on those facts as an answer, merely because the goods which receive the benefit of the provision are of foreign origin. (Mansion House Association *v.* London and S.W.R. Co. [1895] 1 Q.B. 927.)

American Inter-State Commerce Act.—In 1887 the Congress of the United States passed the Inter-State Commerce Act, which was adapted from, and to a large extent followed the language of, the English Acts of 1854 and 1873.

The Act applies to any common carrier engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a continuous carriage, or shipment, from one State or Territory of the United States to another, or between any place in the United States and a foreign country. It does not apply to transportation wholly within one State. "Transportation" includes all instrumentalities of shipping or carriage. The Act first provides generally, that all charges made for any service rendered in connection with transportation, or with the handling of property, shall be *reasonable and just*; and every unjust and unreasonable charge for such service is prohibited and declared unlawful (sec. 1).

Sec. 2 provides that if any common carrier directly or indirectly, by any special rate, rebate, drawback, or other device, charges any person a greater or less compensation for any such service than it charges any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, the carrier is guilty of *unjust discrimination*, which is prohibited and declared unlawful. (Cf. English "equality clause," Railway Clauses Cons. Act, 1845, s. 90.)

Sec. 3 makes it unlawful for a common carrier to make or give any *undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. It further provides that common carriers shall afford proper and reasonable

facilities for through traffic with connecting lines, and shall not discriminate in their charges between such connecting lines. (Cf. Railway and Can. Traffic Act, 1854, s. 2.)

Sec. 4 makes it unlawful for any common carrier to charge any greater compensation in the aggregate for the transportation of passengers or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance; but this is not to be construed as authorizing *as great* a compensation for a shorter as for a longer distance. It is provided, however, that on application to the Inter-State Commerce Commission, a carrier may in special cases, after investigation by the Commission, be authorized to charge less for the long-haul than for the short-haul, and the Commission may prescribe, from time to time, how far such carrier may be exempt from this section. (Cf. Railway and Can. Traffic Act, 1888, s. 27—iii.)

Sec. 5 prohibits combinations for the pooling of freights. Sec. 6 provides that carriers shall print and publish schedules of their rates, stating separately the terminal charges, &c. Sec. 8 provides that for any contravention of the Act a carrier shall be liable to the person injured for the full amount of damages sustained. Sec. 9 enables any person injured either to make complaint to the Commission or to sue for damages, at his election, but not to pursue both remedies. Sec. 10 provides that any carrier, or any director, officer, agent, or employee of a carrying company, who is privy to any violation of the Act, is guilty of a misdemeanour, and liable to a fine not exceeding $5000 for each offence. The rest of the Act deals with the establishment and duties of the Inter-State Commerce Commission. (See Note, § 423, *supra*.)

"The principal objects of the Inter-State Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable." (Inter-State C.C. *v.* Baltimore, &c., R. Co., 145 U.S. at p. 276.)

Consequently a party-rate ticket for passengers is not a discrimination or preference; and see Texas and Pacific R. Co. *v.* Inter-State C.C., 162 U.S. 197.

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." (Cincinnati, &c., R. Co. *v.* Inter-State C.C., 162 U.S. 184, at p. 197.)

"The conclusions of the court, drawn from the history and language of the Acts under consideration, and from the decisions of the American and English courts, are:— (1) That the purpose of the Act is to promote and facilitate commerce by the adoption of regulations, to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences. (2) That in passing upon questions arising under this Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. (3) That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports, as in the case of traffic originating within the limits of the United

States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier company and the welfare of the community which is to receive and consume the com modities are to be considered. (4) That if the Commission instead of confining its action to redressing, on complaint made by some particular person, firm, or corporation, or locality, some specific disregard by common carriers of provisions of the Act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the Act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country." (Texas and Pac. R. Co. *v.* Inter-State C.C., 162 U.S. 197.)

The mere fact that the disparity between through and local rates is considerable does not necessarily constitute undue discrimination—especially if not complained of by any one affected. (Texas *v.* Inter-State C.C., 162 U.S. 197.)

"A rate may be unreasonable because it is too low, as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper." (Inter-State C.C. *v.* Cincinnati R. Co., 167 U.S. at p. 511.)

The portion of a through rate received by one of several railway companies transporting the goods as inter-state commerce may be less than its local rate. (Parsons *v.* Chicago and N.W.R. Co., 167 U.S. 447.)

Competition is one of the most obvious and effective circumstances that make the conditions under which a long and a short haul is performed substantially dissimilar. The following conclusions were affirmed :—

(1.) That competition between rival routes is one of the matters which may lawfully be considered in making rates for inter-state commerce.

(2.) That essential dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line in such commerce. (Inter-State C.C. *v.* Alabama Midland R. Co., 168 U.S. 144.)

The meaning of the previous decisions is that, under sec. 4, substantial competition which materially affects transportation and rates may produce dissimilarity of circumstances and conditions which may justify a carrier, even without authority from the Commission, in charging less for a longer than for a shorter haul. (Louisville and Nashville R. Co. *v.* Behlmer [1900], 175 U.S. 648.)

Sec. 4 of the Act has in view only transportation by rail. Free cartage after arrival does not concern the Commission. (Inter-State C.C. *v.* Detroit Grand Haven, &c., R., 167 U.S. 633.)

Preference or Discrimination.—Guided by the English and American authorities, we may now proceed to discuss the meaning of the words "preference" and "discrimination" in this Constitution. Before any clear idea can be formed of what constitutes a preference or discrimination which is undue and unreasonable, or unjust to any State, it is necessary to obtain some definition of the words "preference" and "discrimination" themselves.

A preference is a setting of one person or thing before another; here it means a dissimilarity of treatment, involving advantage to one person, locality, or class of goods, or prejudice to another. Discrimination is a difference of treatment; as applied to railways it is defined by Webster's Internat. Dict. as "the arbitrary imposition of unequal tariffs for substantially the same service." In the English Railway and Canal Traffic Act (see p. 906, *supra*) "preference" is applied to persons, and to descriptions of traffic; in the American Inter-State Commerce Act (see p. 910, *supra*) it is applied to persons, descriptions of traffic, and localities. "Discriminations," in the Inter-State Commerce Act, sec. 4, is applied to persons only, and means a departure from equal treatment of persons in respect of substantially the same service. In sec. 5, discrimination between connecting lines is referred to. There seems, however, no reason why the word "discrimination," used generally, should not apply as between localities and descriptions of traffic, as well as between persons. Thus Hadley (Railroad Transportation, p. 111) speaks of "the three forms of discrimination—between classes of

business, localities, or individuals." At least it is clear that the words "preference" and "discrimination" together cover differences of treatment (1) as between different persons; (2) as between different descriptions of traffic; and (3) as between different localities. That is to say, the words include the unequal treatment of persons, the arbitrary classification of goods, and the unequal treatment of localities.

The difficulty, however, is to get a satisfactory test of what constitutes a difference of treatment. Where the circumstances are exactly, or even substantially similar, the difficulty disappears; but where circumstances are dissimilar—as they must be between different localities and different goods, and may be between different persons—a difference due to the dissimilarity of circumstances is not a discrimination at all; and the problem is to find out how far the difference of treatment is due to the dissimilarity of circumstances. Before discussing the three kinds of discriminations, it will be necessary to allude briefly to the chief principles of equality which have been laid down. They may be shortly described as mileage, cost of service, and value of service.

(1.) *Mileage.*—The principle of equal mileage rates is now universally discarded. It was never strictly applied except in connection with a classification of goods, which gave some recognition to both cost and value of service. Even if the terminal charges are assessed separately, equal mileage charges are quite unsuited to the requirements of railway traffic. Mileage is in fact only one element arbitrarily selected as a test of the cost of service; it ignores other elements which may be equally important. (See Grierson, Railway Rates, pp. 13-20; Acworth, The Railways and the Traders, Chap. II.)

(2.) *Cost of Service.*—The cost of the service is sometimes laid down as the true principle on which rates should be based. That it is one important element cannot be doubted. In the first place, however, it is practically impossible to estimate the proportion of the total expenses of the railway which each article ought to bear. "Broadly speaking, the cost of carriage, whether of passengers, or goods, is made up of four different items: locomotive or movement expenses, terminals or station expenses, maintenance of way and works, interest on capital." (Acworth, The Railways and the Traders, p. 24.) The permanent-way expenses are practically constant; many of the working expenses vary with the traffic. The apportionment of these among the different classes of traffic must always be to a certain extent arbitrary.

But even if the cost of service were always ascertainable, it is not always a practicable basis. In many cases "the traffic will not bear" rates based on the cost of service, for the simple reason that the cost of the service—if a share of the interest on the fixed capital is included—is greater than the value of the service. Yet if the traffic cannot be had on other terms, it may be profitable to carry it at a margin above working expenses, and the public benefit resulting from the development of trade may be enormous. (See Grierson, Railway Rates, pp. 8-12; Acworth, The Railways and the Traders, Chap. I.; Lewis, National Consolid. of Railways, Chap. V.)

(3.) *Value of Service.*—This basis, usually known as "charging what the traffic will bear," is one which, with careful qualifications, is most favoured by scientific writers as the true basis, but is sometimes used by railway companies as a pretext for "charging what the traffic will not bear," or "bleeding the traffic to death." Charging what the traffic will bear is the basis—or chief basis—of every system of classification of goods. "Railroads divide their freight into four or more classes, the division being mainly based on the value of the goods. Thus, dry goods are placed in the first class, and lumber in the fourth; and the charges on the former are made two or three times as high as on the latter. There is a difference of cost of handling, and of risk; but nothing like so great as the difference in charge. The railroad does not base its classification upon cost of service, but upon what the traffic will bear. A ton of lumber has so little value that, if they attempted to charge the same rates for it as for the dry goods, they would get none of it to carry; the traffic would not bear the higher rate." (Hadley, Railroad Transportation, p. 112.) The value of the service is of course affected by the laws of supply and demand; it varies with the value of the articles, and with the

facilities offered by competing modes of transit. (See Grierson, Railway Rates, pp. 68-77; Acworth, The Railways and the Traders, Chaps. III., IV.; Lewis, National Consolid. of Railways, Chap. V.)

In the case of Government Railways, the further element is introduced that the proprietors of the railway represent also the public interests of the State, and that rates may be fixed with a view to other things besides a direct profit on the railways, as a business concern. "A Government enterprise may be managed on any one of four principles: (1) as a tax; (2) for business profits; (3) to pay expenses; (4) for public service, without much regard to the question of expense." (Hadley, Railroad Transportation, p. 240.)

Having touched upon the chief principles of rate-making, we may recur to the definition of a preference or discrimination as an arbitrary difference of treatment. An arbitrary difference is one which is not based upon any satisfactory principle. So far as any of the above principles are thought satisfactory, differences of rates based upon their application will not be preferential or discriminating.

It should be noticed that whilst questions of reasonableness and unreasonableness are questions of fact, the question whether the facts proved constitute a preference or discrimination at all is a question of law. The interpretation of the words "preference" and "discrimination" is, in the last resort, for the High Court; and that court alone can authoritatively decide the principles upon which the question of preference or no preference is to be determined. If there is no preference, there can be no unreasonable preference; if there is a preference, whether it is reasonable or unreasonable is a question of fact which the Inter-State Commission alone can decide.

(1.) *Personal Discriminations.*—Personal discriminations, when the facts are known, are the easiest of all to decide. Between persons, as individuals, there is not likely to be any serious discrimination by the States. Between classes of persons there might conceivably arise cases of discrimination affecting inter-state traffic.

A law prohibiting discriminations does not ignore the principle that one can sell wholesale cheaper than retail, so long as reductions are made impartially to all, under the same circumstances. Consequently a party-rate ticket for passengers is not a discrimination or preference. (Inter-State C.C. *v.* Baltimore, &c., R., 145 U.S. 263. See Texas and Pac. R. Co. *v.* Inter-State C.C., 162 U.S. 197; Nicholson *v.* Great Western R. Co., 28 L.J. C.P. 89; Hadley, Railroad Transportation, p. 119.)

(2.) *Discriminations between Classes of Traffic.*—The classification of goods is the most generally recognized form of departure from the principle of cost of service. Such classification, if it is challenged by any person who is prejudiced, must, it is conceived, be based upon some definite principle; and that principle might, in the case of a State railway, either be the value of the service to the producer or the importance of the service to the public. It does not necessarily follow, because a class of business is done at less than average rates, or even at less than the average cost, that such business is an actual loss to the road, or that other business is taxed to make up for it. And still less does it follow that there is a loss to the country. (Hadley, Railroad Transp. p. 112.)

(3.) *Local Discriminations.*—The preferences and discriminations which will probably assume the greatest importance are local discriminations between States—rates made by the competing railways of different States in order to secure or retain the traffic of particular localities. It is only between States that competition between railway and railway exists. Experience suggests that this competition needs regulating; and at the same time the power of the Commonwealth in this regard is hedged about with special restrictions in order that this competition may only be interfered with so far as it is unfederal in character, and not so far as it is necessary to secure the profitable working of the railways of a State, or the development of the territory of a State.

But the competition is not only between railway and railway; it is also between railway and river. Questions are likely to arise as to how far it is justifiable to reduce

the rates at competitive points as compared with the rates at non-competitive points; how far it is justifiable to reduce the rate for the long-haul as compared with the rate for the short-haul, and so forth. (See Notes on "Undue and Unreasonable," § 431, *infra*.)

§ 431. "Undue and Unreasonable, or Unjust to Any State."

The only preferences or discriminations which can be forbidden under this section, are preferences or discriminations which are either (1) undue and unreasonable, or (2) unjust to any State. The preferences prohibited by the Railway and Canal Traffic Act, 1854, and by the American Inter-state Commerce Act, are preferences which are "undue *or* unreasonable." As no distinction seems ever to have been judicially drawn between the words "undue" and "unreasonable," but on the contrary they have been declared to "point to the same sort of mischief" (per Lindley, L.J., Phipps *v.* London and N.W.R. Co. [1892] 2 Q.B. at p. 251), it would seem that their use conjunctively instead of disjunctively makes no material difference.

The words "unjust to any State" may be compared with the words "unjust discrimination" in sec. 2 of the American Inter-state Commerce Act. The American Act, designed to control persons and corporations, was chiefly concerned with injustice to persons; but this constitutional provision is designed to control the States themselves in their capacity as carriers, and is therefore concerned with injustice by one State to another. The insertion of these words, "unjust to any State," perhaps does not definitely include any preference which was not already included in undue and unreasonable preferences; but it indicates that the section expressly contemplates the prevention of injustice between States, and it also indicates that States, as well as individuals, will be entitled to complain of any breach of federal legislation as to preferences. It may be compared with sec. 13 of the American Inter-State Commerce Act, which provides that "any person, firm, corporation . . . . or *any body politic* or municipal organization complaining" of any violation of the Act may apply to the Commission.

Question of Fact.—What constitutes undueness, unreasonableness, or injustice to a State, is a question of fact to be determined broadly on a consideration of the circumstances of each case; and on these questions the decision of the Inter-State Commission is absolutely final. (See Phipps *v.* London and N.W.R. Co. [1892] 2 Q.B. 229; Palmer *v.* London and S.W.R. Co., L.R. 1 C.P. 593; Texas and Pac. R. Co. *v.* Inter-State C.C., 162 U.S. 145.)

Since the question whether a rate is reasonable or not is a question of fact, to be determined on consideration of the circumstances of each case, it would seem to be beyond the power of the Parliament to empower the Commission to prescribe rates. The power to forbid a preference or discrimination is not the power to make a rate unlawful, but the power to forbid a *difference* between two rates. The Parliament under this section cannot empower the Commission to forbid a *rate*, but only to forbid a preference or discrimination caused by an inequality of rates. Moreover, to prescribe a general rate would be practically to decide that the rate is reasonable, and so to prejudge the case without reference to the circumstances.

"It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of a rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable." (Cincinnati, &c., R. Co. *v* Inter-State C.C., 162 U.S. at pp. 196-7.)

Though what is undue, unreasonable, or unjust, is a question for the Commission alone, it will be useful to point to some of the principles which seem to be indicated by

the Constitution, read in the light of the authorities already cited. The three kinds of rates to which special reference may be made are (1) prohibitive rates, intended to prevent the flow of trade in one direction, with a view to inducing it in another; (2) competitive rates; (3) long-haul and short-haul rates.

(1.) *Prohibitive Rates.*—Any rate made unreasonably high for the purpose of preventing inter-state traffic in any direction could undoubtedly be forbidden by the Federal Parliament if any person or State were thereby prejudiced. And it seems clear that, even without federal legislation, any such rate would be unlawful under sec. 92 as an interference with freedom of trade, irrespective of any question of discrimination. If this were not so, any State could practically levy export or import duties upon State railways.

The common law, though it does not oblige a carrier to charge all customs equally, limits him to a reasonable charge. (Baxendale *v.* Eastern Counties R. Co., 27 L.J. C.P. 137.) It is unnecessary to argue that this rule of the common law becomes applicable as inter-state law, under the Constitution; but it seems that some such test is involved in the requirement of freedom of trade between the States. That is to say, whilst federal legislation is needed in order to forbid the relative inequality of rates, a rate which is in itself unreasonably obstructive is forbidden by the Constitution itself. (See Notes to sec. 92.)

(2.) *Competitive Rates.*—"A rate may be unreasonable because it is too low, as well as because it is too high. In the former case it is unreasonable to the stockholder, and in the latter to the shipper." (Inter-State C.C. *v.* Cincinnati, &c., R. Co., 167 U.S. at p. 511.) In this constitution it is undoubtedly contemplated that a rate may be unreasonable, or unjust, by being, in comparison with other rates on the same railway, too low—not indeed from the point of view of the stockholder, but of the locality which suffers by the discrimination. Every discrimination is in fact a matter of comparison between two or more rates, one of which is relatively too low, and one relatively too high.

As regards competitive rates, the Constitution expressly recognizes, in the provision that due regard shall be had to the financial responsibilities of the States, the business principle of competition within reasonable limits, for the purpose of preventing a financial loss in connection with the construction and maintenance of railways. And the Constitution also safeguards rates which are made low—even though from the point of view of another State they may be unreasonably and unjustly low, and even though they may be competitive in effect—if they are necessary for the development of the territory of a State (sec. 104).

These provisions seem to indicate that the Constitution contemplates reasonable competition between State railways, but at the same time recognizes that competition may become unreasonably and unjustly preferential. This is substantially in accordance with the English and American decisions already cited. (Phipps *v.* London and N.W.R. Co. [1892] 2 Q.B. 229.)

"It seems to me that . . . it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is unnecessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of one trader as compared with the other." (Per Lindley, L.J., Phipps *v.* London and N.W.R. Co. [1892], 2 Q.B. at p. 245.)

(3.) *Long-haul and Short-haul.*—Two questions arise in connection with rates for short and long hauls; whether a greater aggregate charge for the short-haul than for the long-haul is an undue preference; and whether an equal charge for the short-haul and for the long-haul is an undue preference. Neither the American nor the English Acts answer these questions absolutely, but they afford indications which may be a valuable guide.

The American Act does not declare a greater aggregate charge for a shorter than for a longer haul to be an undue preference, but it prohibits it. The prohibition, however, is not absolute; the Commission being authorized to exempt any carrier, after investigation, from the operation of the section (sec. 4). The English Act of 1888 merely empowers the Commission to forbid a greater charge for a shorter than for a longer haul. (Sec. 27; see p. 906, *supra*.) Both provisions seem to imply that such a charge is not necessarily, though it may be usually, an undue preference. (See Hadley, Railroad Transportation, pp. 114-9.)

With the question of an equal charge for a shorter and for a longer haul, the American Act only deals negatively. Following the prohibition of a greater charge for a shorter haul, it declares that "this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive *as great* compensation for a shorter as for a longer distance." In other words, it leaves the question, whether an equal charge is permissible, to the operation of the preference and discrimination clauses; merely rebutting the inference that might arise, from a greater charge being forbidden, that an equal charge was permitted. The English Act of 1888, in the provision for group rates, arrives at a somewhat similar result in a more explicit way. It provides (sec. 29, see p. 906, *supra*) that uniform charges may be made to and from a group of places at reasonable distances from each other; but subject to the proviso that the rates must not be such as to create an undue preference. This is a distinct recognition of the principle that an equal charge for a shorter and a longer haul is not necessarily an undue preference.

The resulting inferences would seem to be: (1) that generally speaking there should be a greater aggregate charge for a longer than for a shorter haul; (2) that a system of "group-rates" may justify an equal charge for a longer and for a shorter haul; (3) that in exceptional cases a greater charge for a shorter than for a longer haul may be justifiable; (4) that the question whether a long or short haul rate creates an undue preference must be decided accordingly to the circumstances of each case.

It should be noticed, however, that both the English and American provisions are chiefly for the protection of the short-haul customer who is discriminated against; in this Constitution the chief concern is for competing railways and traders who are prejudiced by the diversion of traffic due to the long-haul rate. In the one case the complaint is that short-haul rates are unfairly high as compared with long-haul rates; in the other, that long-haul rates are unfairly low as compared with short-haul rates.

§ 432. "Due Regard Being Had."

The object of this provision, which was first introduced by Mr. Reid (Conv. Deb., Melb., pp. 1510-2) was to safeguard New South Wales against any possibility of such federal interference with the long-distance rates of that colony as would make it impossible to work the lines at a profit. In each colony the railways had been constructed with the provincial object of drawing all trade to the ports of that colony. New South Wales had sunk a large amount of capital on long-distance lines reaching out into the competitive areas which are geographically nearer to Melbourne than to Sydney, or which are within reach of the river route to Victoria and South Australia. The fear that the powers of the Constitution might possibly be exercised in such a way as to make some of these railways "waste iron" led to the insertion of this provision.

It is here declared explicitly that one of the things to be taken into consideration, in deciding whether a preference or discrimination is undue or unreasonable, or unjust to any State, is the financial responsibility incurred by a State in connection with the construction and maintenance of its railways. It does not say that any rate which helps the railways is reasonable and just, but requires "due regard" to be had to the financial interests of the States.

Who is to pay this due regard is not stated. The provision was accepted by Sir George Turner on the distinct understanding that it was to be appended to the words

empowering the Parliament to forbid preferences; he wished the words to mean "due consideration by the Parliament," but he did not insist on the insertion of the words "by the Parliament," as that "might appear to be invidious." (Conv. Deb., Melb., p. 1510.) His desire was to prevent the High Court being appealed to on this question. It would seem that the words may involve a direction to the Parliament, in legislating upon the subject, to have due regard to the financial responsibilities of the States; but it would be clearly impossible for the High Court to declare a law invalid on the ground that the Parliament had not had this due regard.

It seems clear that the real importance of the words is in connection with the duty of the Inter-State Commission to adjudge whether a discrimination is undue or unreasonable, or unjust to any State. The question of "due regard" is an element in the decision whether a preference or discrimination is undue, &c., and must be considered by the tribunal which decides that question. What regard is "due" is obviously a question of fact on which the decision of the Commission is final; but if the Commission declined to take the question into consideration at all, it seems that there would be an appeal on the ground of an error in law. If the Commission takes into consideration something which the law excludes it from taking into consideration, or declines to take into consideration something which the law requires it to take into consideration, that is clearly a mistake in law. (See Phipps *v.* London and N.W.R. Co. [1892] 2 Q.B. 229.)

§ 433. "Unless so Adjudged by the Inter-State Commission."

The Parliament may forbid preferences or discriminations which are undue and unreasonable, or unjust to any State; but it cannot prejudge the question of fact as to whether any particular preference, under all the circumstances of the case, is of that character. That is a judicial question, which belongs to the Inter-State Commission solely and finally. That is to say, the preferences and discriminations which the Parliament is empowered to forbid by law are those which are undue, &c.; the application of the law to the facts of each case is a matter with which the Parliament, as a solely legislative body, can have no concern.

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission[434]—

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall hold office for seven years[435], but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

Historical Note.—The first draft of the Bill at the Adelaide session provided for the members of the Commission holding office during good behaviour, on exactly the same terms as the federal justices. Some members, however, who were not convinced that an Inter-State Commission was really necessary, or would have very serious duties, thought that this provision tied the hands of the Parliament too much; and the clause was struck out. (Conv. Deb., Adel., pp. 1114-7.)

Melbourne Session, 1898.—The important duties cast upon the Commission in connection with railway rates led to the question of independent tenure being reconsidered. On the third recommittal Mr. Barton (in pursuance of a promise made during the debate on the powers of the Commission) introduced the clause in its present form. Objections were made on the score of economy, and it was suggested that it might be found desirable that the Railway Commissioners for the time being should act; but the arguments for the independence of the Commission prevailed, and the clause was passed. (Conv. Deb., Melb., pp. 2457-62; and see Hist. Note to sec. 101.)

§ 434. "The Members of the Inter-State Commission."

No provision is made by the Constitution as to the number of the members of the Inter-State Commission, or as to their qualification. The (Imperial) Interpretation Act, 1889 (52 and 53 Vic. c. 63, sec. 1) provides that in all Acts of the Imperial Parliament, unless the contrary intention appears, words in the plural shall include the singular. The words "the members of the Inter-State Commission" would seem clearly to express a very definite intention that there must be more Commissioners than one; a single Commissioner would not be a "member" of a Commission; nor—according to Webster's definition—could he be a "Commission." A Commission is "a company of persons joined in the performance of some duty or the execution of some trust; as, the Inter-State Commerce Commission." (Webster's Internat. Dict.) The Parliament, in the exercise of its general powers and its duty of establishing the Commission, will be able to fix the number of members, and, if thought fit, to prescribe a qualification.

§ 435. "Shall Hold Office for Seven Years."

Except that the appointment need not be for a longer term than seven years, the tenure of a Commissioner is the same as that of a Justice of the High Court. (See sec. 72, *supra*.) The provision for removal is indeed framed in an enabling instead of a prohibitive form, but that is because it is in derogation of the preceding words "shall hold office for seven years," which exclude all modes of removal except that specified.

The fixity of tenure is for the purpose of securing to the Commission independence from political influence in the exercise of its important judicial and administrative functions. On the other hand, the variation from the judicial tenure is a recognition of the fact that the work of the Commission is administrative as well as judicial, and that the reasons which make the life tenure of administrative offices undesirable and inconvenient may be applicable in this case.

The requirement that the members "shall hold office for seven years" does not prevent the Parliament, if it should think fit, from conferring a longer tenure of office.

Saving of certain rates.

104. Nothing in this Constitution shall render unlawful any rate[436] for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State[437], and if the rate applies equally[438] to goods within the State and to goods passing into the State from other States.

Historical Note.—At the Melbourne session, 1898, after the adoption of Sir George Turner's "undue preference" clause (see Hist. Note to sec. 102) the New South Wales representatives feared that the tapering "long-haul" rates necessary for the working of their railway system might be interfered with by the Federal Parliament—which was the tribunal provided for at that stage. It was argued that Sir George Turner's clause, as it stood, affected the internal traffic of a State as well as inter-state traffic. Accordingly Mr. O'Connor proposed (Debates, p. 1410) to insert a provision that nothing in the Constitution should be taken to render a rate on any State railway unlawful "on the ground that it is unduly low." The intention was to allow unlimited competition, so far as "cutting rates" was concerned, subject only to the prohibition against preferential treatment. Sir George Turner complained that this neutralized his clause, because nine times out of ten the injustice would be that a rate was unduly low. He wished to prevent *unfair* competition. The position became critical, and Mr. O'Connor, to relieve the strain, modified his proposal to read that a rate on a State railway should not be prohibited on the ground that it was unduly low "if such rate is imposed for the development of traffic between places within the limits of the State." He insisted strongly that the clause as it stood meant that the internal trade of New South Wales was to be "fixed to suit somebody else." Sir George Turner still objected to the amendment; low rates would be wanted, not for development, nor for the benefit of producers, but for the conserving of "traffic." At last (p. 1443) Mr. Grant appeared as mediator. He admitted that Sir George Turner's amendment was meant fairly, but thought it might hinder development; and he moved an amendment providing that notwithstanding anything in the Constitution, "such laws [*i.e.*, federal trade and commerce laws] shall not have the effect of preventing the development of the internal resources of any State." This, after discussion, he modified to provide that "Nothing in this Constitution shall prevent the imposition of such railway rates by any State as may be necessary for the development of its territory, if such rates apply equally to goods from other States." Sir George Turner and Mr. Isaacs were willing to accept this if it were worded as an instruction to the Federal Parliament, instead of being left to the High Court. They did not wish to prevent rates which were honestly developmental, but insisted that this was a political question, and that Parliament was the proper tribunal. The question now was practically which of the three tribunals should be adopted: the High Court, the Parliament, or—as a compromise between the two—the Inter-State Commission. At last the amendments were withdrawn, and Mr. Grant (p. 1506) moved his proposal in the form of a new clause. Sir George Turner moved to insert "in the opinion of the Parliament." Mr. Holder, however, proposed to substitute "Inter-State Commission" for "Parliament," and this was agreed to on the voices. The clause in this form was carried by 22 votes to 21. (Conv. Deb., Melb., pp. 1410-1510.)

On the second recommittal a redraft of the clause was carried. (Conv. Deb., Melb., pp. 2392-3.) After the fourth report further drafting amendments were made.

§ 436. "Shall Render Unlawful Any Rate."

Strictly speaking, it would seem that there is nothing in the Constitution—except the provision of sec. 92 that inter-state trade shall be "absolutely free"—to render a rate, considered by itself, unlawful. Sec. 102 renders unlawful any preference or discrimination which is forbidden by the Parliament and which is adjudged by the Commission to be undue and unreasonable, or unjust to any State; but what may be forbidden by that section is not a rate, but a difference between rates. On this ground it has been held under the English preference clauses that there is no right of action for an overcharge, because the court cannot decide what the rate ought to be, but only that there is an undue difference between two rates. (Denaby Main Colliery Co. *v.* Manchester, &c., R. Co., 11 App. Ca. 97; Rhymney R. Co. *v.* Rhymney Iron Co., 25 Q.B.D. 146.) "Where there is a breach of the equality clause, no doubt you may sue to recover the difference on the basis that you can compel the railway company to pay you back anything which you have paid over what, for precisely the same service, they have charged to another. But under the Railway and Canal Traffic Act, as was pointed out in the House of Lords, the company have their option. They may put up one charge, they may put down the other." (Per Lord Herschell, Phipps *v.* London and N.W.R. Co., 1892, 2 Q.B. at p. 248.)

When therefore a rate is complained of, and it is adjudged that in connection with another rate it constitutes an undue preference, the rate complained of is adjudged to be, not absolutely, but relatively, unlawful; to be unlawful on the assumption that the preference is not removed by the alteration of other rates. That is clearly the sense in which the prohibition contained in this section is intended. The debates, and the words of the section itself, show that this provision is meant as a qualification of the power to prevent preferences by a State, so far as they may be "necessary for the development of the territory of the State."

§ 437. "Necessary for the Development of the Territory of the State."

Mr. O'Connor's first suggestion, that a rate should not be unlawful if imposed "for the development of *traffic* between places within the limits of a State" (see Historical Note) was objected to by Sir George Turner as referring not to the development of the country, but to conserving the traffic in the competitive area. Accordingly Mr. Grant's amendment, from which the section is adapted, spoke of the development of *territory*.

The section is a recognition of the fact that the railways, being owned by the State, are in a different position to private companies. They are public institutions as well as business concerns, and may be worked, not merely for the purpose of making a profit on the railway business, but for the purpose of developing the resources of the State by which they are owned. Rates which, in the case of a company, would be preferential, might conceivably, from the point of view of a State, be necessary for the development of its territory; and the object of this section is to protect rates imposed with that object, whilst leaving unprotected any rate the purpose of which is to interfere with the equality of inter-state trade.

That public interests should be considered is the basis of all railroad legislation. It has been laid down in numerous American cases that railways are public highways, and subject to government control (see Smyth *v.* Ames, 169 U.S. 466; Cherokee Nation *v.* Kansas R. Co., 135 U.S. 641). What this section recognizes is a particular exemption from control by the Federal Government, so far as is necessary for development of the resources of the States.

A curious analogy to this provision may be found in the (Imperial) Railway and Canal Traffic Act, 1888, sec. 27, sub-sec. ii., which empowers the court or the Commissioners, in deciding whether a lower charge or difference of treatment is an undue

preference, to take into consideration whether the lower charge or difference is "necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made." (See p. 906 *supra*.)

The question, whether a rate is necessary for the development of the territory of a State, is one of fact, to be decided in each case as it arises by the constitutional tribunal. The test of the legality of such a rate is its necessity. Not every rate which does as a fact develop or tend to develop a territory will be valid. It must have something more than a mere developing effect to place it beyond attack. It must not be merely "for the development," but "necessary for the development;" and the Commission, not the State authority, is the sole judge of that necessity. Consequently a State could not under the name and guise of a development rate make a charge for the carriage of goods on a railway which is not fairly and reasonably essential for developmental purposes, but which is in reality intended to act as a preference or to draw trade and traffic from its natural flow and destination.

The "territory" contemplated by this section is no doubt that region of the State within the sphere of influence of the railway on which the rate is operative. The development of localities beyond that sphere could not be taken into consideration.

§ 438. "If the Rate Applies Equally."

The section of the Railway and Canal Traffic Act, 1888, just mentioned, contains the following proviso, which makes the analogy even more marked:—"Provided that no railway company shall make, nor shall the court or the Commissioners sanction, any difference in the tolls, rates, and charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services." Just as, in New South Wales, complaint has been made of the "special rates" by which the Riverina trade is drawn to Melbourne, so in England complaints were made of "special import rates" for foreign merchandise. The difference was that in England the complaint was made by the rival home producers, who objected to the encouragement of the imported article; here it is a complaint, by the merchants of one State, against unfair competition by another State for the export trade.

Under the English section, it has been held that the effect of the proviso is not to prohibit all inequalities in rates as between home and foreign merchandise, but that, if the railway company has proved facts which would justify the admitted differences, had the goods in both cases been home goods, the company is not debarred from relying on these facts as an answer, merely because the goods which receive the benefit of the difference of are foreign origin. (Mansion House Association *v.* London and S.W.R. Co. [1895], 1 Q.B. 927.)

The effect of the provision is that, if a rate infringes the provision of equality as between States, it loses the protection of this section, and becomes subject to the operation of federal laws as to preference and discrimination.

Taking over public debts of States.

105. The Parliament may take over[439] from the States their public debts as existing at the establishment of the Commonwealth[440], or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts[441], or any part thereof; and the States shall indemnify the Commonwealth[442] in respect of the debts taken over, and thereafter the interest payable in respect of

the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States[443].

UNITED STATES.—All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation —Const., Art. VI, sec. 1. (This refers to the war debt of the Confederation—not to the debts of the States.)

CANADA.—Canada shall be liable for the debts and liabilities of each Province existing at the Union.—B N.A Act, 1867, sec. 111. (The Provinces were made liable to Canada for the amounts by which their indebtedness exceeded certain specified amounts.—Secs. 112-116.)

HISTORICAL NOTE.—The original clause in the Bill of 1891 was as follows :—

"The Parliament of the Commonwealth may, *with the consent of the Parliaments of all the States*, make laws for taking over and consolidating *the whole or any part* of the public debt of any State of States, but so that a State shall be liable to indemnify the Commonwealth in respect of the amount of a debt taken over, and that the amount of interest payable in respect of a debt shall be deducted and retained from time to time from the share of the surplus revenue of the Commonwealth which would otherwise be payable to the State."

In the Sydney Convention of 1891, Sir John Bray moved an amendment, somewhat on Canadian lines, to make the Commonwealth liable at once for the debts of each State existing at the time of union, and to make the States liable to the Commonwealth for any excess of such debts over a fixed amount per head of the population. Most of the members favoured ultimate consolidation, but this was thought to go too far. The points in its favour were that it would get rid of the dangerous surplus, and result in a large saving of interest; the chief point made against it was that it involved the transfer of a liability without corresponding assets. The last argument was answered by pointing out that the revenue powers of the Commonwealth were the equivalent asset; but the real objection, from the point of view of New South Wales, was that the proposal might dictate a high revenue tariff. The amendment was negatived. A protest was made against requiring the consent of "all the States," but the clause was passed without alteration. (Conv. Deb., Syd., 1891, pp. 835-49.)

Adelaide Session, 1897.—The clause as introduced at Adelaide provided that the Parliament might, with the consent of the Parliament of any State, take over the whole or any part of the debt of that State. The rest of the clause was as before, with an addendum that "upon any conversion or renewal of the loan representing the debt, any benefit or advantage in interest or otherwise arising therefrom shall be applied to the reduction of the debt." There was much diversity of opinion upon the whole subject. Mr. Reid had nothing to say, so long as no compulsory proposition was made. Sir George Turner would have liked a compulsory taking over of all the debts, but in view of Mr. Reid's strong objection he did not press this. Still, he thought that the power should be to take all the debts of all the States, and he objected to the consent of the States being required. Mr. Holder and Mr. McMillan pointed out that compulsory consolidation meant making a present of the federal security to the bondholders; but they approved of giving the Parliament power to act without the consent of the States. Some thought that the power should be limited to existing debts; others that it ought to extend to future debts; some thought that future State borrowing should be restricted; others that this was impossible.

Eventually, on Sir George Turner's motion, the requirement of the consent of the State Parliaments was omitted, on division, by 20 to 15, and the power was limited to "the whole, or a rateable proportion of the public debts of the States as existing at the establishment of the Commonwealth." The provision requiring any savings made to be spent in reduction of interest was negatived, and Mr. Higgins added a declaration that

the "rateable proportion" should be calculated on a population basis. (Conv. Deb., Adel., pp. 1085-1103.)

Melbourne Session, 1898.—At Melbourne, Mr. Glynn moved an amendment providing for compulsory consolidation of debts, each State indemnifying the Commonwealth for any excess of its debts over the average indebtedness. This, after a long debate, was negatived.

Mr. Holder (for Mr. McMillan) then moved (Debates, p. 1577) to insert, after "Parliament," the words "may take over the whole or any part of the debt of the State, subject to the consent of the State." On this Sir Geo. Turner moved the substitution of "shall" for "may," which was carried by 25 votes to 8; a division which, coming as it did after the rejection of the guarantees, signified a desire on the part of the Convention to make some definite provision with regard to the threefold problem of the debts, the railways and the guarantees. Mr. Holder lamented this "unfortunate vote" on the ground that it would at least put our worst securities on a level with our best, and would make a present of millions to the bondholders; whilst Mr. Reid (who had been absent when the vote was taken) objected on the ground that it dictated a high tariff. The Convention, after some debate, showed a disposition to reverse the effect of its vote. The amendment was consequentially amended by the omission of all words after "shall take over;" but the proposal to insert these words in the clause was negatived, on division, by 19 to 18, and the clause was agreed to without any amendment. (Conv. Deb., Melb., pp. 1540-1653.) Drafting amendments were made before the 1st Report, and after the 4th Report.

§ 439. "The Parliament May Take Over."

The power given to the Parliament by this section is absolute, and may be exercised without the consent of the States. The power can of course only be exercised under an Act passed by the Parliament for that purpose. Such an Act will presumably not be passed so as to effect the transfer itself, or even so as to direct absolutely that the transfer *shall* be made; as either of these courses would be open to the objection raised by Mr. Holder to a peremptory provision in the Constitution—namely, that it would make a present of the federal security to the bondholders, and so prevent any possibility of an advantageous conversion before maturity. It will probably be in an enabling form, authorizing the Federal Treasurer to negotiate with the bondholders, and so offer them the federal security in exchange for some concession which will share the benefits of the transfer between the Commonwealth and the bondholders.

The effect of the transfer will be to substitute the credit of the Commonwealth for the credit of the States—to make the Commonwealth the debtor to whom the bondholders will have to look, and to release the States from any obligation to the bondholders, imposing on them instead an obligation to indemnify the Commonwealth for the amount of principal and interest.

§ 440. "Their Public Debts as Existing at the Establishment of the Commonwealth."

The Parliament, when it takes action under this section, will have two alternatives open to it; either to take over the whole of the debts of all the States, as existing at the time of the establishment of the Commonwealth, or to take over from each State a certain definite sum per head of its population. If it chooses to adopt the latter course, it may fix the *per capita* indebtedness to be taken over at any amount up to, but not exceeding, the *per capita* indebtedness of the State whose *per capita* indebtedness is lowest. In other words, all the possible alternatives may be expressed thus:—If the public debt of each State is divided by the number of its people, we get the *per capita* indebtedness of each. The result, taking the figures for 1900 (Coghlan's Statistics of the Seven Colonies, 1900, p. 25) is as follows:—

Colony.	Public Debt.	Indebtedness per capita.
	£	£ s. d.
New South Wales	65,332,993	48 0 0
Victoria	49,324,885	42 4 6
Queensland	34,349,414	70 7 9
South Australia	26,156,180	70 16 5
Western Australia	11,804,178	66 4 11
Tasmania	8,413,694	46 3 1
Total	£195,381,344	£52 2 10

The minimum indebtedness per head of population is that of Victoria, £42 4s. 6d. Adopting the "proportional" alternative, the Commonwealth may take over from each State any amount per head that may be decided upon, up to £42 4s. 6d. Beyond that sum the proportional plan cannot go, because no greater amount can be taken over from Victoria; and if it is desired to take over a larger amount, the only way is to take over the whole of all the debts.

It should be observed that in calculating the indebtedness per head, though the amount of the debts is taken as at the establishment of the Commonwealth, the population is taken from "the latest statistics of the Commonwealth" at the time when the transfer is proposed. The powers given to the Commonwealth, if the whole debts are not taken over at first, may be exercised from time to time; that is to say, if a proportion less than the maximum has been taken over at one time, a further proportion may be taken over at another; or the whole balance may be taken over.

This section gives no power except with regard to debts "as existing at the establishing of the Commonwealth." After the establishment of the Commonwealth there is nothing to prevent the States continuing to borrow on their own credit; but there is no provision in the Constitution to allow the Commonwealth to assume liability in respect of such subsequently incurred debts.

The question arises whether, in the event of any debt of a State falling due and being renewed before the debts are taken over, such renewed debt can be taken over by the Commonwealth under this section. It is submitted that it can; and that the effect of the words "as existing at the establishment of the Commonwealth" is to fix the amount of the debts which can be taken over, and not to identify the particular contracts of debt existing at that time.

§ 441. "And may Convert, Renew, or Consolidate such Debts, or any Part thereof."

These words were inserted on Sir George Turner's motion at the Adelaide Convention (Debates, p. 1097; Proceedings, p. 99); but they hardly seem to be necessary. The powers of conversion, renewal, and consolidation would seem to be necessarily incidental to the power to take over the debts—or at least to be included in the power to borrow money on the public credit of the Commonwealth (sec. 51—iv).

§ 442. "The States shall Indemnify the Commonwealth."

The indemnity here given seems, by the subsequent words, to be limited to the principal and interest payable by the Commonwealth, and not to include charges other than interest, or the expenses of administration, which are apparently to be treated as expenditure of the Commonwealth, and charged against the States (so long as sec. 89 or sec. 93 is in operation) in proportion to population.

§ 443. "Shall be Paid by the Several States."

It would seem that the indemnity, coupled with the direction that the amount shall be paid, is sufficient to create a debt owing by the State to the Commonwealth. The Constitution contains no provision for the recovery of this debt, and the States, apart from legislation, are not suable except by their own consent (§ 338, *supra*); but it is submitted that a suit by the Commonwealth for payment, being a matter "in which the Commonwealth is a party," is within the judicial power, and therefore that the Federal Parliament may, under sec. 78, make laws conferring rights to proceed against the States in such matters.

CHAPTER V.—THE STATES[444].

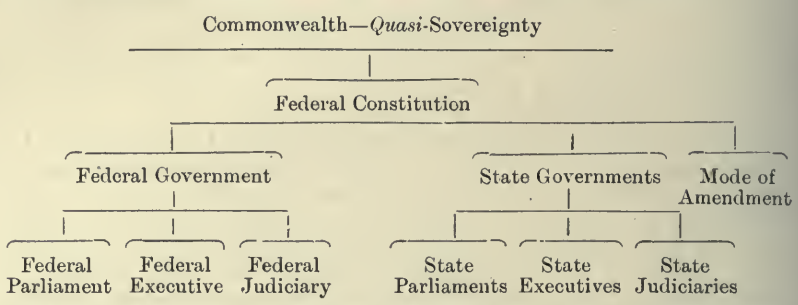
§ 444. "The States."

The States are parts of the Commonwealth; this is one of the basic principles in the structure and organization of the federated community. In order to present a true conception of the position of the States in the Commonwealth some of the ground previously traversed must be here reviewed, and attention drawn to the fundamental conceptions and relations expressed by the words "Empire," "Commonwealth," "States," "Constitution," and "Government."

In accordance with the agreement of the people of the Australian Colonies to unite in one Federal Commonwealth under the Crown, the British Parliament, in which resides the supreme and absolute sovereignty of the Empire, has established the Commonwealth and ratified and legalized the Constitution previously approved by the people. The Commonwealth is the united political society thus established; it consists of the people and of the pre-existing colonies, converted into States. Attention is particularly drawn to this definition of Commonwealth, which is clear and unchallengeable, according to the express wording of the Preamble and the first six clauses of the Imperial Act. In certain sections of the Constitution, however, the word Commonwealth is used to denote the central Government established by the Constitution, and not the political society itself which is organized under the Constitution, and governed by Federal and State governments alike. In the American Constitution it has been noticed that a similar confusion of meaning exists. In the Preamble and other sections, the term "United States" means the united political society composed of the people of the States. Occasionally, however, as in Art. IV. Sec. 4, and the Tenth Amendment, the term "United States" is used to signify the Federal Government. (Luther *v.* Borden, 7 How. 1; Pomeroy's Const. Law, 10th ed. p. 68. Note, § 466, *infra.*) These are illustrations of the manner in which a political community capable of exercising sovereign or *quasi*-sovereign powers may be confused with its governing organs. Care must, therefore, be taken to note and understand the meaning of the word Commonwealth, as conveyed by its context; by so doing misapprehension and confusion of thought will be avoided.

The primary and fundamental meaning of "The Commonwealth" is the united political community composed of the people and the antecedent colonies, now converted into States. That political community has been established by the Imperial Parliament, and endowed with the powers of self-government, by virtue of which the community may be described, for the purpose of this analysis, as possessing a kind of political sovereignty; not absolute and independent sovereignty, for that belongs to the British Parliament, but a derivative, delegated, or *quasi*-sovereignty. This *quasi*-sovereignty is conveyed to the new society by the Imperial Act, and through the Constitution in that Act. The Constitution partitions or distributes the powers pertaining to this *quasi*-sovereignty in the following manner: One bundle or set of the totality of *quasi*-sovereign powers is expressly and definitely assigned to certain governing organs called the Federal Parliament, the Federal Executive, and the Federal Judiciary, accompanied by limitations and prohibitions, determining the methods or principles according to which those powers are to be used. The balance of the *quasi*-sovereign powers are reserved to certain autonomous and governing groups, formerly called colonies, now called States; those powers being such as are defined in the Constitutions of the States, granted to them by the Imperial Parliament before the union. By the Federal Constitution the State Constitutions were confirmed and continued in existence, subject to the grants of power made by the Constitution to the Federal organs of government. In addition to these

assignments of power among the two sets of governing agencies, the Constitution contains a section enabling the people of the united community, in the exercise of their *quasi*-sovereign power, to amend the supreme instrument of government itself. This power of amendment enables the people, if necessary, to redistribute the powers granted and apportioned by the Constitution, either by taking from the State Governments and giving to the Federal Government, or by taking from the Federal Government and giving to the State Governments. The subjoined conspectus may be used to illustrate the relation of the State Governments to the Federal Government, and the joint relation of both to the amending power, to the Constitution, and to the Commonwealth :—



From these observations it appears that the Imperial Parliament has vested, in the united and indivisible people of the Commonwealth, some of the highest attributes of sovereignty, limited only by its own paramount supremacy ; that in the Constitution there is a division of that delegated sovereignty into two spheres or areas, one being assigned to the Federal Government, and the other to the State Governments ; that each Government is separate and distinct from the rest ; that the Federal Government cannot encroach on the sphere or area of the State Governments, and that the State Governments cannot encroach on the sphere or area of the Federal Government ; that the sphere or area of the Federal jurisdiction can only be modified, enlarged or diminished by an alteration of the Constitution ; that the sphere or area of the State jurisdictions can only be modified, enlarged, and diminished by a similar alteration. This dual system of government is said to be one of the essential features of a Federation.

It may be added that the governing powers reserved to the States are not inferior in origin to the governing powers vested in the Federal Government. The States do not derive their governing powers and institutions from the Federal Government, in the way that municipalities derive their powers from the Parliament of their country. The State Governments were not established by the Federal Government, nor are they in any way dependent upon the Federal Government, except by the special provisions of sec. 119. The States existed as colonies prior to the passing of the Federal Constitution, and possessed their own charters of government, in the shape of the Constitutions granted to them by the Imperial Parliament. Those charters have been confirmed and continued by the Federal Constitution, not created thereby. Hence, though the powers reserved to the States are not wide, general, and national, no badge of inferiority or subordination can be associated with those powers, or with the State institutions through which they are exercised. State powers and State institutions, Federal powers and Federal institutions, all spring directly from the same supreme source—British sovereignty. The Federal Government and the State Governments are in fact merely different grantees and trustees of power, acting for and on behalf of the people of the Commonwealth. Each of them has to exercise its powers within the limits and in the manner prescribed by the Constitution ; each of them has different powers to be used in different domains for different purposes. The Constitution is the title, the master, and the guardian of all these various governing agencies. At the back of the Federal and State Governments are the *quasi*-sovereign people of the Commonwealth, organized

within the Constitution as a *quasi*-national State; they can alter the instrument of government, abolishing existing institutions of government, and substituting new ones, subject only to its special provisions and the Imperial supremacy. The States, therefore, as governing organizations, are not inferior in origin or status to the Federal governing organizations. Both are equally subject to the law of the Constitution, and equally entitled to its protection. "The perpetuity and indissolubility of the Union by no means imply the loss of distinct and individual existence, or of the right of self-government by the States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may not be unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States." (Per Chief Justice Chase in Texas *v.* White, 1868, 7 Wall. 724-5.) "In these opinions the Supreme Court, for the first time in its entire history, struck the solid ground of historic fact, and announced a theory which defines and preserves both the inherent nationality of the United States, and the separate existence, necessity, and local rights of the several States." (*The Nation*, 29th June, 1871.)

Saving of Constitutions.

106. The Constitution of each State[445] of the Commonwealth shall, subject to this Constitution[446], continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

HISTORICAL NOTE.—Clause 6, Chap. V. of the Commonwealth Bill of 1891 was to the same effect. In Committee, in the Convention of 1891, Mr. Gordon moved to add:—"But it shall not be necessary to reserve any proposed alteration of the Constitution of any State for the Queen's pleasure to be made known." This was negatived by 27 votes to 11. Sir Geo. Grey moved to add:—"But it shall not be necessary to reserve for the Queen's pleasure any law made by a State." This was negatived by 30 votes to 9. (Conv. Deb., Syd. [1891] pp. 864-5.) At the Adelaide session, 1897, the clause was framed in almost exactly the same words. In Committee, Mr. Gordon moved to omit the words "in accordance with" &c. This was negatived. (Conv. Deb., Adel., pp. 991-2.) At the Melbourne session, a redraft was agreed to. (Conv. Deb., Melb., pp. 664-5.) A drafting amendment was made after the fourth report.

§ 445. "The Constitution of each State."

In the preparation of the new Constitution the design kept in view was to distribute the delegated sovereignty of the Commonwealth among two groups of governing organs. That delegated sovereignty consisted partly of old powers and partly of new powers. The old powers were those previously granted by the Imperial Parliament to the separate colonies. The new powers were those freshly granted by the Imperial Parliament. The whole of those powers, new and old, constituted the *quasi*-sovereignty of the Commonwealth. In the process of distribution nearly all the new powers and a proportion of the old powers were vested in the Federal Government, the guiding principle being that those powers, and those powers only, which could be best exercised by a Parliament representing the united people, should be transferred from the States to the Federal Government. This distribution left the States in the full possession and enjoyment of their original institutions and their previously acquired powers, minus

only this deduction and transfer. Thus the States retain their Constitutions, their Parliaments, their Executive and Judicial organizations, subject only to the loss of those powers which by the Federal Constitution are withdrawn from the scope and operation of the State Constitutions and brought within the sphere of the Federal Constitution.

These principles of delimitation and partition were plainly outlined in the preliminary resolutions moved by Sir Henry Parkes, and adopted by the Federal Convention of 1891.

"I, therefore, lay down certain conditions which seem to me imperative as a groundwork of anything we have to do, and I prefer stating that these first four resolutions simply lay down what appear to me the four most important conditions on which we must proceed. First: 'That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.' I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as it is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that neither their territorial rights nor their powers of legislation for the well-being of their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers." (Sir Henry Parkes. Conv. Deb., Syd., 1891, p. 24.)

In the Adelaide Convention of 1897, a similar resolution was made the basis of the Constitution which was then drawn. It was resolved that the several colonies were not to be touched in any of their powers, privileges, and territories, except where a surrender was necessary to secure uniformity of law and administration in matters of general concern; that, after the establishment of Federation, the inviolability of the territory of each colony should be still preserved, subject to the determination of the people of such colony themselves. (Conv. Deb., Adel., p. 20.)

By the force of the legislative mandate that "the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth" it may be argued that the Constitutions of the States are incorporated into the new Constitution, and should be read as if they formed parts or chapters of the new Constitution. The whole of the details of State Government and Federal Government may be considered as constituting one grand scheme provided by and elaborated in the Federal Constitution; a scheme in which the new national elements are blended harmoniously with the old provincial elements, thus producing a national plan of government having a Federal structure.

In the pardoning power case of the Attorney-General of Canada *v.* Attorney-General of Ontario (1892), 19 Ont. Rep. 31, it was argued that the use of the phrase "constitution," in referring to the federal and provincial instruments of government, indicated the existence in the case of the Provinces of the same quality of legislative power, to be exercised in the same way, and with the same degree of latitude, as to methods, means, and facilities for carrying out such legislative power, as in the case of the Dominion. The same word was used to denote the British Constitution, the Constitution of the Dominion, and the Constitutions of the Provinces. In its application to the Provinces it was contended that it could not be used in the sense of an Act for the incorporation of a company, or in the sense of a charter of a municipality; the title showed that it referred to the Constitution of a State, embracing the idea of sovereignty and political organization. (Wheeler, C C., p. 27.)

It was accordingly held in that case that the legislature of a Province could vest in the Lieutenant-Governor thereof the power to commute and remit sentences for offences against the law of the Province, or offences over which the legislative authority of the Province extends, as fully and effectually as the Dominion Parliament could vest a similar authority in the Governor-General in relation to offences against the law of the Dominion. (Lefroy, Leg. Power, p. 39.)

The Federal Government and the State Governments are, within their respective spheres and areas, subject equally to the Constitution, and, in the last resort, to the Imperial Parliament. In the case of Maritime Bank of Canada *v.* New Brunswick Receiver-General (1892), App. Cas. 437, the question raised was whether the Provincial Government were entitled to payment in full over the other depositors and simple contract creditors of the bank. When the bank stopped payment, the Provincial Government was a simple contract creditor for $35,000, being public money of the Province deposited in the name of the Receiver-General. The Receiver-General claimed payment in full as representing Her Majesty. The Judicial Committee (per Lord Watson) held that the effect of the Dominion Act was not to sever all connection between the Crown and the Provinces. The Act of 1867 nowhere professes "to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy" (1892, App. Cas. 441). "The prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's Colonial possessions as in Great Britain. And the Crown, as a simple contract creditor for public moneys of the Province deposited with the bank, was entitled to priority over other creditors of equal degree." (Wheeler, C.C., p. 31.)

§ 446. "Subject to this Constitution."

The Federal Constitution withdraws powers and functions, but it does not abolish or interfere with any of the political institutions established in the States under their respective Constitutions. The States retain their executive, legislative, and judicial departments as before, but shorn of some of their powers and functions. The Governor and Executive of a State will not be required to discharge all the duties which belonged to the Governor and Executive of a separate colony. The Parliament of a State will not have the same quantity of work to get through as the Parliament of a separate colony. The Courts of the States, however, will not, to any appreciable extent, lose any of their old duties, whilst new Federal work may be imposed upon them.

Unimpaired Executive Power.—The Executive Government of each State retains the right to hold direct and immediate communication with the Imperial Government in all matters relating to State business. In the Draft Bill of 1891, ch. V. clause 5, it was provided that "all references or communications required by the Constitution of any State or otherwise to be made by the Governor of the State to the Queen shall be made through the Governor-General, as Her Majesty's Representative in the Commonwealth, and the Queen's pleasure shall be made known through him." In support of this section strong arguments were advanced by members of the Convention of 1891, of known sympathy with State rights :

"I have always maintained that one of the principal reasons for establishing a federation in Australia was because the Governments were always pulling in different directions. Australia speaks with seven voices instead of with one voice. Now, the hon. gentleman wishes that Australia should continue to speak with seven voices instead of with one voice. (Mr. Gillies: Only on matters appertaining to themselves! Dr. Cockburn: On matters appertaining to themselves they should not want to communicate with the Imperial Government at all!) I maintain that ministers in Australia are to be the Queen's ministers for the Commonwealth, and any communication affecting any part of the Commonwealth which has to be made to or by the Queen, should be made with their knowledge. Without that we shall not have the voice of one Commonwealth in Australia. I maintain that this argument is quite indisputable. The hon. member's argument amounts to this: somebody will not like it; some people object to it, and it is not absolutely necessary. I admit that it is not absolutely necessary; but I say it is necessary if we are going to establish a real Commonwealth in Australia. I think the idea is that there is to be but one Government for Australia, and that we shall have

nothing more to do with the Imperial Government except the link of the Crown. We recognize the Crown, but do not desire to have the Governments of Australia all trying to attract the attention of the Secretary of State in Downing-street. (Mr. Gillies: We cannot prevent them from having agents-general!) Certainly not; but the agents-general will be limited to their functions as commercial agents. (Mr. Gillies: Will they?) They will no longer be diplomatic agents. I maintain that Australia is to have only one diplomatic existence, and, therefore, only one diplomatic mouth-piece in any other part of the world." (Sir Samuel Griffith, Conv. Deb., 1891, p. 850.)

"I do not think there is in this Convention a stronger advocate of State rights and State interests than I am; but, still, I strongly support the clause as it stands, for it seems to me that one of the very fundamental ideas of a federation is that, so far as all outside nations are concerned, we shall be Australia to the outside world, in which expression I include Great Britain; that we shall speak, if not with one voice, at all events, through one channel of communication to the Imperial Government." (Mr. R. C. Baker, *id.* p. 852.)

"It really does one good to hear so sound a sentiment from my hon. friend, Mr. Baker, to which I entirely respond. I cannot understand for the very life of me, how we can aspire to be one Australian people under the Crown, and have several channels of communication with the Crown. We must either be a nation or we must be a chain of unfederated States." (Sir Henry Parkes, *id.* 853.)

The clause was carried by 16 votes to 6. The draft of the Constitution, as submitted by the Constitutional Committee to the Federal Convention at Adelaide, contained no such clause. In the Convention Mr. Deakin proposed to insert a clause similar to that of the old Bill. Such a provision, he argued, was absolutely essential to secure a proper national administration of Australasian affairs. There should be only one channel of communication with the Imperial Government. If there were separate and independent communications sent to the Imperial Government through the various State Governors, there would be the possibility of dissension and discord. There should be only one Australian voice heard in London, and to secure that, every official communication relating to public matters within the Commonwealth should go through the Governor-General. (Mr. A. Deakin, Conv. Deb., Adel., p. 1177.)

The proposed new clause was strongly objected to by Sir Edward Braddon and Mr. Kingston. It was agreed that the federation should speak with only one voice on behalf of Australia generally, but subject to the qualification that it should only speak on national affairs, and that it should leave State affairs to the management of the States without the slightest interference. If every communication relating to State affairs had to pass through the Governor-General, it would mean the subordination and degradation of the office of State Governor to the position occupied by a Lieutenant-Governor in Canada. The States would regard it as objectionable to have to send their reserved Bills to the Imperial Government through the Governor-General. It would be a serious blow to the autonomy of the States, and likely to lead to friction between the Governments of the States and the Federal Government; it might result in the loss of power and prestige, which it was not intended that the States should suffer. The proposed clause was negatived.

Loss of Executive Power.—Among the prominent executive powers to be transferred from the States to the Federal Government are the administration of the customs and excise departments, and the control of the payment of bounties, from the establishment of the Commonwealth; the administration of the post, telegraph, and telephone departments, the command-in-chief of the naval and military forces, the management of light-houses, light-ships, beacons, buoys, and quarantine, on dates to be proclaimed by the Governor-General after the establishment of the Commonwealth.

Gain of Executive Power.—The Governments of the States have, under the new Constitution, assigned to them some new executive powers, among which may be mentioned the issue of writs for election of senators (sec. 12); the certification to the Governor-General of the names of senators chosen for each State (sec. 7); on the place of a senator becoming vacant, before the expiration of his term of office whilst the Houses of Parliament of the State are not in session, the appointment of a person to hold the place temporarily (sec. 15).

Saving of power of State Parliaments.

107. Every power of the Parliament of a Colony[447] which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

UNITED STATES.—The powers not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.—Amendment X.

SWITZERLAND. The Cantons are sovereign, so far as their sovereignty is not limited by the Federal Constitution; and, as such, they exercise all the rights which are not delegated to the Federal Government.—Art. 3.

HISTORICAL NOTE.—Clause 1, Chap. V. of the Commonwealth Bill of 1891, was as follows:—

"All powers which at the date of the establishment of the Commonwealth are vested in the Parliaments of the several Colonies, and which are not by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliaments of the several States, are reserved to, and shall remain vested in, the Parliaments of the States respectively." (Conv. Deb., Syd. [1891], pp. 849-50.)

At the Adelaide session, 1897, the clause was passed almost verbatim. At the Melbourne session, before the first report, it was re-drafted as follows:—

"All powers of the Parliament of a colony or province which at the establishment of the Commonwealth or afterwards becomes a State, except such powers as are by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, shall continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

After the fourth report the clause was altered to its present form.

§ 447. "Power of the Parliament of a Colony."

The Parliament of each State is a creation of the Constitution of the State. The Constitution of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent to which their original legislative authority and jurisdiction has been transferred to the Federal Parliament. In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Federal legislation becomes more active and extensive the powers contemplated by the Constitution will be gradually withdrawn from the States Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes—"exclusive" and "concurrent." Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating to the subject, the Federal law prevails, and the State law to the extent of its inconsistency is invalid.

EXCLUSIVE POWERS.—The following are the powers which in the course of time will be absolutely withdrawn from the States:—

(1.) Power to make laws with respect to the seat of Government (sec. 52—i.). This power will become exclusive on the acquisition of the territory within which the seat of Government is situated (sec. 125).

(2.) Power to make laws with respect to places acquired by the Commonwealth for public purposes (secs. 52—i. and 122).

(3.) Power to make laws with respect to any part of a State surrendered by the State to and accepted by the Commonwealth (sec. 111), or to territory placed by the Queen under the authority of and accepted by the Commonwealth (sec. 122).

(4.) Power to make laws with respect to departments of the public service transferred to the Commonwealth (sec 52—ii.). This power will become exclusive immediately upon the transfer of the departments.

(5.) Power to make laws imposing duties of customs and of excise (sec. 90). This power will become exclusive on the imposition of uniform duties of customs.

(6.) Power to make laws granting bounties on the production or export of goods (sec. 90). According to the literal words of the Constitution this power does not become exclusive until the imposition of uniform duties of customs.

(7.) Power to make laws with respect to the naval and military defence of the Commonwealth and of the States (sec. 51—vi.). This power becomes exclusive on the establishment of the Commonwealth (sec. 114).

(8.) Power to make laws with respect to the coinage of money (sec. 51—xii., and sec. 115).

(9.) Power to make laws with respect to legal tender in anything but gold and silver coin (sec. 115).

Concurrent Powers.—Of the 39 classes of subjects enumerated in sec. 51, with respect to which the Federal Parliament has power to make laws, 13 are quite new, and are applicable only to the Commonwealth, having been created by the Constitution, and are of such a character that they could only be vested in and effectually exercised by the Federal Parliament; such as: The power to borrow money on the credit of the Commonwealth, fisheries in Australian waters beyond territorial limits, and sub-sections xxiv., xxv., xxix., xxx., xxxi., xxxiii., xxxv., xxxvi., xxxvii., xxxviii., and xxxix. Three of those 39 classes of subjects, viz.:—

(1.) Bounties (except aids on mining for gold, silver, or metal)—after the imposition of uniform duties of customs (sec. 90).

(2.) Naval and military defence (secs. 51—vi. and 114).

(3.) Coinage and legal tender (secs. 51—xii. and 115).

formerly vested in the States—are exclusively within the competence of the Federal Parliament. Trade and Commerce is a concurrent power, but a branch of it, viz., the power to impose duties of customs and excise, becomes exclusively vested in the Federal Parliament on the imposition of uniform duties of customs (sec. 90). This leaves, in the list of 39 subjects, 23 old powers which formerly belonged to the States, but are now concurrently vested in the State Parliaments and the Federal Parliament, subject to the condition imposed by sec. 109. These concurrent powers are as follows:—

(1.) Astronomical and meteorological observations (viii.).

(2.) Banking, other than State banking; also State banking extending beyond the limit of the State concerned, the incorporation of banks, and the issue of paper money (xiii.).

3.) Bankruptcy and insolvency (xvii.).

(4.) Bills of exchange and promissory notes (xvi.).

(5.) Census and statistics (xi.).

(6.) Copyrights, patents of inventions and designs, and trade-marks (xviii.).

(7.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (xxii.).

(8.) Foreign corporations, and trading or financial corporations formed within the Commonwealth (xx.).

(9.) Immigration and emigration (xxvii.).

(10.) Influx of criminals (xxviii.).

(11.) Insurance, other than State insurance; also State insurance extending beyond the limits of tho State concerned (xiv.).

(12.) Invalid and old-age pensions (xxiii.).

(13.) Light-houses, light-ships, beacons and buoys (vii.).

(14.) Marriage (xxi.).

(15.) Naturalization and aliens (xix.).

(16.) People of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (xxvi.).

(17.) Postal, telegraphic, telephonic, and other like services (v.).

(18.) Quarantine (ix.).

(19.) Railways, control with respect to transport for naval and military purposes of the Commonwealth (xxxii.).

(20.) Railway construction and extension in any State with the consent of that State (xxxiv.).

(21.) Taxation; but so as not to discriminate between States or parts of States (ii.).

(22.) Trade and commerce with other countries, and among the States (i.); except that on the imposition of uniform duties of customs the power to impose duties of customs and excise becomes exclusively vested in the Federal Parliament (sec. 90).

(23.) Weights and measures (xv.).

Residuary Legislative Powers.—The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal, and social powers, including control over:

Agriculture and the cultivation of the soil:
Banking—State banking within the limits of the State:
Borrowing money on the sole credit of the State:
Bounties and aids on mining for gold, silver, or metals:
Charities—establishment and management of asylums:
Constitution of State: amendment, maintenance and execution of
Corporations—other than foreign corporations and trading or financial corporations:
Courts—civil and criminal, maintenance and organization for the execution of the laws of a State:
Departments of State Governments—regulation of
Education
Factories
Fisheries within the State:
Forests
Friendly Societies
Game
Health
Inspection of goods imported or proposed to be exported in order to detect fraud or prevent the spread of disease:

Insurance – State Insurance within the limits of the State :

Intoxicants—the regulation and prohibition of the manufacture within the State of fermented, distilled, or intoxicating liquids :

Justice—Courts :

Land—management and sale of public lands within the State :

Licenses—the regulation of the issue of licenses to conduct trade and industrial operations, within the State, such as liquor licenses and auctioneers' licenses. Subject however to sec. 92 :

Manufactures—see factories :

Mines and Mining :

Municipal institutions and local government :

Officers—appointment and payment of public officers of the State :

Police – regulations, social and sanitary :

Prisons—State prisons and reformatories :

Railways—control and construction of railways within the State, subject to constitutional limitations (see Restricted Powers) :

Rivers—subject to constitutional limitations (see Restricted Powers) :

Shops—subject to constitutional limitations (see Restricted Powers) :

Taxation on order to the raising of revenue for State purposes (see Restricted Powers) :

Trade and Commerce within the State (see Restricted Powers) :

Works—construction and promotion of public works and internal improvements, subject to the constitutional limitations (see Restricted Powers) :

Restricted Powers.—Some powers reserved to the States can only be exercised *sub modo*—subject to conditions and limitations specified by the Constitution :

Bounties—A State may, with the consent of both Houses of the Federal Parliament, expressed by resolution, grant any aid or bounty on the production or export of goods (sec. 91) :

Naval and Military Forces—A State may with the consent of the Federal Parliament raise and maintain naval and military forces (sec. 114) :

Railways—A State may construct, use, and control its railways, but subject to Federal control with respect to transport for naval and military purposes of the Commonwealth (sec. 51—xxxii.) and subject to the rule that in the use and control of its railways the State may be forbidden to make any preferences or discriminations, which in the judgment of the Inter-State Commission are undue and unreasonable, or unjust to any State (sec. 102) :

Rivers – A State and its residents have the right to the reasonable use of the waters of rivers within the State for conservation or irrigation (secs. 98, 100) :

Taxation of Federal property – A State may, with the consent of the Federal Parliament, impose any tax on property of any kind belonging to the Commonwealth (sec. 114) :

Taxation—A State may impose taxation so long as it does not conflict with federal taxation, and so long as it does not violate the rule of inter-state freedom of trade and commerce. It is forbidden to impose duties of customs and excise after the imposition of uniform duties of customs by the Federal Parliament (secs. 90, 92) :

New Legislative Powers.—By the Federal Constitution certain new legislative powers are conferred on the Parliament of each State, the exercise of which is necessary for the constitution of the Federal Parliament. The Parliament of each State is permanently endowed with power to make laws for determining the times and places of elections of senators for the State (sec. 9). Until the Federal Parliament otherwise provides, the Parliament of each State may make laws prescribing the method of

choosing the senators for that State (sec. 9). Until the Federal Parliament otherwise provides, the Parliament of any State may make laws for determining the divisions in each State, for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division (sec. 29). Until other provision is made by the Federal Parliament, the qualification of electors of members of both Federal Houses is, in each State, that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State (sec. 30). The laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State, apply to the election of members of the Federal Parliament, as far as practicable, and until the Federal Parliament makes other provision (secs. 10 and 31). If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, are authorized to choose a person to hold the place until the expiration of the term, or until the election of a successor (sec. 15).

Saving of State laws.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament[448] of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal[449] in respect of any such law as the Parliament of the Colony had until the Colony became a State.

Historical Note.—Clause 2, Chap. V. of the Commonwealth Bill of 1891 was as follows:—

"All laws in force in any of the colonies relating to any of the matters declared by this Constitution to be within the legislative powers of the Parliament of the Commonwealth shall, except as otherwise provided by this Constitution, continue in force in the States respectively, and may be repealed or altered by the Parliaments of the States, until other provision is made in that behalf by the Parliament of the Commonwealth."

At the Adelaide session, 1897, this clause was adopted *verbatim*. At the Melbourne session it was verbally amended. (Conv. Deb., Melb., pp. 642-3.) It was redrafted after the fourth report.

§ 448. "Any Matter Within the Powers of the Parliament."

The preceding section declares how the Federal Constitution will affect the powers of the Parliament of a State; it provides that those powers not exclusively vested in the Federal Parliament, or withdrawn from the States, continue as at the establishment of the Commonwealth. This section declares how the Federal Constitution will affect the laws in force in a colony which has become a State. The powers of a Parliament are those conferred on it by its Constitution. The laws of a Parliament are its acts passed in the exercise of its powers. The possession of power is different from the exercise of power; powers may not conflict, but their exercise may; in the event of a conflict the laws of the Union are supreme. (Lewis, Fed. Power Over Commerce, p. 39.)

Every law in force in a colony, relating to any matter within the power of the Federal Parliament, continues in force, subject to the Federal Constitution. In considering what laws remain in force and how long, regard must be had to the distinctions between different classes of powers.

As regards laws of the States relating to matters in which the Federal Parliament is given concurrent powers, no difficulty arises. Such laws clearly remain in force except so far as they may be inconsistent with laws passed by the Federal Parliament in the exercise of its concurrent power. When a conflict arises, the federal law prevails; but unless there is a conflict, the State law holds good.

As regards laws passed by a colony, or a State, in respect of any matter which has subsequently come within the exclusive jurisdiction of the Federal Parliament, we have already distinguished between (1) matters as to which the Federal Parliament is given "exclusive power to make laws," and (2) matters as to which the Federal Parliament is given "power to make laws"—not expressed to be exclusive—and as to which the States are expressly or by necessary implication prohibited from acting. In the first case, what is prohibited to the States is merely the making of laws, and laws already made are not affected, unless inconsistent with federal laws; in the second case, the States are prohibited from either legislative or executive action, and existing laws purporting to authorize them to deal with these matters cease to have effect. (See Note, "Exclusive Power," § 234, *supra.*)

Thus the power to raise or maintain a naval or military force; the power to coin money; the power to make anything but gold and silver coin a legal tender in payment of debts, are all denied to the States and granted to the Federal Parliament; therefore, they become exclusively Federal powers from the establishment of the Commonwealth, and all State laws relating thereto are dislodged and displaced once and for all.

There may thus be a distinction between two different degrees of exclusiveness, as regards the operation of the exclusive power upon State laws passed before the character of exclusiveness attached. But the exclusive powers of the Federal Parliament all have one common quality; that with respect to any matter within such exclusive power the State Parliaments, after the exclusiveness of the power attaches, are absolutely deprived of power. The laws which they have previously made may hold good; but they cannot extend, modify, alter, or repeal those laws in any way whatever, because their legislative power is gone.

§ 449. "Powers of Alteration and of Repeal."

In matters within the power of the Federal Parliament concurrently with the State Parliaments, the laws in force in a State continue until inconsistent provision is made in that behalf by the Federal Parliament; then they cease to have force to the extent of their inconsistency. Subject to that contingency, the Parliament of a State may alter or repeal laws bearing on concurrent matters, in the same way as it could before the colony became a State. The words quoted must refer to concurrent powers. It would be illogical to contend that they refer to powers which have become exclusively vested in the Federal Parliament. The ability to alter or repeal must be based on concurrent power.

Inconsistency of laws.

109. When a law of a State is inconsistent[450] with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Historical Note.—Clause 3, Chap. V. of the Commonwealth Bill of 1891 was in the same words, and was adopted *verbatim* at the Adelaide session in 1897. At the Melbourne session, Mr. Reid suggested the insertion, after "law of the Commonwealth," of the words "upon a subject within the legislative powers of the Commonwealth."

Mr. Symon and Mr. Isaacs explained that this was unnecessary, as a law of the Federal Parliament outside the legislative powers of the Commonwealth would be no law. (Conv. Deb., Melb., pp. 643-4.) After the first report, Mr. Barton, at Mr. Reid's suggestion, moved the same amendment, to remove doubts. On Mr. Reid's request for a postponement, the amendment was withdrawn. (*Id.* pp. 1911-3.)

§ 450. "When a Law of a State is Inconsistent."

Our analysis and explanations of secs. 106, 107, and 108 render it unnecessary to elaborate on sec. 109, which is practically a corollary to the three preceding sections. Sec. 106 provides that the Constitution of each State is to continue, subject to the Constitution of the Commonwealth. Sec. 107 provides that the power of each State Parliament is to continue, subject to the Constitution of the Commonwealth. Sec. 108 provides that every law in force in a colony is to continue, subject to the Constitution of the Commonwealth. The consequence of this subjection of State Constitution, State Parliamentary power, and State law, to the Federal Constitution, would have been obvious without the insertion of sec. 109. That section, however, places beyond doubt the principle that the Federal Constitution and the laws passed by the Federal Parliament, in pursuance of that Constitution, prevail over the State Constitutions and the State laws passed by the State Parliaments, in pursuance of the State Constitutions. The later laws, however, are declared to be invalid only to the extent of their inconsistency with the former.

"A law of the Commonwealth" means a valid law. A law passed by the Federal Parliament outside the scope of its authority would be no law at all. (Norton *v.* Shelby County, 118 U.S. 425.)

It has been held in the United States that the cases in which federal legislation will supersede the legislation of a State are those in which the same matter is the subject of legislation by both. (Davis *v.* Beason, 133 U.S. 333.) When a State statute and a Federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the Federal statute is one within the power of the Federal Parliament, the State statute must give way. (Gulf, Colorado, and Santa Fé R. Co. *v.* Hefley, 158 U.S. 98.)

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State[451] extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

HISTORICAL NOTE.—Clause 9, Chap. V., of the Commonwealth Bill of 1891 was in identical terms, with the addition of the words "by whatever title he is designated." At the Adelaide session, 1897, this was adopted without modification. At the Melbourne session, drafting amendments were made before the first report and after the fourth report. (Conv. Deb., Melb., p. 645.)

Chap. V. of the Commonwealth Bill of 1891 also contained the two following clauses:—

7. "In each State of the Commonwealth there shall be a Governor.
8. The Parliament of a State may make such provisions as it thinks fit as to the manner of appointment of the Governor of a State, and for the tenure of his office, and for his removal from office."

In Committee, Sir John Bray objected to clause 7 as unnecessary and inadvisable, and as an interference with the States. Sir Samuel Griffith did not remember why it

was inserted, but suggested that it was to "indicate that the States are sovereign," and are not merely to have Lieutenant-Governors. The clause was agreed to. Clause 8 was objected to as limiting the powers of the Crown, as an interference with the State Constitutions which was beyond the functions of the Convention, and as encouraging an undesirable system of elected Governors. On the other hand it was urged that the clause was merely enabling, that there should be some such power, and that the objections were imaginary. The clause was carried by 20 votes to 19. (Conv. Deb., Syd., 1891, pp. 865-77.)

At the Adelaide session the clause providing that there should be State Governors was introduced *verbatim*, but the clause dealing with their mode of appointment was omitted. In Committee, Dr. Cockburn moved to insert it, as otherwise the appointment of the Governors would practically be with the Federal Executive, as in Canada. This amendment would have enabled the Parliament of a State to provide for the election of the Governor, either by the Parliament of the State, or by a mass vote of the people. Mr. Grant suggested the substitution of "Lieutenant-Governor," and Sir John Downer supported Dr. Cockburn, to make it clear that the State Governors are not Lieutenant-Governors. The clause was objected to partly on the ground that the Convention had no authority to interfere with the Constitutions of the States, even to make them more easy of amendment than at present; and partly on the ground that the clause was not only a power but an invitation to the States to elect their own Governors. On the other hand it was urged that the Constitution practically abolished the necessity for State Governors, or at least altered the character of their office; and that it was the duty of the Convention to empower the States to meet the altered circumstances. Eventually Dr. Cockburn withdrew his amendment on the understanding that the clause requiring that "in each State of the Commonwealth there shall be a Governor" should also be omitted. This was done. (Conv. Deb., Adel., pp. 992-1001.)

§ 451. "Governor of a State."

The provisions of this Constitution relating to the Governors of States are:—

Sec. 7, which provides that the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Sec. 12, which empowers the Governor of any State to cause writs to be issued for elections of senators for the State.

Sec. 15, which empowers the Governor of a State, with the advice of his Executive Council, to temporarily fill a vacancy in the representation of the State in the Senate, if the Parliament of the State is not in session.

Sec. 21, which requires the President of the Senate, or the Governor-General, to notify to the Governor of a State any vacancy in the representation of the State in the Senate.

Sec. 84, which defines the rights of any officer in the public service of a State who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth.

States may surrender territory.

111. The Parliament of a State may surrender[452] any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

Historical Note.—Clause 12, Chap. V. of the Commonwealth Bill of 1891 was in almost identical terms, and was adopted at the Adelaide session in 1897. At the Melbourne session, a suggestion by the Parliament of Tasmania to substitute "its territory" for "the State" was negatived. (Conv. Deb., Melb., p. 646.) Drafting amendments were made after the fourth report.

§ 452. "The Parliament of a State may Surrender."

A State, through the legislative action of its Parliament, may surrender any part of its territory to the Commonwealth. The Commonwealth, through the Federal Parliament, may accept the surrendered territory, which thereupon becomes subject to its exclusive jurisdiction.

This provision was contained in the Bill of 1891, and seems to have had reference to two other provisions of that Bill:—namely, Clause 53-ii., Chap. I., which, following the words of the Americal Constitution, gave the Federal Parliament exclusive power with respect to the government of any territory "which may by surrender of any State or States and the acceptance of the Parliament become the seat of Government of the Commonwealth," and the exercise of like authority over all places acquired by the Commonwealth with the consent of a State for public purposes; and Clause 3, Chap. VI., which empowered the Parliament to make laws for the provisional government of any territory surrendered by the State to or accepted by the Commonwealth.

The Bill of 1891 thus contemplated two kinds of territory which the Commonwealth might acquire from a State by surrender and acceptance: namely, (1) territory surrendered to the Federal Government for the special purpose of the seat of Government, or other public purposes; and (2) territory surrendered, to be provisionally administered by the Federal Government until the time should be ripe for its establishment as a new State or States. Between these two kinds of federal territory the American authorities show that there is a fundamental difference. Territory ceded to the "exclusive jurisdiction" of the Federal Government for special purposes cannot be erected by the Federal Government into new States, or given anything but purely municipal powers of self-government. Exclusive jurisdiction does not necessarily mean unlimited jurisdiction; the Federal Government cannot delegate this exclusive power to a local legislature—though it can, by ceding the territory back to the State from which it was obtained, or to some other State, extinguish the exclusive power altogether. (Stoutenburgh *v.* Hennick, 129 U.S. 141; Burgess, Pol. Sci. II. p, 160; Von Holst, Const. Law, p. 173.) On the other hand, territory ceded to the Federal Government to be organized under a territorial Government may be so organized, and may, in the discretion of the Federal Legislature, be erected into a State. (Burgess, Pol. Sci. II. p. 161.)

The two kinds of territories were clearly contrasted by Marshall, C.J., in Loughborough *v.* Blake, 5 Wheat. at p. 324, when he distinguished between "a part of the society which is either in a state of infancy, advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the Territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government, as is the case with the District."

Whether this clause was primarily designed to meet the case of the seat of Government, and other places surrendered for public purposes, or whether it was intended to apply to territories generally, there is nothing in the debates to show. Even without this clause, the two other provisions, quoted above, would have clearly implied a power to acquire both kinds of territory; and this clause was probably added to remove any doubt that might exist as to whether the States - not having had, before Federation, the sovereign power of ceding territory—could do so without an express grant of power.

Under the Constitution as it now stands the acquisition of territory for the seat of Government seems to be provided for by sec. 124, and the power to acquire territorial possessions by surrender and acceptance seems sufficiently implied by sec. 122. This section, however, will enable the Commonwealth to acquire territory for special purposes by negotiating with the States, and without the necessity for the exercise of its power of eminent domain under sec. 51—xxxi. Territory thus acquired for special public purposes cannot be erected into a State or granted any but purely municipal powers of self-government; nor can its inhabitants be given any rights which, under the Constitution, belong only to the people of the States. (See authorities cited *supra*.)

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy[453] on imports or exports[454], or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws[455] of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

United States.—No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. (Const. Art. I., sec. X. sub-s. 2.

Historical Note.—Clause 13 of Chap. V. of the Commonwealth Bill of 1891 was as follows:—

"A State shall not impose any taxes or duties on imports or exports, except such as are necessary for executing the inspection laws of the State; and the net produce of all taxes and duties imposed by a State on imports and exports shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth."

At the Adelaide session, the same provision was adopted, but with the introductory words "After uniform duties of customs have been imposed," and with the substitution of "imposts or charges" for "taxes or duties." At the Melbourne session, a suggestion by the Legislative Council of New South Wales to omit the second part of the clause was negatived. Mr. Isaacs pointed out that, according to American decisions, the prohibition did not apply to inter-state trade, and would not affect the police powers of the States. A question was raised by Mr. Henry whether the clause applied to wharfage rates, and whether marine boards and harbour trusts would be affected. Mr. Barton replied that charges for services were not imposts. Mr. Glynn proposed to add, after "inspection laws of the State," the words (suggested by the Parliament of Tasmania):—"Or by way of payment for services actually rendered in improvement or maintenance of ports or harbours or in aid of navigation." Mr. Barton thought the amendment dangerous, and it was withdrawn for further consideration. (Conv. Deb.,

Melb., pp. 646-52.) Before the first report, the clause was thrown into the enabling, instead of the prohibitive form—the prohibition being already contained in secs. 90 and 92. After the fourth report the clause was further amended by the addition, after "imports or exports," of the words "or on goods passing into or out of the State."

§ 453. "A State may Levy."

Sec. 90 provides that after uniform duties have been imposed, the power of the Parliament to impose duties of customs shall be exclusive. That section accordingly prohibits the States from thereafter imposing duties of customs—a term which includes both import and export duties on goods entering or leaving the Commonwealth. (Webster's Internat. Dict.) Sec. 92 further provides that from the same time "trade, commerce, and intercourse among the States . . . shall be absolutely free." That section prohibits the States and the Commonwealth from imposing duties on goods passing from one State to another.

This section reserves to the States, notwithstanding the above provisions, the police power of making charges which may be necessary for executing their inspection laws. Such charges would seem to be both taxes and duties, and might, in the absence of special provision, have been held to be within either or both of the above prohibitions.

The section, however, though it expressly reserves this police power to the States, also makes the exercise of the power subject to control by the Federal Parliament. State laws imposing such charges, even though they may be necessary for executing the inspection laws of the State, may be annulled by the Federal Parliament; and if they are not necessary for that purpose, they are not protected from the prohibitions of secs. 90 and 92.

§ 454. "Imports or Exports."

It was suggested at the Convention (Deb., Melb, p. 647), on the authority of Brown *v.* Houston, 114 U.S. 622, and Woodruff *v.* Parham, 8 Wall. 123, that these words did not apply to goods carried from one State to another, but only to goods imported from or exported to foreign countries. On the other hand in Brown *v.* Maryland, 12 Wheat. 419, Marshall, C.J., in deciding that a charge imposed by the State of Maryland on foreign imports was unconstitutional both as a duty on imports and as a regulation of commerce, said:—"It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." And in Leisy *v.* Hardin, 135 U.S. 100, Fuller, C.J., quoting these words, said: "Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other."

In this Constitution the words imports and exports are uniformly used of foreign imports and exports only, and the words "goods passing into or out of the State" are used with reference to inter-state trade. (See secs. 92, 93, 95.)

§ 455. "Inspection Laws."

Definition.—The inspection laws of a State are those laws which a State may enact in the exercise of its police powers, providing for the official view, survey, and examination of personal property, the subjects of commerce, in order to determine whether they are in a fit condition for sale according to the commercial usages of the world. (Foster *v.* Port Wardens, 94 U.S. 246.) The examination extends to the quality, form, size, weight, and measurement of articles imported. An inspection, it is held, is something which can be accomplished by looking at, or weighing, or measuring the thing to be inspected, or by applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense

whatever. (The People *v.* Compagnie Transatlantique, 107 U.S. 62.) In some cases chemical analysis may be demanded, and in these cases State requirements that the vendor shall furnish samples of his goods to the State chemist, and label the product with the correct statement of its chemical ingredients, are valid. (Patapsco Guano Co. *v.* Board of Agriculture, 171 U.S. 345.) The object of examination is to ascertain whether the articles examined are fit for commerce, and to protect the citizens and the market from fraud. (The People *v.* Edye, 11 Daley [U.S.] 132.) Inspection laws must not be of a discriminating character. (Brimmer *v.* Rebman, 138 U.S. 78; Voight *v.* Wright, 141 U.S. 62.)

Limits of Inspection Laws.—The power to inspect is not applicable to vessels and other means of transportation. (Railroad Co. [Morgan L. and T.] *v.* Board of Health, 36 Louisiana Ann. 666.) Under the guise of inspection laws a State is not permitted to impose a heavy charge amounting to a tax or an obstruction of trade and commerce. The courts will scrutinize the purpose and the amount of such a tax, and will decide whether it is intended to violate the constitutional prohibition. (Goodwin *v.* Caraleigh Phosphate Works, 119 N. Carolina, 120.) The Federal Parliament may also at any time annul State inspection laws which are objectionable or suspected of being intended to obstruct the freedom of inter-state trade and commerce.

Examples of Inspection Laws.—A law of Maryland requiring tobacco to be brought to a State warehouse for inspection and branding, &c., and to pay charges for outage and storage, held to be valid as inspection laws. (Turner *v.* Maryland, 107 U.S. 38. Baker, Annot. Const. 104.)

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. They are so upheld as contemplating benefits to commerce and navigation, and as altogether distinct from imposts and excise duties, and duties on tonnage. (State Tonnage Tax Cases, 12 Wall. 204-219. *Id.*)

When the right of inspection exists and is properly exercised, it applies alike to imports and exports. (Neilson *v.* Garza, 2 Woods, 287. *Id.*)

Inspection laws, so far as they act upon articles of exportation, are generally executed on land, before the article is shipped; so far as they act on importation they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax paid for the performance of the services and while the article inspected is in the bosom of the country. This is an exception to the prohibition on the States to lay duties on imports or exports, and was made because the tax would otherwise have been within the prohibition. (Brown *v.* Maryland, 12 Wheat. 419-438. *Id.*)

This clause has reference to the inspection of property, and cannot be made to apply to free human beings. The methods of determining whether such persons are criminals, paupers, lunatics, &c., are not to be determined by inspection laws alone. (The People *v.* Compagnie Gen. Transatlantique, 107 U.S. 59. *Id.*)

The statute of Minnesota held unconstitutional and void in so far as it requires, as a condition of sales in Minnesota of fresh meat for human food, that the animals from which such meat is taken shall have been inspected in that State before being slaughtered. The inspection thus provided for is of such character, or is burdened with such conditions, as will prevent the introduction into the State of sound meats, the product of animals slaughtered in other States. (Minnesota *v.* Barber, 136 U.S. 314. *Id.*)

Intoxicating liquids.

113. All fermented, distilled, or other intoxicating liquids[456] passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

Historical Note.—At the Adelaide session, Mr. Deakin moved, as an addition to the free-trade clause (sec. 92) the words "But nothing in this Constitution shall prevent any State from prohibiting the importation of any article or thing, the sale of which

within the State has first been prohibited by the State." The object was to enable the States to prevent the importation of articles—such as alcohol or opium—which it deemed hurtful. This was then postponed in order to proceed with the financial clauses. (Conv. Deb., Adel., pp. 875-7.) At a later stage, it having been suggested that the clause might affect the fiscal issue, and also that power ought to be given to regulate as well as to prohibit the sale, Mr. Deakin moved his amendment in this form :

"Nothing in this Constitution shall be construed to prevent any State from regulating the importation of opium or alcohol under conditions which are applicable as nearly as possible to the laws relating to opium and alcohol within the State."

Mr. O'Connor opposed the amendment; partly because it was unnecessary, American decisions showing that retail sale within the State might be prohibited; and partly because the mention of these two articles might dangerously limit the police powers of the States with regard to other articles. After debate the amendment was negatived by 15 votes to 14. (*Id.* pp. 1140-8.)

During the statutory adjournment, the Legislative Assemblies of New South Wales and Victoria, and both Houses in South Australia, made suggestions substantially identical with Mr. Deakin's "opium and alcohol" proposal; and the Legislative Assembly of Victoria made a suggestion (practically identical with the Wilson Act—Note, § 456, *infra*) to add to the trade and commerce sub-clause these words :—

"Provided that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory to the same extent and in the same manner as though such liquors or liquids had been produced in such State or territory."

At the Sydney session, Mr. Deakin moved the Victorian amendment, which after considerable debate was carried. (Conv. Deb., Syd., 1897, pp. 1037-59.) At the Melbourne session, before the first report, the provision was transferred, with verbal amendments, to a separate clause. A further drafting amendment was made after the fourth report.

§ 456. "Intoxicating Liquids."

As an introduction to a study of this section, reference may be made to the leading provisions of the Constitution with reference to trade and commerce. The first fundamental rule is that the Federal Parliament may make laws with respect to trade and commerce with other countries and among the States (sec. 51—i.). The next rule is that after the imposition of uniform duties of customs the Federal Parliament acquires exclusive power to impose duties of customs and excise, and to grant bounties on the production or export of goods (sec. 90). The result of these two rules is to leave to the States a concurrent power to deal with inter-state and foreign commerce, but to take from them the power to deal with customs, excise, and bounties. The concurrent power, however, may not be exercised in a manner inconsistent with Federal legislation. The third rule is that each State retains the sole and exclusive power to deal with the manufacture, production, use, and consumption of articles of commerce, and the sole and exclusive power to regulate the internal trade and commerce of the State - that is, trade and commerce which begins and ends in the State—subject to the limitation that it may not grant bounties on the production of goods (sec 51—iii.). The next important rule is, that on and after a certain event trade and commerce and intercourse among the States, whether by internal carriage or ocean navigation, shall be absolutely free (sec. 92). This mandate, in favour of the freedom of inter-state trade and commerce, is as binding on the Federal Parliament as on the States. Neither the Federal Parliament nor the States are permitted to make any rule or regulation of commerce obstructing the free transportation of goods, wares, and merchandise from one State into another. To this rule of freedom sec. 113 is intended to enable the States to make an exception or qualifi-

cation in the case of fermented, distilled, or other intoxicating liquids. As to the manner in which the section will operate several cases decided in the United States under a corresponding law will afford a valuable guide.

Prior to the year 1888, the law of the State of Iowa permitted the sale of foreign liquors imported under the laws of the United States, subject to the condition that the sale was effected by the importer in the original casks and packages. In 1888 the law was amended so as to provide that, whether imported or not, wine could not be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not even for those limited purposes except by registered pharmaceutists having proper permits. Certain brewers doing business in the State of Illinois shipped beer in sealed packages to Keokuk in the State of Iowa, where it was offered for sale in the original packages. A certain quantity of the beer was seized by Hardin, the City Marshall of Keokuk, under colour of authority of the law of Iowa. The brewers then brought an action against Hardin to recover the beer seized. The local court gave judgment for the plaintiffs on the ground that the State law was invalid. This judgment was reversed by the Supreme Court of Iowa. The brewers appealed to the Supreme Court of the United States, which allowed the appeal and restored the judgment of the local court. The ground of the decision was that the State could not pass a law obstructing free trade and intercourse between the States. At the same time the court suggested no doubt as to the power of the State to control the sale of imported articles, once they had become mixed with the general mass of property in the State. (Leisy *v.* Hardin [1890], 135 U.S. 100.)

It was in consequence of the decision in Leisy *v.* Hardin that on 8th August, 1890, a statute was passed by Congress now known as the Wilson Act, which provided :—

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

As soon as this Act was passed it was challenged as involving an unconstitutional delegation of power by Congress. The power conferred by the Act was used by several States, and its meaning and constitutionality became the subject of judicial decision. No doubt as to its constitutionality was suggested by any of the courts. An Act passed by Congress in 1886, providing that the transportation of and traffic in nitroglycerine and other high explosives might be regulated or prohibited by the States, had never been questioned. It had been the settled practice of Congress to grant to the States on the sea-board permission to collect duties at their ports for the improvement of harbours, the erection of piers and light-houses, and the appointment of health officers. Such laws did not amount to a delegation of power by Congress to the States. So with reference to such a law as the Wilson Act. It delegated no power to the States ; it conferred no additional authority on the States ; it merely removed an impediment to the operation of State law. State statutes passed before the Wilson Act were not void but only inoperative ; they became effective at once upon the passage of the Federal statute without being re-enacted. (*Re* Rahrer, 140 U.S. 545 ; Prentice and Egan, Commerce Clause, p. 81.)

The construction of the Wilson Act was a more difficult question. The most important point was whether under its provisions a State could forbid the introduction of intoxicating liquors within its limits. In the case of State *v.* Rhodes, 90 Iowa, 496, it was held that liquor becomes subject to the police laws of the State immediately upon its arrival within the State, and that under the law of Iowa its transportation was unlawful. This construction of the statute was not adopted by the Supreme Court of the United States, which held that the Federal statute did not authorize a State to

forbid the introduction of intoxicating liquor, but recognized the right of transportation and permitted the State law to operate upon the liquor only when its carriage was completed, and when it had reached its destination and been delivered to the consignee. (Rhodes *v.* Iowa, 170 U S. 412.)

The Wilson Act has been further considered by the courts in litigation arising out of the South Carolina Dispensary Act. This law forbade the sale of intoxicating liquor, within the State, by any private individuals. It prohibited the importation of liquor for use by the importer, but permitted the use of domestic liquor. It vested in the State the sole right to sell liquor. Officers were appointed throughout the State to dispense liquor at convenient places, and the profits arising from the business were appropriated to the State, county, and municipal treasuries. This law was declared void by the Supreme Court of South Carolina. (McCullough *v.* Brown, 41 S. Carol. 220; Prentice and Egan, Commerce Clause, p. 80.) The decision in that case has since been overruled, but some of its doctrines have been approved of in Federal courts. This Dispensary Act, it is said, is not a proper exercise of the police power so far as it discriminates between inter-state and domestic commerce, in articles the manufacture and use of which are lawful. A State could not forbid the importation of liquor for use by the importer while it permitted the use of domestic liquors. (Donald *v.* Scott, 67 Fed. Rep. 854 and 165 U.S. 558.) In the case of Vance *v.* Vandercook Co., 170 U.S. 438, it was held that the fact of the State law permitting the sale of liquor, subject to certain restrictions, did not prevent the law from being an exercise of police power. The Federal Act, it was said, was passed to allow State regulations to operate on the sale of original packages of intoxicants brought from other States; it was not intended that a State should be unable to control the liquor traffic except by prohibition. The effect of the decision in this case is that the importation of intoxicating liquors, for use by the importer, cannot be prohibited under the Wilson Act, but that upon their importation for sale they come within the operation of the Act and State laws founded thereon. (Prentice and Egan, Commerce Clause, p. 81.)

Section 113 may now be compared with the Wilson Act, on which it is founded. It will be at once seen that it is not intended to authorize the States to prohibit the introduction of intoxicating liquids; once introduced they cannot be prevented from reaching their destination—the consignee. What the section provides is that intoxicating liquids, upon passing into any State for use, consumption, sale, or storage, shall become subject to the laws of the State as if they had been produced in the State. They are liable to the same licensing laws as locally produced intoxicants; they are liable to the same restrictive and regulating laws; they are liable to the same prohibitive laws. Their sale may be restricted to certain limited purposes; or to certain defined localities; it may be allowed to be conducted by certain qualified persons only; or it may be forbidden altogether. The only condition to the legality of the liquor laws of a State is that they must apply without discrimination to intoxicants locally produced as well as to those imported.

The liquor laws of a State would only be allowed to apply to intoxicants passing into a State for use, consumption, sale, or storage. They would not imply to intoxicants passing into a State for the purpose of being transported directly and without the intervention of a sale into another State. (See notes, § 163, pp. 528, 548, *supra*.)

Prohibition and Local Option.—The Federal Parliament has not control over the liquor traffic as extensive as that exercised by the Parliament of Canada, which has power to regulate "trade and commerce" generally. The Federal Parliament can deal only with trade and commerce with other countries and among the States. This excludes the trade and commerce which begins and ends in a State. A federal law authorizing the establishment of a system of local option under which the sale of liquor could be prohibited in defined areas, or restricted to defined areas, would not be a law relating to trade and commerce "among the States," but a law relating to trade and commerce in those defined localities "within the States."

The Federal Parliament has no power to directly prohibit the manufacture of intoxicants or to establish a local option system in any State. It has, however, the exclusive power to impose duties of customs and excise. This will enable it to tax heavily, or lightly, all intoxicating liquids imported into the Commonwealth, or produced in any State—a power which may be exercised in a manner calculated to influence the liquor traffic in a material degree (sec. 90). The Federal Parliament has also the exclusive authority to grant bounties on the production or export of goods (sec. 90). This will enable it, if thought necessary, to directly encourage the manufacture of intoxicants by a pecuniary subsidy. The Parliament of a State would probably be able, under sec. 113, to prohibit the production, or sale, of intoxicants within the State limits, but should the Federal Parliament pass a law offering bounties for the production or export of those intoxicants, an inconsistency would arise, and the State law in that case would be invalid to the extent of the inconsistency (sec. 110). (See this question discussed, p. 548, *supra*.)

States may not raise forces. Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain[457] any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth[458], nor shall the Commonwealth[459] impose any tax on property of any kind belonging to a State.

United States.—No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace . . . . or engage in war unless actually invaded, or in such imminent danger as will not admit of delays.—Const. Art. I., sec. X., sub-s. 3.

Canada.—No lands or property belonging to Canada or any Province shall be liable to taxation.—B.N.A. Act, 1867, sec. 125.

Historical Note.—As introduced in the Sydney Convention of 1891, the clause ran:—

"A State shall not, without the consent of the Parliament of the Commonwealth, impose any duty of tonnage, or raise or maintain any naval or military force, or impose any tax on any land or other property belonging to the Commonwealth."

In Committee, on Sir Samuel Griffith's motion, the words "nor shall the Commonwealth impose any tax on any land or property belonging to a State" were added. (Conv. Deb., Syd. [1891], 883.) At the Adelaide session, 1897, the clause was introduced in substantially the same form. In Committee, Mr. Henry asked how the words "tonnage dues" would affect Marine Boards and Harbour Trusts, which were dependent for revenue on tonnage dues. Mr. Barton thought the words unnecessary, since if they were payments for services they ought not to be interfered with, and if taxes they would be unconstitutional as interfering with free trade. The words were omitted. At the Melbourne session, the clause was shortly discussed. (Conv. Deb., Melb., p. 653.) A verbal transposition was made after the fourth report.

§ 457. "Raise or Maintain."

A State is forbidden without the consent of the Federal Parliament to raise or maintain any naval or military force. This inhibition, coupled with sec. 51—vi., has the effect of conferring on the Federal Parliament exclusive power with respect to naval and military forces. The negation in this section is so strong, "no State shall raise or maintain," that it begins to operate immediately on a colony becoming a State; thereafter it will render the raising maintenance of naval and military forces by a State absolutely illegal. The inhibition, however, is accompanied by the condition that it may be removed with the consent of the Federal Parliament.

Sec. 69 provides that the departments of naval and military defence in each State shall be transferred to the Commonwealth on a date to be proclaimed by the Governor-General. A question arises as to the position of the existing naval and military forces in the different colonies during the period after the establishment of the Commonwealth and before the actual transfer. No permissive law can be passed until the Parliament meets; and it can hardly be intended that during that interval the maintenance of the existing forces is illegal. It has been suggested, in order to meet this difficulty, that "maintain" should be read as subsidiary to "raise," so that the words should mean "no State shall raise or (having raised) maintain." The difficulty could, of course, be evaded by the transfer of the defence departments simultaneously with the establishment of the Commonwealth.

§ 458. "Impose any Tax on Property . . Belonging to the Commonwealth."

The immunity of Commonwealth property from taxation by the States is secured by this section. A State may not impose any tax on property of any kind belonging to the Commonwealth without its consent given through the agency of the Federal Parliament. The property of the Commonwealth will include all revenues derived from taxation (sec. 51—ii.); money borrowed on the credit of the Commonwealth (sec. 51—iv.); land. places. buildings, and chattels acquired by the Commonwealth from the States, or from private individuals (sec. 51—xxxi.); such railways as may be taken over by the Commonwealth from the States (sec. 51—xxxii.); such railways as may be constructed or extended by the Commonwealth for the States (sec. 51—xxxiii.); revenue derived from fines, penalties, fees, and forfeitures imposed by Federal laws (sec. 53); departmental buildings and property which will be transferred to the Commonwealth by the States, such as post and telegraph buildings and materials, military and naval works, fortifications, equipments, war materials, war vessels, &c., light-house and light-ships, beacons and buoys, and quarantine stations (sec. 69); and property of any kind used in connection with departments taken over (sec. 85—i.).

Under the Constitution of the United States, which contains no express inhibition like this, it has been held that the States cannot tax the property and lawful agencies and instrumentalities of the Federal Government, no matter in whose hands they may be found. McCulloch *v.* Maryland, 4 Wheat. 316; Dobbins *v.* Commissioners of Erie County, 16 Pet. 435; Bank Tax Cases, 3 Wall. 573; Compare Leprohon *v.* City of Ottawa, 2 Ont. App. 522.)

A stock of the United States which constitutes the whole or a part of the capital stock of a State bank is not subject to State taxation. Such taxation would be a tax upon the exercise of the powers conferred upon Congress. If such power were recognized in the States it might be carried to such extent as to, in effect, destroy this power in Congress. (The People of New York *v.* Commissioners of Taxes, 2 Wall. 200. Baker, Annot. Const. 17.)

Securities of the United States are exempt from State taxation, and this immunity extends to the capital stock of a corporation if made up of such public funds. (Provident Inst. *v.* Massachusetts, 6 Wall. 611; National Bank *v.* Kentucky, 9 Wall. 353. *Id.* 18.)

United States certificates of indebtedness issued by the general Government directly to creditors are subject to taxation by the States. (The Banks *v.* Mayor, 7 Wall. 16. *Id.*)

Where the capital of a bank is invested in Government bonds it cannot be taxed by the States. But the shares of stock may be taxed as such in hands of stockholders. And held that the revenue law of Kentucky which imposes a tax on bank stock, and requires the officers of the bank to pay the tax so levied on the shares of stock, is a tax on the stockholders and not on the capital of the bank, and is valid. (National Bank *v.* Kentucky, 9 Wall. 353; Lionberger *v.* Rouse, 9 Wall. 468. *Id.* 19.)

United States securities are not subject to taxation by States. (Society for Savings *v.* Coite, 6 Wall. 594; Weston *v.* Charleston, 2 Pet. 449; McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* United States Bank, 9 Wheat. 738. *Id.*)

§ 459. "Nor Shall the Commonwealth."

The exemption of State property from Federal taxation is also secured. The Supreme Court of the United States has decided that the general principles of the Constitution forbid the Congress to tax the necessary governmental instrumentalities of the States, such as the salaries of officers and the revenues of municipal corporations, on the ground that such a power would enable the Congress to destroy the States, which nothing short of the amending power, the sovereignty, should be able to do in a federal system of government. (Collector *v.* Day, 11 Wall. 113.) The United States courts determine, of course, in what these necessary instrumentalities, in any particular case, consist. (Burgess, Political Sc., ii. p. 151.)

States not to coin money.

115. A State shall not coin money[460], nor make anything but gold and silver coin a legal tender[461] in payment of debts.

UNITED STATES.—No State shall . . . coin money; . . . make anything but gold and silver coin a tender in payment of debts.—Art. I., sec. x., sub-s. 1.

HISTORICAL NOTE.—The clause in the Commonwealth Bill of 1891 was in identical words—with the exception of "or" for "nor." At the Adelaide session, 1897, it was introduced and passed as it now stands. (Conv. Deb., Adel., p. 1204.) At the Melbourne session, a suggestion by the Legislative Council of Tasmania, to insert after "money" the words "unless the Parliament otherwise provides" was negatived. A suggestion by the Legislative Assembly of New South Wales, to omit the provision as to legal tender, and insert "unless the Parliament otherwise determines," was also negatived. (Conv. Deb., Melb., pp. 653-4.)

§ 460. "A State shall not Coin Money."

Coinage is a prerogative of the Crown (see Note, § 177, *supra*). A State is forbidden to coin money; it cannot create a metal currency; it cannot give to metal any more than to paper the quality of money. The combined effect of this negation, coupled with the operation of sec. 51—xii., is that the coinage and legitimation of metal money, and in fact the regulation of the whole of the monetary system of the Commonwealth, is exclusively vested in the Federal Parliament, as against the States. That Parliament alone will be able to create money and regulate its value, as well as create paper money, and regulate its value. Its laws of course will only be operative within the Commonwealth, and may, in accordance with the usual practice, be reserved for Imperial consideration, in order to maintain the uniformity of coinage laws throughout the Empire.

§ 461. "Nor Make anything but Gold and Silver Coin a Legal Tender."

The provision of this section, that the States may not make anything but gold and silver coin a legal tender in payment of debts, would appear, at first view, to authorize a State to make gold and silver a legal tender, in the absence of Federal legislation, and consequently to give the States a concurrent power within those limits. It must be noted, however, that gold and silver coin can only be impressed with the quality of money by Federal legislation, and Federal legislation may withdraw that quality at any time. Then the power of the States to make gold and silver a legal tender would cease; gold and silver metal can not be made legal tender until it is converted into coin; it can only be converted into coin by the Federal authority. (Burgess, Political Sc. ii. 142.)

Commonwealth not to legislate in respect to religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance[462], or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

United States.—No religious test shall ever be required as a qualification to any office or public trust under the United States.—Art. VI. sec. 3.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.—Amendment I.

Historical Note.—Clause 16, Chap. V. of the Commonwealth Bill of 1891 was:—"A State shall not make any law prohibiting the free exercise of any religion.' This was adopted verbatim at the Adelaide session, 1897. At the Melbourne session, Mr. Higgins moved an amendment to make the clause read: "A State shall not, nor shall the Commonwealth, make any law prohibiting the free exercise of any religion, or imposing any religious test or observance." Mr. Higgins argued that these words might be necessary to prevent an implication, arising out of the recognition of Almighty God in the preamble, that the Commonwealth had power to legislate upon religious matters. The objections raised to the amendment were that the "free exercise of religion" was too wide an expression, and might sanction objectionable rites; and that the provision was unnecessary, as the Federal Parliament had no power to legislate as to religion. Mr. Higgins' amendment was negatived, as was also a suggestion by the House of Assembly in Tasmania, to add the words "nor appropriate any portion of its revenues or property for the propagation or support of any religion." The clause itself was then negatived. (Conv. Deb., Melb., pp. 654-64.) At a later stage Mr. Higgins proposed a new clause, in substantially the form of the above section. Mr. Symon moved, as an amendment, to substitute the following provision:—

"Nothing in this Constitution shall be held to empower the Commonwealth to require any religious test as a qualification for any public office or public trust under the Commonwealth."

After debate, Mr. Symon's amendment was negatived by 22 votes to 19, and Mr. Higgins' clause was carried by 25 votes to 16. (Conv. Deb., Melb., pp. 1769-79.) Drafting amendments were made after the fourth report.

§ 462. "Any Religion or . . . any Religious Observance."

The Commonwealth is forbidden to make any law for establishing any religion or for imposing any religious observance. A preliminary observation which should be made is that the term Commonwealth as used in this section does not mean the Federal community, but the Government of the Commonwealth acting through any of its agencies or instrumentalities. The people and States constituting the Federal community could at any time interpose and amend the Constitution in order to authorize the enactment, by the Federal Parliament, of the laws now prohibited. The prohibition itself and the circumstances under which it has found a place in the Constitution next demand attention.

By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship. The Christian religion is, in most English speaking countries, recognized as a part of the common law. "There is abundant authority for saying that Christianity is a part and parcel of the law of the land." (Per Kelly, C.B., in Cowan *v.* Milbourn [1867], L.R. 2 Ex. 234.) In America the courts of the Union and of the States find it necessary, in administering the common law, to take notice that the prevailing religion is Christian. (Vidal *v.* Girard's Executors, 2 How.

127.) Consequently the fundamental principles of the Christian religion will continue to be respected, although not enforced by Federal legislation. For example, the Federal Parliament will have to provide for the administration of oaths in legal proceedings, and there is nothing to prevent it from enabling an oath to be taken, as at common law, on the sanctity of the Holy Gospel. (Cooley's Principles of Const. Law, 224)

In considering the question of religion, the Federal Convention was called on to decide (1) whether it was advisable to grant substantive power of this kind to the Federal Parliament ; and if not, (2) whether it was necessary to deny this power to the Federal Parliament. As regards the first question, it was not seriously suggested that any such power should be granted. The only arguable point was whether it ought to be denied, and if so, to what extent ? The Federal Parliament is a legislative body capable only of exercising enumerated powers. Its powers are determined and limited by actual grants to be found within the Constitution. Anything not granted to it is denied to it. If it is not granted the power to deal with religion, it cannot legislate concerning religion. It is superfluous to deny to it what is not granted—what it does not possess. The force of this reasoning, based on recognized canons of federal construction, was generally conceded. At the same time it was found that the American Constitution contained two important negative sections relating to religion. As originally drawn, that Constitution, in Art. VI., s. 3, declared that no religious test should ever be required as a qualification for an office or public trust under the United States Government. By the first amendment it was provided that Congress should make no laws respecting an establishment of religion or prohibiting the free exercise thereof. The prohibition of religious tests was a denial of power—a denial which was necessary, because otherwise there would have been nothing to prevent the Federal legislature, in defining the qualifications for federal office, to impose such tests. It was therefore a provision of practical use and value. The prohibition contained in the first amendment was one of the ten articles in the so-called "American Bill of Rights" adopted after the establishment of the Union, in order to satisfy popular demands and sentiments. No logical or constitutional reasons have been stated why such a negation of power which had never been granted and which, therefore, could never be legally exercised, was introduced into the instrument of Government. It does not appear that its necessity has ever been demonstrated. Still, that was one of the grounds on which Mr. H. B. Higgins asked the Convention of 1898 to adopt the section now under consideration.

The strongest argument, however, for the adoption of the earlier portion of sec. 116, was found in the special form of the preamble of the Constitution Act, which recites that the people of the colonies, "humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Commonwealth." Referring to this recital, it was stated by Mr. Higgins that, although the preamble to the Constitution of the United States contained no such words as these, it had been decided by the courts in the year 1892 that the people of the United States were a Christian people ; and although the Constitution gave no power to Congress to make laws relating to Sunday observance, that decision was shortly afterwards followed by a Federal enactment declaring that the Chicago Exhibition should be closed on Sundays. This law, he said, was passed simply on the ground that among Christian nations Christian observances should be enforced. (Conv. Deb., Melb., p. 1734.) If, then, such Federal legislation could be founded on a Constitution which contained no reference whatever to the Almighty, how much more likely was it that the Federal Parliament might, owing to the recital in the preamble, be held to possess power with respect to religion of which we have no conception. Consequently, argued Mr. Higgins, the power to deal with religion in every shape and form should be clearly denied to the Federal Parliament. These arguments were allowed to prevail, and the provisions of sec. 116 became part of the Constitution. (See, however, note, § 4, *supra*, "Humbly relying on the blessing of Almighty God," and Church of the Holy Trinity *v.* United States, 143 U.S. 457, there cited.)

The appearance of this section in a chapter purporting to deal with the States is

somewhat anomalous; it can only be accounted for by the fact that it took the place of clause 15 of Ch. V. in the Draft Bill of 1891, which declared that a State should not prohibit the free exercise of any religion. How such a clause crept into the Bill of 1891 it is difficult to conjecture. It was rejected without hesitation by the Convention of 1898, which saw no reason or necessity for interfering with the States in the free and unfettered exercise of their power over religion.

Whilst the Constitution forbids the Federal Parliament to interfere with the free exercise of religion, it does not make any provision for protecting the citizens of the States in their religious worship or religious liberties; this is left entirely to the State Constitutions and laws, and there is no inhibition in regard to the subject imposed upon the States. (Permoli *v.* First Municipality, 3 How. 589; *Ex parte* Garland, 4 Wall. 398. Baker, Annot. Const. p. 179.)

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and this section cannot be invoked as a protection against legislation for their punishment. (Reynolds *v.* United States, 98 U.S. 145; Davis *v.* Beason, 133 U.S. 333. *Id.*)

"In the great case of Reynolds *v.* United States, the constitutional immunity of the individual in respect to the freedom of religion and worship was fixed and defined. The court declared that by this constitutional restriction Congress is deprived of legislative power over opinion merely, but is left free to reach actions which it may regard as violations of social duties or as subversive of good order. The free exercise of religion secured by the Constitution to the individual against the power of the government is, therefore, confined to the realm of purely spiritual worship; *i.e.*, to relations between the individual and an extra-mundane being. So soon as religion seeks to regulate relations between two or more individuals, it becomes subject to the powers of the government and to the supremacy of the law; *i.e.*, the individual has in this case no constitutional immunity against governmental interference." (Burgess, Political Sc. I. p. 194.)

An appropriation of money to a hospital conducted by a Roman Catholic sisterhood is not a law respecting an establishment of religion. (Bradfield *v.* Roberts, 175 U.S. 291.)

Rights of residents in States.

117. A subject of the Queen[463], resident in any State[463A], shall not be subject in any other State to any disability or discrimination[464] which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

UNITED STATES.—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.—Const., Art. IV., sec. 2.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . . deny to any persons within its jurisdiction the equal protection of its laws.—Fourteenth Amendment, sec. 1.

HISTORICAL NOTE.—Clause 17, Chap. V., of the Commonwealth Bill of 1891 was:—

"A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws."

At the Adelaide session, 1897, this was adopted verbatim. At the Melbourne session, it was proposed, on the suggestion of the Legislative Assembly of New South Wales and the Legislative Council of Tasmania, to omit the first portion. No one was able to suggest a privilege or immunity of a citizen of one State which could be abridged by a law of another State, and it was pointed out that there was no definition of citizenship. Mr. Barton and Mr. Wise wished to give the citizens of each State the privileges and immunities of citizens of the other State; Mr. Reid and Mr. Symon said that this would be an interference with the independence of States, and that the Convention was only concerned with protecting the federal citizenship. Mr. Wise, as a test question,

moved the first few words of an amendment suggested by the House of Assembly in Tasmania, based on the fourteenth amendment of the American Constitution, and declaring that the citizens of each State should be citizens of the Commonwealth, and entitled to all the privileges and immunities of citizens of the Commonwealth in the several States. After debate, this was negatived by 24 votes to 17; and the words dealing with privileges and immunities were then struck out. An amendment by Mr. O'Connor, to add "deprive any person of life, liberty, or property without due process of law," was negatived by 23 votes to 19. An amendment by Mr. Glynn, to add "deny to the citizens of other States the privileges and immunities of its own citizens," was also negatived, and the whole clause was struck out. (Conv. Deb., Melb., pp. 664-91.) At a later stage Dr. Quick moved to insert in the "powers of Parliament" clause a new sub-clause—"Commonwealth citizenship." The importance of the question was recognized; but there were three different opinions expressed:—(1) That the Parliament should have power to deal with the question; (2) that citizenship ought to be defined in the Constitution itself; (3) that the rights of citizenship were already secured in the Constitution, and that citizenship itself had never been defined in Great Britain, and was better not defined. The sub-clause was negatived by 21 votes to 15. (Conv. Deb., Melb., pp. 1750-68.) On the reconsideration of clauses, Mr. Symon moved, in place of the clause struck out, to insert:—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Dr. Quick moved as an amendment to insert a definition of Commonwealth citizenship:—"All persons resident within the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Parliament, shall be citizens of the Commonwealth." This was thought too wide, and opinions were expressed that the better plan would be to empower the Parliament to deal with the question. Mr. O'Connor then moved to insert:—"Every subject of the Queen, resident in any State or part of the Commonwealth, shall be entitled in any other State or part of the Commonwealth to all the privileges and immunities to which he would be entitled if a subject of the Queen resident in that latter State or part of the Commonwealth." This was objected to as being too wide, and making residence in one State equivalent to another, for all purposes. It was suggested that the clause should be put negatively, instead of affirmatively, and Mr. O'Connor then proposed it as follows:—"No subject of the Queen, resident in any State, shall be subject in any other State to any disability or discrimination not equally applicable to the subjects of the Queen in such other State." This was agreed to. (*Id.* pp. 1780-1802.) After the second report Mr. Deakin moved to substitute "such" for "the" before "subjects," in order to indicate to the Drafting Committee that State rights of defining citizenship were not interfered with. This was agreed to. Drafting amendments were made after the fourth report.

§ 463. "A Subject of the Queen."

The clause of the Bill of 1891, cited above, provided that a State should not make or enforce any law abridging any privilege or immunity of citizens of other States, nor deny to any person, within its jurisdiction, the equal protection of the laws. The framers of that clause did not define State citizenship, as distinguished from municipal citizenship. The term citizen was a novel one in the connection in which it was used. The clause was constructed out of pre-existing materials to be found in two clauses in the Constitution of the United States, viz., (1) "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." (Art. IV. sec. 2.) (2) "Nor shall any State . . deny to any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment, sec. 1.)

Referring to the importance of the first of these provisions, Von Holst says:—"To it is chiefly due the fact that, step by step with the progressive development of the United States, the practical nationalization of the people proceeds." (Const. Law, p. 247.) The marginal note to the clause of the Draft Bill referred to reads:—"And

protection of citizens of the Commonwealth;" that note is not warranted by the clause itself, which did not mention a citizenship of the Commonwealth, but only protected the privileges and immunities of citizens of States.

Sec. 117 of the present Constitution represents the modest outcome of an attempt on the part of the Convention of 1898 to improve the work of 1891, and to establish a status capable of being designated "Federal citizenship." It was suggested that in a federal Commonwealth, such as was being called into existence, there should be a full-bloomed national citizenship above and beyond and immeasurably superior to State citizenship. A person might be a domiciled resident of a State and an elector for a State, but at the same time he would occupy a broader and more dignified relationship in his membership of the great federated community, of which the States were separate parts and entities; and that relationship ought to be expressly defined. These contentions, apparently logical, were not sustained. Membership of the federal Commonwealth may, as a legal relation, be deduced from the Constitution, but it is not expressed there in the concrete form which the advocates of the foregoing views proposed.

According to the root meaning of the word, as well as its original use, a citizen was a member of a city. The political life of ancient Greece knew nothing higher or more developed than a city commonwealth, which occasionally combined with other city commonwealths in a kind of Federal Union. The independent self-ruling city was the political unit and the political ideal. A citizen was a member of a city state. The city was, to the Greek, his all in all; he was above all things a citizen. His political career and horizon were restricted to a city community. (Freeman's Greater Greece and Greater Britain, p. 18.) The Greek felt the tie of membership of such a community, with all the duties which sprang from membership. He owed faith and loyalty to his city—loyalty in its true and ancient sense of obedience to the law. The tie was local; the duty was local; of a tie of personal allegiance, binding and subjecting him to a personal superior—of loyalty in that sense the old Greek, the Phœnician never had any thought or experience (*id.* pp. 19-20.)

In the Roman Republic the term "*civitas*" expressed the bundle of rights and obligations connoted by citizenship; the conceptions involved in the Roman *civitas* implied citizenship in an enlarged sense, as denoting not the membership of a city state, as known to the Greeks, but the membership of a complex and highly organized political community which, beginning in the city of the Seven Hills, expanded into a national republic, which united all Italy and then all the known world into one Empire. According to Roman law men were originally divided into citizens (*cives*) and aliens (*peregrini*). The rights of citizens fell into two branches, political and civil. Political rights were those relating to the electoral and legislative powers (*jus suffragii*) and capacity for office (*jus honorum*); civil rights related to property (*commercium*) or to marriage (*connubium*). Aliens were deprived of political rights. They were also refused proprietary and family rights, except to a limited extent. (Poste's Gaius, p. 176.)

In the middle ages, during which the monarchies of modern times grew and became organized, personal allegiance or subjection became the tie which bound the people together, causing them to rally round and acknowledge a leader, who in return for allegiance and service afforded them his protection. Allegiance and subjection were then the test of membership of a political community. The members of such a community owing personal duty to a single sovereign were called "subjects." That relationship was one that could not be acquired or lost without the permission of the personal sovereign.

"By the English common law, founded on the principle of feudal ligeance and homage, none were admissible as natural-born subjects, if they were not born in a place actually possessed at the time of their birth, either by the king himself or by some prince doing homage to him for it; except, first, the children of any subjects born beyond sea who at the birth of those children should be in the service of the Crown; secondly, the sovereign's children born during the royalty of their parents; and, thirdly,

the heir of the Crown wherever born." (Report of the Naturalization Committee, Part I. 1869.)

There is thus a fundamental distinction between a "citizen" as understood in ancient Greece, in ancient Rome, and in modern republics, and a "subject" as understood at common law. (See Note, "A Subject or a Citizen," § 144, *supra.*)

The framers of the Constitution of the United States had no difficulty in the selection of a word to denote membership of the nation which they helped to organize. The people of the United States, having successfully rebelled against George III., ceased to be subjects of a monarch; they only recognized the obligation of loyalty to their country, to their Constitution, and to their political institutions. Hence they naturally reverted to the wider conception of citizen, as known to the Roman law, in order to express the idea of membership of the new federal community; they also used the same term to express the idea of membership of the minor groups, the States, within the federal community.

The original Constitution, in its sections relating to the organs of government, provided that no person should be qualified to be elected President or member of Congress unless he was "a citizen of the United States" of so many years standing; these clauses clearly contemplated and recognized, but did not define, a federal citizenship. Then Art. IV. s. 2 provided that the citizens of each State should be entitled to the privileges and immunities of citizens of the several States This clause recognized a State citizenship distinct from and independent of a Federal citizenship, and from this State citizenship certain important results of advantage to citizens were intended to flow. From these provisions there was deduced the idea, so commonly met with in federal literature, that in a federation there is a dual citizenship as well as a dual system of government. The Constitutional development and formulation of a Federal citizenship was completed by the famous Fourteenth Amendment, passed after the Civil War to establish the equality and freedom of the negro race:—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Dr. Burgess has pointed out that before the adoption of that amendment the Constitution contained no definition of citizenship, either of the United States or of a State. It referred to a citizenship of the United States as a qualification for membership of Congress and for the Presidential office, but it did not declare what should constitute such citizenship. The leaders of the State-rights party held that citizenship of the United States was but the consequence of citizenship in some State. The Supreme Court itself indicated that it was inclining to the same view in the decision that a man of African descent could not be a citizen of a State or of the United States; *i.e.*, that the United States Government had not the power to make him so. (Dred Scott *v.* Sandford, 19 How. 393; Burgess, Political Sc. I. p. 219.)

"This amendment, therefore, reverses the previously-established principle. According to it. citizenship is primarily of the United States; and secondarily and consequently, of the locality in which the citizen of the United States may reside. Citizenship, both of the United States and of the States, is thus conferred by the Constitution of the United States and the laws of Congress made in accordance therewith. The States can neither confer nor withhold citizenship of the United States. A citizen of the United States is now, *ipso jure*, a citizen of the State in which he may fix his residence; and if any State should undertake to defeat the spirit of this provision by the enactment of hostile laws in regard to the gaining of residence within its limits, any individual suffering injury from the same may invoke the interpretation of the term 'residence' by the United States judiciary, and the aid of the general government in the protection of his liberty under that interpretation. There is nothing in this provision, indeed, which would prevent a State from permitting an alien to exercise the privileges of a citizen within the State so far as that particular State is concerned. The provision was meant to enlarge the enjoyment of these privileges, not to contract them.

It is easy to see, however, that a State may abuse this power to the detriment of the whole people of the United States. For example, a State might permit aliens to hold real estate in such quantities and under such tenures as to introduce a very disturbing element into our general system of ownership of land. I will say nothing at this point concerning the possible, nay, actual, abuse of this power by the States in permitting aliens to exercise the suffrage, since the suffrage cannot be classed among the civil or private rights." (Burgess, Political Sc. I. p. 219.)

In framing the Constitution of a Federal Commonwealth under the Crown, and in determining the status, conditions, and incidents of membership thereof, several technical difficulties were encountered, such as, what designation should be assigned and what privileges and immunities could be annexed to that membership?

In view of the historical associations and the peculiar significance of the terms "citizens" and "subjects," one being used to express the membership of a republican community, and the other that of a community acknowledging an allegiance to a personal sovereign, it was obvious that there might have been an impropriety in discarding the time-honoured word "subject" and in adopting a nomenclature unobjectionable in itself but associated with a different system of political government.

Whatever be the reason, rightly or wrongly, the term "citizen" has been rejected and does not appear in the Constitution. In several notable passages in the instrument, the phrase, "the people of the Commonwealth," is used to denote the personal units composing the national elements of the Commonwealth. The members of the House of Representatives are chosen by "the people of the Commonwealth" (sec. 24). In reckoning the number of "the people of the Commonwealth," persons belonging to disqualified races are not to be counted (sec. 25). In reckoning the numbers of "the people of the Commonwealth or of a State," aboriginal natives are not to be counted (sec. 127.) This is the nearest approach in the Constitution to a designation equivalent to citizenship, and intended to indicate membership of the Federal community. When it is sought to express a narrower political relationship than that of the Commonwealth, the phrase "the people of the States" is used. The senators for each State are chosen by "the people of the State" (sec. 7). The number of members of the House of Representatives in each State is determined by dividing "the people of each State" by the quota (sec. 24—ii.). Where it is sought to express a political relationship more comprehensive than either that of the State or that of the Commonwealth, the term used is one denoting British nationality—"a subject of the Queen." Thus the different gradations of political status recognized by the Constitution are:—

Subjects of the Queen:
People of the Commonwealth:
People of a State.

In their political relations, as subjects of the Queen, the people are considered as inhabitants and individual units of the Empire over which Her Majesty presides. That is the widest political relationship known to British law. "I am a British subject," is equal in practical and Imperial significance to the proud boast of the Roman "*civis Romanus sum.*" Subjects of the Queen, or British subjects, have rights, privileges, and immunities secured to them by Imperial law, which they may assert and enjoy without hindrance in any part of the Queen's dominions, and in British ships on the high seas. In a modified degree some of those rights, privileges, and immunities, founded on treaty, may be enforced in foreign countries. The whole naval and military strength of the Empire, and the assistance of its highest courts of justice, may be invoked for the vindication of those rights, privileges, and immunities.

The people of the Commonwealth constitute only one group of the subjects of the Queen. The people of the Commonwealth are those people who are permanently domiciled within the territorial limits of the Commonwealth. Territorially such people may be called Australians, but constitutionally they are described as British subjects or subjects of the Queen. They do not lose their character as people of the Commonwealth by migrating from one State to another, any more than they lose their national character

by migrating from one part of the Empire to another, or sojourning in foreign countries. Their privileges and immunities as people of the Commonwealth are secured and guaranteed to them, without regard to their residence in a particular State.

The people of a State compose a group of the people of the Commonwealth. Their privileges and immunities, as members of a State community, depend on their residence within the limits of the State, and their compliance with the requirements of State laws. Within each State there are minor municipal groups designated citizens.

In this connection it is interesting to notice how the need of some word to express colonial citizenship has evolved the phrase "subject of a colony," first made use of by Sir G. J. Turner, L.J., in Low *v.* Routledge, L.R. 1 Ch. 42, 1865. Referring to this expression, a writer in 31 Canad. L.J. 37, says: "There is no such thing as a Canadian, Australian, or Indian subject." Mr. Lefroy, commenting on this observation, admits that in an international sense no doubt this is so; but argues that the authorities on the extra-territorial application of colonial laws show that "there is a sense in which it is proper to speak of a man as a subject of a particular colony, and that legal distinctions hinge upon his position as such." (Lefroy, Legisl. Power in Canada, p. 329, n.)

Assuming that the establishment of a distinct membership of the Federal community may be inferred from those passages in the Constitution which allude to "the people of the Commonwealth," we now proceed to consider what incidents are annexed to such a status, and how they can be enforced and how differentiated from incidents annexed to the other condition, State membership, which may be inferred from the use of the expression, "the people of the State."

Federal Privileges and Immunities.—In the Constitution of the Commonwealth there is no special section corresponding to the Fourteenth Amendment of the American Constitution, declaring who are "the people of the Commonwealth," affirming their privileges and immunities, and placing them beyond the power of the States to abridge. Since the decision of the Supreme Court of the United States in the celebrated Slaughter-house Cases (16 Wall. 36), it has been doubted, by competent American jurists, whether the Fourteenth Amendment was really necessary in order to place Federal privileges and immunities beyond State control. The mere fact that the Constitution has created privileges and immunities is, it is argued, of itself sufficient to place them beyond the reach of unfriendly State legislation. The State laws can only operate within the sphere of power assigned to the States. The same reasoning applies to the Constitution of the Commonwealth, and accounts for the absence of any affirmation similar to that of the Fourteenth Amendment. The privileges and immunities of the people of the Commonwealth exist within the sphere of Federal power, and by the Constitution itself the Federal laws are paramount and supreme; they cannot be impaired or abridged by State legislation. (Cooley's Principles of Const. Law, 274.)

Although there is no special section affirming the existence of Federal privileges and immunities, such privileges and immunities may be gathered from the express provisions or necessary implications of the Constitution. Among the most prominent Federal privileges may be mentioned those relating to the suffrage—the right to vote at elections for both houses of the Federal Parliament (sec. 41); the right to participate, on terms of equality, in trade and commerce between the States and with other countries (secs. 51—i. and 99); the right to have the benefit of the postal, telegraphic, and telephonic services (sec. 51—v.); the right to share the protection of the naval and military forces of the Commonwealth (sec. 51—vi.); the right to use the navigable waters of the Commonwealth for the purposes of trade and commerce (sec. 98); the right to pass from one State into another and to hold intercourse with foreign countries (secs. 51—i. and 92). To be allowed to visit the seat of Government, to gain access to Federal territories, to petition the Federal authorities, to examine the public records of the Federal courts and institutions, are rights which, if not expressly granted, may be inferred from the Constitution, and which could not be taken away or abridged by the States any more than those directly and clearly conveyed. (Story, Comm. § 1937; Crandall *v.* Nevada, 6 Wall. 35.)

Immunities are generally the corollaries of privileges. Where a privilege is granted there must be an exemption from interference or obstruction in the enjoyment of the privilege. Consequently, a State could not pass laws which would operate as burdens and impositions and prevent the free exercise of Federal privileges. Thus a State could not require an importer of foreign merchandise to pay a tax for a license to sell such goods. (Brown *v.* Maryland, 12 Wheat. 419.) Free intercourse between the States being established by the Constitution, a State could not impose a tax on travellers entering or leaving the State. (Crandall *v.* Nevada, 6 Wall. 35.) The people of the Commonwealth having a right to sue in the Federal courts in the prosecution of causes specified by the Constitution, a State could not obstruct the citizens of other States in suing its own citizens in the Federal courts. (Insurance Co. *v.* Morse, 20 Wall. 445.) A State could not interfere with the freedom of inter-state trade by demanding license fees from the vendors of goods imported from other States (sec. 92).

Enforcement of Federal Privileges and Immunities.—As there is no necessity for specially declaring that the privileges and immunities of the people of the Commonwealth may not be abridged by the States, so there is no necessity for specifying any procedure by which they may be enforced. They may be described as self-executing. Every privilege or immunity conferred by the Constitution implies a prohibition against anything inconsistent with the free exercise or enjoyment thereof. Any law passed by a State, in violation of any constitutional privilege or immunity, would be null and void; the courts would not enforce it.

§ 463a. "Resident in Any State."

We have explained generally the privileges and immunities of the people belonging to the Commonwealth, and accounted for the absence from the Constitution of any express declaration or reference to such privileges or immunities; we now come to the consideration of those privileges and immunities created by and dependent upon State laws which are the only ones coming within the purview of sec. 117. This section as drawn prohibits the imposition of disabilities and discriminations by a State against the people of another State. It would be impossible, however, to grasp the significance of this prohibition without some consideration of the privileges and immunities with respect to which such disabilities and discriminations may be enacted.

State Privileges and Immunities.—In the exercise of its reserved powers each State will have exclusive authority to legislate concerning the rights, privileges, immunities, and obligations of the people. In fact the whole domain of civil liberty, except that assigned to the Federal authority, is subject to the jurisdiction of the State. A complete enumeration of the matters belonging to that domain, and dependent upon State law, would be too complicated and too lengthy to present, but a fair summary has been given by an eminent American Judge:—

"The privileges and immunities of State citizenship are all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the citizens of other States, may be mentioned as some of the principal privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental. (Per Washington, J., in Corfield *v.* Coryell, 4 Wash. C.C. 380.)

"Other Judges, while approving of this general enumeration, have been careful to say that they deem it safer and more in accordance with the duty of a judicial tribunal to leave the meaning to be determined in each case upon a view of the particular rights asserted therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are

of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." (Cooley's Const. Law, p. 207.)

Such being some of the fundamental privileges and immunities within the power of a State to confer, we are now in a position to consider the nature of the limitations imposed by sec. 117. This section provides that a subject of the Queen resident in one State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State. Its object is to establish a sort of inter-state reciprocity in the enjoyment of privileges and immunities created by and dependent upon State laws. This reciprocity is secured by the inhibition that a qualified resident in one State shall not, in his dealing or connection with another State, be liable to any disability or discrimination which would not be applicable to him if he were a qualified resident in that other State.

Residence is an elastic word which may be modified by the context. (*Exp.* Breull, *re* Bowie [1888], 16 Ch. D. 484; Lewis *v.* Graham [1888], 20 Q.B. D. 780.) Its ordinary meaning is the place where a person lives; that is, where he usually eats, drinks, and sleeps, or where his family or servants eat, drink, and sleep. (Per Bayley, J., in Rex. *v.* North Curry [1825], 4 Barn. and Cress. 959; and see Notes, pp. 477, 776, *supra.*) In this section, "a resident in any State" means a person who permanently lives in a State; one who is not a mere visitor or sojourner; one who by his continued residence in a State has become identified with it and is regarded as one of its people.

The privileges and immunities contemplated by this section are those which belong to resident subjects of the Queen in a State. The States are not forbidden to impose disabilities and make discriminations in laws relating to aliens. It is assumed that the resident subjects of the Queen will be the most favoured people and the special object of State consideration and solicitude. Hence the Constitution interposes and as a matter of national policy seeks to secure equality of treatment, in all the States, for subjects of the Queen resident in any State of the Commonwealth.

§ 464. "Disability or Discrimination."

No privileges or immunities are secured against disability and discrimination except those annexed by the laws of a State to the combined conditions of State residence and British subjectship. A State is not forbidden to enact that certain privileges and immunities may flow from a contractual relation. Thus a State law prohibiting, in certain districts, the sale of goods other than the agricultural products and articles manufactured in the State, by persons not residents of the State, until license therefor has been obtained, is unconstitutional. (Ward *v.* Maryland, 12 Wall. 418.) On the other hand, in contrast to this case, privileges and immunities attached by law to contracts by reason of the place where such contracts are made or executed are not within the mischief intended to be rectified by this section. It would not be a disability or discrimination prohibited by this section, for a State to deny to a widow, whose marriage was not contracted within the State or executed there by a matrimonial domicile, the same rights of property in the estate of a deceased husband as is given to a widow whose marriage was there contracted, or where the spouses live in the State. (Conner *v.* Elliott, 18 How. 591.) Other American cases may be cited in illustration of the operation of this section.

A State statute which, in effect, provides that where a defendant is out of the State the statute of limitations shall not run against the plaintiff if the latter resides in the State, but shall if he resides out of the state, is not repugnant to the "privilege and immunity" clause (*supra*). (Ryan *v.* Carter, 93 U.S. 78; Baker, Annot. Const. p. 158.)

A law of Iowa, which provides that a person having in his possession "Texas cattle" which have not been wintered north of a certain line shall be liable for all damages caused by allowing such cattle to run at large and thereby spread the Texas cattle fever, is not a denial to the citizens of other States of the rights, privileges and immunities accorded to citizens of Iowa. (Kimmish *v.* Ball, 129 U.S. 217. *Id.*)

The "privilege and immunity" clause does not control the power of the State Governments over the rights of their own citizens. Its sole purpose is to declare to the several States that whatever those rights are, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction. (Slaughter-House Cases, 16 Wall. 36. *Id.*)

This section, like the Fourteenth Amendment, is directed against State action. Its object is to place the citizens of each State on the same footing with citizens of other States, and inhibit discriminating legislation against them by other States. (United States *v.* Harris, 106 U.S. 629. *Id.*)

Each State owns the tide-waters and beds of all tide waters within its jurisdiction; a right of fishery is a property right, and not a mere privilege or immunity of citizenship. Therefore a State may grant to its own citizens the exclusive privilege of using the lands covered by water on its borders for the purpose of maintaining oyster-beds, and may with penalties prohibit such use by citizens of other States. (McCready *v.* Virginia, 94 U.S. 391. *Id.* 157.)

It seems doubtful whether the rule affirmed in McCready *v.* Virginia (*supra*) would be followed in a legal construction of sec. 117. To grant subjects of the Queen, in a State, the exclusive right to plant oysters in soil covered by tidal waters within a State and to forbid the subjects of the Queen resident in another State to do so, would look uncommonly like a discrimination in favour of the people of one State, and a disability on the people, subjects of the Queen, of another State; as such it would be within the mischief intended to be suppressed by the Constitution.

Corporations.—It has been held in the United States that a corporation created by a State is not a "citizen" of the State, so as to be entitled to the privileges and immunities of citizens in the several States. (Paul *v.* Virginia, 8 Wall. 168; Blake *v.* M'Clung, 172 U.S. 239.) It would seem equally clear that a corporation cannot be a "subject of the Queen" within the meaning of this section. Accordingly a State may discriminate between its own corporations and those of another State—subject of course to the limitations imposed by other sections of the Constitution. (Ducat *v.* Chicago, 10 Wall. 410.)

Recognition of laws, &c., of States.

118. Full faith and credit[465] shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

United States.—Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.—Const., Art. iv., sec. 1.

Historical Note.—In the Commonwealth Bill of 1891 were provisions identical with this section and with sub-sec. xxv. of sec. 51—provisions which together make up the American section quoted above. (Conv. Deb., Syd, 1891, p. 883.) At the Adelaide session in 1897, these provisions were adopted verbatim. At the Melbourne session a suggestion by the Legislative Council of New South Wales to omit (in sec. 51) "throughout the Commonwealth" was negatived.

§ 465. "Full Faith and Credit."

Section 118 contains a constitutional declaration in favour of inter-state official and judicial reciprocity, which the Federal Parliament and the States may assist to effectuate, but which they cannot prejudice or render nugatory; the Federal Parliament being enabled to carry it into execution by sec. 51—xxiv. and xxv., and the States in the exercise of their reserved powers. Subjects of the Queen, residents in one State, may have rights of property and personal privileges which they wish to assert in

other States where they do not reside. They may desire to take proceedings in the courts of another State, in order to assert their rights and privileges and to protect their interests. In such proceedings it may be necessary to prove the statutes, records, and judicial proceedings of their own State, or to give evidence of muniments of title existing in their own State. By the rules of international and inter-state comity, as well as at common law, there are certain recognized methods of proof and modes of enforcing such rights and privileges. These rules, however, may be altered or abolished by State legislation. It is conceivable that in times of antagonism and contention between States, laws might be passed in one State intended to defeat or delay the residents of another State in the prosecution of legal rights and remedies against residents in that State. This policy, once resorted to, would lead to reprisals and retaliations, resulting in infinite mischief and unwarrantable denial of right. The Constitution has interposed and converted the rule of comity into a rule of law, in order to promote uniformity of regulation in such inter-state proceedings as well as to prevent the possibility of resort to a narrow-minded unfraternal policy.

American Legislation.—In pursuance of power conferred on it by a similar section in the Constitution, the Congress of the United States, in 1790, passed a law which declared that the Acts of the legislatures of the several States should be authenticated by the seals of their respective States, and that the records and judicial proceedings of the courts of any State should be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, together with a certificate of the judge that the said attestation was in due form ; and that records so authenticated should have the same faith and credit given to them in every court within the United States as they had in the courts of that State. (U.S. Stat. at Large i. 122 ; Rev. Stat. 2nd ed. §§ 905-6 ; Hanley *v.* Donoghue, 116 U.S. 1 ; Cole *v.* Cunningham, 133 U.S. 107 ; cited Rorer, Inter-State Law, p. 154.)

By a subsequent Act of Congress, passed in 1804, similar provisions as to faith and credit were applied to all records and exemplications of office books kept in any public office of any State, not belonging to a court. (U.S. Stat. at Large ii. 298 ; Rev. Stat. 2nd ed. § 906 ; Rorer, Inter-State Law, p. 155.)

Application to State Courts.—"The foregoing constitutional and statutory provisions of the United States apply only to the courts of the States and Territories of the United States. They have no reference whatever to the courts, records, documents, or acts of the United States as evidence in the State courts, or to those of the State courts as evidence in the National courts ; in these cases the ordinary certificate of the clerk and seal of the court, in such manner or form as renders them admissible in the courts of the same State, or in the Federal courts, as the case may be, renders these documents, records, and acts mutually admissible as between the State and Federal courts, when otherwise proper evidence. But notwithstanding those National provisions are not intended to apply to the United States courts, yet the records of those courts are admissible in other courts, though certified in accordance with said act of Congress. The fact that such authentication *more* than fulfils the requirement of the law as to admissibility will not be ground of exclusion." (Rorer on Inter-State Law, p. 156.)

Federal Courts and State Courts.—"The State and National courts, though emanations of different sovereignties, are in no wise foreign tribunals to each other, nor are the National courts of one circuit or district such in reference to those of other circuits or districts, but are domestic tribunals, whose seals are recognized as matter of course. But such courts, both National and State, are courts of different sovereignties, and the National Courts are only required to give judgments of State courts such authority as they are entitled to in the courts of the State wherein they are rendered." (Rorer on Inter-State Law, p. 156.)

Proof of Statutes.—"The certificate and seal of State of the genuineness of statute laws need no other proof of their authenticity, or of the official character of the person certifying as Secretary of State, and if there be any interlineations they are presumed to have been made rightfully ; and so it is settled that State laws need not be proved in the courts of the United States." (Rorer on Inter-State Law, p. 159.)

General Principles.—"The full faith and credit to which the public acts, records, and proceedings are entitled in other States is the same faith and credit to which they

are entitled in the State whose acts, records, and judicial proceedings they are. (Armstrong *v.* Carson, 2 Dall. 302.) When, therefore, suit is brought in one State upon a judgment rendered by a court of another State, and it appears that by the law of the last-mentioned State it is conclusive upon the defendant, it must be held equally conclusive in the court in which suit upon it is brought. (Mills *v.* Duryee, 7 Cranch 481.) Whatever pleas would be good to it in the State where it was pronounced, and none others, might be pleaded to it in any other court within the United States. (Hampton *v.* McConnell, 3 Wheat. 234; Green *v.* Van Buskirk, 7 Wall. 139.) Judgments in one State when proved in another differ from judgments of another country in this alone, that they are not impeachable for fraud nor open to question upon the merits. (Hanley *v.* Donoghue, 116 U.S. 1.) But the judgment can have no greater or other force abroad than at home, and therefore it is always competent to show that it is invalid for want of jurisdiction in the court rendering it. (Harris *v.* Hardeman, 14 How. 334.) To preclude inquiry into it in another State, the judgment must not only be rendered by a court having jurisdiction of the subject-matter and the parties, but, if the defendant does not appear at the trial, it must be responsive to the pleadings. (Reynolds *v.* Stockton, 140 U.S. 254.) So anything that goes in release or discharge of the judgment may be shown. (McElmoyle *v.* Cohen, 13 Pet. 312; D'Arcy *v.* Ketchum, 11 How. 165.) And the Statute of Limitations of the State where the suit is brought will be available, if the case comes within it. But it is not competent for any State to pass an act of limitations which would, in effect, nullify judgments rendered in other States, and allow no remedy upon them whatever. Reasonable opportunity to enforce a demand must always be afforded." (Cooley's Principles of Const. Law, p. 203.)

"Constructive service of process by publication or attachment of property is sufficient to enable the courts of a State to subject property within it to their jurisdiction in such cases as the statutes of the States may provide therefor; but such a service cannot be the foundation of a personal judgment. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailable in proceedings to establish his personal liability. But in respect to the *res*, a judgment *in rem*, rendered with competent jurisdiction, is conclusive everywhere." (*Id.* pp. 204-5.)

"The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. (Robertson *v.* Pickrell, 109 U.S. 608.)" (Rorer on Inter-State Law, p. 155.)

"This section of the Constitution does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other States, and they enjoy not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the '*lex fori*' gives to them by its own laws, in their character of foreign judgments. (McElmoyle *v.* Cohen, 13 Pet. 312; D'Arcy *v.* Ketchum, 11 How. 165; Thompson *v.* Whitman, 18 Wall. 457; Pennoyer *v.* Neff, 95 U.S. 714; Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265; Christmas *v.* Russell, 5 Wall. 290; Story, Constitution, § 1303 et seq., and Story, Conflict of Law, § 609.) And other judicial proceedings can rest on no higher ground. (Cole *v.* Cunningham, 133 U.S. 107, 112.)" (*Id.* p. 152.)

The constitutional provision does not prevent enquiry into the jurisdiction of the court in which the judgment was rendered over subject matter and parties, or into the facts necessary to give such jurisdiction. (Thormann *v.* Frame, 176 U.S. 350.)

Federal Power.—The cases cited merely illustrate the law of the United States, as determined by the Constitution and by Federal legislation thereunder. It must be remembered that the Parliament of the Commonwealth has large powers of legislation under sec. 51—xxiv. and xxv. It can pass laws providing for the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of

the courts of the States. By the exercise of that power the Federal Parliament may revolutionize the principles of service of process, referred to in the extract from Cooley (*supra*). The Federal Parliament can likewise pass laws providing for the recognition, throughout the Commonwealth, of the laws, the public acts and records, and the judicial proceedings of the States. (As to legislation which may be passed in the exercise of these powers, see Notes on sec. 51—xxiv. and xxv.)

Protection of States from invasion and violence.

119. The Commonwealth shall protect every State against invasion[466] and, on the application of the Executive Government of the State, against domestic violence[467].

UNITED STATES.—The United States . . . shall protect [every State] against invasion; and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.—Art. IV., sec. 4.

HISTORICAL NOTE.—In the Commonwealth Bill of 1891, and in the Adelaide draft of 1897, this clause appeared verbatim. At the Melbourne session, Mr. Gordon moved to substitute "attack" for "invasion," to make it clear that a naval attack was included. This was negatived. (Conv. Deb., Melb., pp. 691-2.)

§ 466. "Protect every State against Invasion."

The Commonwealth is required to protect every State against invasion. The courts have interpreted the phrase, "United States" in a similar section in the American Constitution, to mean the Federal Government. (Luther *v.* Borden, 7 How. 1. See Pomeroy, Const. Law, § 101.) Hence the injunction that "the Commonwealth" shall protect a State refers to the Federal Government and not the political community of which that Government is an organ. The power and duty to protect against invasion may be exercised by the Federal authority on its own motion and according to its own judgment and discretion, without the necessity of an application from any State organization within the State.

§ 467. "Domestic Violence."

The Federal Authority is not required or empowered to interfere to protect a State against domestic violence, except on the application of the Executive Government of the State. The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive. If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers. And not only may the Executive Government interfere to suppress by force a rebellion which cripples its powers, but the federal courts may interfere in a peaceful way by issuing an injunction against the offenders, and executing the judgment of the

Court in the ordinary way. These principles were conclusively settled in the United States, in 1895, by the case of *Re* Debs (158 U.S. 564). Debs and others were officers of a trade union in Illinois, who combined to boycott the cars of the Pullman Palace Car Company, and proceeded by threats, intimidation, force and violence, to obstruct and wreck trains engaged in inter-state commerce, and in carrying the United States Mails. A Federal Circuit Court in Illinois, on a bill filed by the Pullman Company, granted an injunction against Debs and his associates. Debs, having been attached for disobedience to the injunction, applied to the Supreme Court of the United States for a writ of *habeas corpus*, which was refused on the ground that the Circuit Court had authority to issue and enforce the injunction.

"There is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers, and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of inter-state commerce, or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the Nation to compel obedience to its laws. But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of inter-state commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result." (Per Brewer, J., *Re* Debs, 158 U.S. 582.)

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." (Per Bradley, J., *Exp.* Siebold, 100 U.S. 395.)

Custody of offenders against laws of the Commonwealth.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth[468], and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Historical Note.—A clause in substantially the same words was in the Commonwealth Bill of 1891, and was adopted at the Adelaide session, 1897. At the Melbourne session the clause was verbally amended. (Conv. Deb., Melb., pp. 692-3.) A verbal alteration was also made after the fourth report.

§ 468. "Offences Against the Laws of the Commonwealth."

In the exercise of its constitutional powers the Federal Parliament may create privileges and immunities and impose obligations, and it may declare that any breach thereof is an offence, punishable by fine or imprisonment. Every violation of public law may be made an offence. For a definition of offences against laws of the Commonwealth, and a discussion of the question whether there is a common law of the Commonwealth, see Notes, §§ 326, 341, *supra*.

§ 469. "Prisons."

The Federal Government will be able to establish its own prisons and reformatories for the detention and punishment of prisoners convicted of offences against the law of the Commonwealth. Until such prisons are established it is the duty of every State to make provision for the detention and punishment of persons so convicted within its limits. Warrants of commitment and imprisonment signed by the proper officers of Federal courts will be as binding on the keepers of State gaols as those issued by the judges and magistrates of the States. The Federal Authority will presumably compensate the State Authorities for the expense which they may incur in providing the necessary gaol accommodation and supervision.

CHAPTER VI.—NEW STATES.

New States may be admitted or established.

121. The Parliament may admit to the Commonwealth or establish new States[470], and may upon such admission or establishment make or impose such terms and conditions[471], including the extent of representation in either House of the Parliament, as it thinks fit.

UNITED STATES.—New States may be admitted by the Congress into this Union.—Const. Art. IV. sec. 3, sub-sec. 1.

CANADA.—It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.—B.N.A. Act, 1867, sec. 146.

HISTORICAL NOTE.—Chap. VI. of the Commonwealth Bill of 1891 contained the following clauses:—

(1.) "Any of the existing Colonies of [*here name the existing colonies which have not adopted the Constitution*] may upon adopting this Constitution be admitted to the Commonwealth, and shall thereupon become and be a State of the Commonwealth."

(2.) "The Parliament of the Commonwealth may from time to time establish and admit to the Commonwealth new States, and may upon such establishment and admission make and impose such conditions, as to the extent of representation in either House of the Parliament or otherwise, as it thinks fit."

This would have entitled any of the existing Australian colonies to be admitted to the Commonwealth at any time, upon equal terms with the Original States, whereas other new States could only be admitted by the Parliament of the Commonwealth, on such terms as it thought fit to impose. In Committee, Colonel W. Collard Smith suggested that existing colonies which did not come in at first should only be permitted to come in afterwards on such terms as the Parliament might determine. Sir Samuel Griffith thought it better to leave the clause as it was, and no amendment was moved. (Conv. Deb., Syd. [1891], p. 883.)

At the Adelaide session both these clauses were included in the first draft. In Committee, however, it was pointed out that the provision as to existing colonies was altogether one-sided; it bound the outstanding colonies to nothing, whilst it bound the Commonwealth to admit them unconditionally at any time; and this offered an inducement to "languid" colonies to "lounge into the Federation" at their own convenience. It was suggested that either the Commonwealth should be empowered to impose terms, or that at least the consent of the Commonwealth should be required to the admission of a new State. On the other hand, it was argued that the clause as it stood would smooth the way for existing colonies, which might not be ready to join at present; and that to impose terms and conditions might discourage them. Eventually the first clause was struck out, and the second clause was amended to read as follows:—

"The Parliament may from time to time admit to the Commonwealth any of the existing colonies of [*here name the colonies which have not adopted the Constitution*] and

may from time to time establish new States, and may upon such admission or establishment impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit." (Conv. Deb., Adel., pp. 1007-12.)

During the statutory adjournment, various suggestions were made by the Legislatures. Both Houses in Western Australia and Tasmania suggested the restoration of the right of the existing colonies to claim admission at any time unconditionally. The Legislative Assembly of South Australia wished the representation of all new States to be unconditional; and both Houses in New South Wales suggested the omission of the power to impose terms and conditions—a suggestion which must be read with their request for proportional representation in the Senate. At the Melbourne session these various amendments were negatived. There was some debate on the words "admit" and "establish." (Conv. Deb., Melb., pp. 694-8.) Before the first report the clause was recast, and after the fourth report the words "from time to time" were omitted.

§ 470. "New States."

Two classes of States are distinctly recognized by the Constitution, (1) Original States and (2) new States. Original States mean such States as are parts of the Commonwealth at its establishment. New States are those which are subsequently admitted or established.

The colonies which were qualified to join the Commonwealth as original States (see clause 6) were seven in number: New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia. When the Constitution was framed by the Convention it was of course uncertain how many of these colonies would embrace the opportunity of becoming Original States, and how many might afterwards seek admission as New States. In the actual event, every one of them except New Zealand has become an Original State; so that New Zealand is the only one of the seven colonies to which this section can now apply; though other new States may be admitted or established in ways which we now proceed to discuss.

Modes of Creating New States.—This section contemplates two methods by which new States may be created and organized as autonomous parts of the Commonwealth—(1) by admission, (2) by establishment. The section does not specify the mode or conditions according to which new States may be admitted or established, or out of what country, or territory, or groups of population, new States are to be either admitted or established. This information may, however, be gathered partly by implication and partly from the express provisions of other sections of the Constitution.

(1.) The admission of new States can only refer to the entry into the Commonwealth of political communities which, prior to their entry, were duly constituted colonies, such as:—

(*a*) Colonies commonly known as Australasian colonies existing at the establishment of the Commonwealth, but not then joining it; of which, in the actual event, New Zealand is the only example.

(*b*) Colonies erected or to be erected in other dominions of the Crown; for example, New Guinea and Fiji.

(*c*) Colonies erected after the establishment of the Commonwealth by the division of other colonies.

This view is supported by clause 6 (Definition), which declares that "States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted or established. These colonies, when admitted, will be transformed into States, and, like original States, become parts of the Commonwealth.

(2.) The establishment of new States evidently includes the formation of States either out of Federal territory, or out of States already in existence, by sub-division or otherwise. Beyond the definition in clause 6, just cited, there is no actual affirmation that new States may be formed out of federal territory. It may be assumed, however, as unquestionable that, whilst some of the territories may permanently remain in a dependent condition subject to the dominion and exclusive jurisdiction of the Commonwealth, others, when sufficiently developed, and not required or appropriated for federal purposes, will be organized into new States having the special privileges of State Government with State representation in the Federal Parliament. In addition to the establishment of new States out of federal territory, they may also be formed out of pre-existing States by the three different methods; namely, division, combination, and accretion:

(*a*) By the partition of a State and the erection of its several parts into new States:

(*b*) By the union of the whole of two or more States, so that such wholes may constitute one State:

(*c*) By the junction of contiguous parts of two or more States, so that such parts may constitute one State:

Little need be said as to the admission of States originally qualified to become parts of the Commonwealth, except that New Zealand—the only outstanding colony which was so qualified—cannot demand admission as a right; her admission depends upon the discretion of the Federal Parliament, which may subject her to terms and conditions. At the same time it is not likely that she would be accorded any differential treatment; she would probably be admitted on terms of equality with the original States, provided that her territory remained undiminished. With reference to the admission of colonies formed by the sub-division of existing colonies, or any other colonies erected after the establishment of the Commonwealth, the Federal Parliament will have to determine when the moral, political, and material conditions of the population of any such newly organized colony are sufficient to justify the belief that its people are able to exercise the power of State Government and fit to participate in Federal Government. The considerations which should influence the Federal authority in deciding when to establish a new State are thus weightily put by Dr. Burgess:—

"Congress ought not to pass its enabling act until it is clear that such a population is fully prepared to exercise the powers of local self-government and to participate in the general government. When this moment has arrived, Congress ought not to withhold its enabling act. This is a matter, however, of political ethics, not of constitutional law; and the Congress alone must judge when the proper requirements shall have been fulfilled to warrant the change from centralized to federal government in any part of the territory of the United States. I think, however, we may say that the Congress is constitutionally bound not to clothe with commercial powers any population which is unrepublican in its character—nor perhaps any population which is unnational in character. But of this character again the Congress alone must be the judge. The conclusion is that the Constitution recognizes no natural right to State powers in any population, but views these powers as a grant from the sovereign . . . . which latter employs the Congress to determine the moment from which the grant shall take effect." (Burgess, Political Sci. ii. 163.)

"When the Congress discharges this function, however, the State powers, both as to local government and participation in general government, are vested in the given population by the Constitution, not by the Congress. I cannot convince myself that the Congress has the right to determine what powers the new State shall or shall not exercise, although I know that the Congress has assumed to do so in many cases. I think the Constitution determines these questions for all the States alike. Certainly a sound political science of the federal system could never countenance the possession of such a power by the Congress. Its exercise might lead to interminable confusion. In fact, its possession is inimical to the theory of the federal system. As we have seen, that system can only really obtain, where the power-distributing organ exists back of both the general government and the States." (*Id.* p. 163.)

§ 471. "Terms and Conditions."

Under the Constitution of the Commonwealth the Federal Parliament has a free hand in deciding the terms and conditions under which a new member may be admitted into the Federal family system. It will be at liberty to impose such stipulations as it thinks fit, unhampered by considerations of equality of Original States. Among the terms and conditions which may be imposed on such new States, the following may be suggested, viz., that such new States shall, before their admission, contain a population duly organized and of a certain numerical strength; that they shall have a Constitution suitable for State Government; that such Constitution shall contain a reasonable rule of suffrage; that such Constitution should contain no provision contrary to the recognized usages and policy of the other States. When Missouri applied for admission as a State in the American Union, she was received on condition that the Constitution should never be construed to authorize the passage of an act by which any of the citizens of other States should be excluded from the enjoyment of any of the privileges and immunities to which they were entitled under the Constitution of the United States. (Benton's Thirty Year's View, ch. 2.) The State of Michigan was admitted to the Union on the condition that she should surrender to the State of Ohio certain territory which had been the subject of dispute between them, and her assent was required to be given by a Convention of delegates chosen by the people for the purpose. (Campbell's Hist. Mich. ch. 14.) The State of Arkansas was admitted on the condition that its Constitution should never deprive any citizen or class of citizens of the right to vote who were entitled to vote by the Constitution at the time that instrument was presented for the approval of Congress. (Cooley's Const. Law, p. 192-4.)

The Constitution of the Commonwealth expressly authorizes the Federal Parliament to determine the extent of representation in either House to which new States shall be entitled. It is to be noted that the rule of equal representation in the Senate is only mandatory in the case of Original States; new States cannot demand parity of senatorial representation as a right; the Federal Parliament may assign to such States the number of senators which it thinks fit. In the House of Representatives the constitutional rule is, that the number of members chosen in the several States must be in proportion to the respective numbers of their people as determined by the quota (sec. 24). Notwithstanding that section each Original State is entitled to a minimum number of five representatives. No minimum number of representatives is prescribed in the Constitution for new States; and it would seem that even the principle of proportional representation in the House of Representatives, though expressed without qualification in sec. 24, might under this section be varied in the case of new States. The Federal Parliament would, clearly, under the power conferred by sec. 121, be able to fix the minimum number of senators, as well as the minimum number of representatives, to be assigned to the new States. The mode of establishing new States is prescribed by secs. 123 and 124.

That part of the compact admitting Alabama as a State respecting the public lands is nothing more than the exercise of a constitutional power vested in Congress, and would have been binding on the people of the new State whether they consented to be bound or not. (Pollard *v.* Hagan, 3 How. 212; Baker, Annot. Const. p. 164.)

The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. (Pollard *v.* Hagan, 3 How. 212; Withers *v.* Buckley, 20 How. 92; McCready *v.* Virginia, 94 U.S. 391; Bridge Co. *v.* United States, 105 U.S. 491. *Id.*)

Prior laws of Congress in relation to the Territories and their government have no force in the new State after its admission and adoption of a Constitution, unless they are adopted by the State Constitution. (Permoli *v.* First Municipality, 3 How. 589. *Id.*)

Government of territories.

122. The Parliament may make laws for the government of any territory[472] surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory[473] in either House of the Parliament to the extent and on the terms which it thinks fit.

United States.—The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be construed to prejudice any claims of the United States, or of any particular State.—Const , Art. IV., sec. 3, sub-s. 2.

Historical Note.—Clause 3, Chap. VI. of the Commonwealth Bill of 1891 was as follows:—

"The Parliament may make such laws as it thinks fit for the provisional administration and government of any territory surrendered by any State to and accepted by the Commonwealth, or any territory in the Pacific placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may in any such case allow the representation of such territory in either House of the Parliament to such extent and on such terms as it thinks fit."

At the Adelaide session, 1897, the clause was introduced in substantially the same form, with the omission of the words "in the Pacific." In Committee, Sir Edward Braddon moved an amendment that the representation allowed by the Parliament should be "in accordance with the ratio of representation provided in the Constitution." This was negatived. Mr. Wise moved an addition to the effect that no federal territory should be leased for a longer term than fifty years, or alienated in fee simple, except on payment of a perpetual rent, subject to periodic appraisement on the unimproved value. This was negatived by 21 votes to 13. (Conv. Deb., Adel., pp. 1012-9.) At the Melbourne session, the word "provisional" was omitted at Mr. Barton's suggestion, as being an undue limitation. An amendment suggested by the Legislative Assembly of South Australia, and another moved by Mr. Glynn, similar to that moved by Mr. Wise at Adelaide, were negatived. (Conv. Deb., Melb., pp. 698-9.) Drafting amendments were made after the fourth report.

§ 472. "The Government of Any Territory."

The Parliament may make laws for the government of Federal territory. Federal territory is country within the jurisdiction of the Commonwealth and not forming part of a State. Such territory may be acquired by the Commonwealth in the following ways:—

(1.) It may be surrendered by a State and accepted by the Commonwealth.

(2.) It may be placed by the Queen under the authority of and accepted by the Commonwealth.

(3.) It may be otherwise acquired by the Commonwealth.

Territory Surrendered.—By sec. 111, a State is authorized to surrender any part of the country within its constitutional limits to the Commonwealth, and the Commonwealth is authorized to accept the same.

It seems that territory may be thus surrendered and accepted, either for the general purpose of being administered as a territory by the Federal Government, or for some special purpose for which it is required by the public service of the Federal Government. (See Notes to sec. 111, *supra*.)

Territory Placed by the Queen.—Any country not within the chartered limits of a State may be placed by the Queen under the control and authority of the Commonwealth. This grant of power will enable the Queen, with the concurrence of the Federal Parliament, to give effect to any approved plan for transferring the Northern Territory of South Australia, or British New Guinea, to the Commonwealth, and will enable those countries to be placed under the authority of the Commonwealth.

Territories Otherwise Acquired.—The only other way of acquiring territory expressly mentioned in the Constitution is under sec. 125, which provides that the seat of Government shall be within territory which shall have been "granted to or acquired by the Commonwealth." It seems, however, that territory may also be acquired by the joint operation of sec. 51—xxxi. and 52—ii.; under which the Federal Parliament is empowered to acquire property from any State for public purposes, and is given exclusive jurisdiction over "places" so acquired. (See Notes to sec. 52, *supra.*) The phrase "otherwise acquired" is wide enough to cover the acquisition of federal territory by every mode within the power of the Commonwealth, either under the express words of the Constitution, or by implication from its general *quasi*-sovereign powers—as for instance, the acquisition of territory by purchase or by cession from other colonies or countries not forming parts of the Commonwealth.

Government of Territory.—The Parliament is authorized to make laws for the government of territory however acquired. Such territory may be ruled by the Federal Authority, acting not merely as a local government but as a *quasi*-sovereign government. It may rule the territory as a dependency, providing for its local municipal government as well as for its national government, in such a manner as may seem politic, wise, and just, having regard to its own interests as well as those of the people of the territory. (American Ins. Co. *v.* Canter, 1 Pet. 511; National Bank *v.* Yankton Co., 101 U.S. 129.)

Territories may either be ruled by a Federal department charged to administer Federal laws therein, or they may be granted municipal institutions and territorial legislatures, empowered to make ordinances not inconsistent with the laws and Constitution of the Commonwealth. Should such territorial ordinances be contrary to Federal law, they may be annulled by the Federal Parliament. (Mormon Church *v.* United States, 136 U.S. p. 1.) In legislating for territories, the Federal Parliament will possess the combined powers of the National and of the State Governments. (American Ins. Co. *v.* Canter, 1 Pet. 511; Forsyth *v.* United States, 9 How. 571.) The territories bear much the same relation to the general government that counties do to the State, and the Federal Parliament may legislate for them as States do for their respective municipal subdivisions. (National Bank *v.* Yankton County, 101 U.S. 129. Baker, Annot. Const. p. 162.)

Territorial Legislation.—A clause in the organic act of the territory of Oregon provided that the legislative power of the territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States." Held that, under the power so conferred, the territorial legislature had power to enact a law annulling the marriage of one of its citizens, even though the wife from whom he was so divorced had never resided within the territory. (Maynard *v.* Hill, 125 U.S. 190. Baker, Annot. Const. p. 167.)

Under the powers of the Federal legislature reserved in the organic acts of the territories to annul the acts of their legislatures, the absence of Federal action annulling a law that is in conflict with the organic act cannot be construed as recognition that such law is valid. (Clayton *v.* Utah, 132 U.S. 632. *Id.*)

The Federal legislature can grant to a corporation existing under the laws of a State, the right to construct a railroad within any of the territories of the Union, and the State afterwards created out of the territory could not put any impediment on the enjoyment of the right thus conferred except upon the same terms that it could do when applied to its own previously granted right. In such matters the State only succeeds to the Federal authority over the territory. (Van Wyck *v.* Knevals, 106 U.S. 360; Railroad Co. *v.* Baldwin, 103 U.S. 426. *Id.* 166.)

The Federal legislature may not only abrogate laws of the territorial legislatures, but may itself legislate directly for the local government. In other words, it has full

and complete legislative authority over the people of the territories and all departments of the territorial governments. It may do for territories what the people under the Constitution of the Union may do for the States. (National Bank *v* Yankton County, 101 U.S. 129; cited and approved in Mormon Church *v.* United States, 136 U.S. 1-43. *Id.* 165.)

The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. The Federal legislature may prescribe the qualification of voters within a territory, and may exclude from such privilege persons guilty of bigamy. (Murphy *v.* Ramsey, 114 U.S. 15. *Id.*)

Prerogative in Territories.—In the case of Reg. *v.* Amer (42 Upp. Can. Q.B. 391), where numerous cases are cited on the prerogative of the Crown, Harrison, C.J., said: "The prerogative as to the issue of special commissions of Oyer and Terminer and General Gaol Delivery exists in all its integrity in the case of what are now known as the unorganized tracts or provisional judicial districts. The exercise of the power by the Governor-General of the Dominion, or by the Lieutenant Governor of the Provinces, is not inconsistent either with sub-sec. 27, sec. 91, or sub-sec. 14 of sec. 92 of the B.N.A. Act." (Wheeler, C.C., p. 33.)

Judicial Authority in Territories.—The legislative and judicial authority of the Federal Government in the territories is illustrated by the Canadian case of Riel *v.* The Queen, 10 App. Cas. 675. By the British North America Act, 1871, the North-west Territories became part of the Dominion, which was given power to pass any law for the peace, order, and good government thereof. The Dominion Parliament passed the North-west Territory Act, 1880, which gave power to try all criminal cases to a tribunal consisting of two magistrates and a jury of six, instead of a Judge and a jury of twelve men, as in England. Louis Riel was tried by a territorial court on a charge of high treason; he was convicted and sentenced to death. Riel applied to the Privy Council for special leave to appeal against the conviction, on the ground that the court had no jurisdiction to try the case. His counsel contended that it was not competent for the Dominion Parliament, under the Act of 1871, to take away from a person charged with treason the right to be tried by a jury of twelve, whose verdict must be unanimous. The Privy Council refused leave to appeal. (See extract from the judgment, per Halsbury, L.C., quoted *supra*, p. 514.)

§ 473. "Representation of such Territory."

A territory which has been surrendered to the Commonwealth by a State, or placed under the authority of the Commonwealth by the Queen, or been otherwise acquired by the Commonwealth, may be allowed representation in either house of the Federal Parliament, to the extent and on such terms as the Parliament thinks fit. The representation thus accorded is not representation as a State, but territorial representation. It may be allowed not only—as in the case of new States—"to the extent" which the Parliament thinks fit, but also "on the terms which it thinks fit." Apparently, therefore, the Parliament may not only fix the number of representatives for a territory, but determine—at least in some degree—the mode of representation. In the United States, there being no power to allow the territories to send members to Congress, the organized territories are nevertheless allowed to be represented in Congress by delegates who may speak but not vote. It would seem clear that under this Constitution the Parliament may, if it thinks fit, allow the representation of territories by delegates of the same kind, who, although allowed to sit and speak in the Senate or the House of Representatives, would not be members of either House, or entitled to vote therein. The Parliament may, however, under this section, allow a territory to be represented by actual members in either house; and in that case no terms would be imposed inconsistent with the provisions of the Constitution as to mode of election, tenure, and right to vote. The number of representatives which a territory may be allowed is of course absolutely in the discretion of the Parliament.

SEAT OF GOVERNMENT.—In the United States, the District of Columbia is not allowed even territorial representation. Under this Constitution, however, the power to allow the representation of territories clearly includes the territory within which the seat of Government is situated. Whether it would also include any "place" acquired by the Commonwealth for public purposes is a more doubtful matter. It is of course most unlikely that any territory—other than the seat of Government—acquired for public purposes would be extensive enough to be entitled to a member of its own; and the practical question is whether the residents in such territory would have to be disfranchised altogether, or whether they might be thrown into one of the electoral divisions of the State out of which the territory was carved. As regards Senate elections the answer must clearly be in the negative; the Senators for each State must be chosen by "the people of the State." As regards elections for the House of Representatives the matter is not so clear. Members of that House are chosen by "the people of the Commonwealth," which includes the people of the territories; and although the mode of apportionment provisionally prescribed by sec. 24 does not provide for the people of a territory being counted in with the people of the State out of which the territory may have been carved, yet that mode of apportionment is alterable. Sec. 29 provides that "a division shall not be formed out of parts of different States;" but there is no direct prohibition against including an area of federal territory in an adjoining electoral division. On the whole, it would seem that the residents of a federal territory which is too small to be allowed a member of its own in the House of Representatives, need not necessarily be disfranchised, but may, if the Parliament thinks fit, be included in one of the electoral divisions of "the people of the Commonwealth."

Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter[474] the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

HISTORICAL NOTE.—Clause 4, Chap. VI. of the Commonwealth Bill of 1891 was as follows:—

"The Parliament of the Commonwealth may, from time to time, with the consent of the Parliament of a State, increase, diminish, or otherwise alter the limits of a State, upon such terms and conditions as may be agreed to, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any State affected by it."

At the Adelaide session, 1897, the clause was adopted in substantially the same words. At the Melbourne session, it was verbally altered after the fourth report.

After the failure of the Convention Bill to poll the statutory number of votes in New South Wales, both Houses of the Parliament of that colony recommended (*inter alia*) "that better provision should be made against the alteration of the boundaries of a State without its own consent—namely, by the protection afforded by clause 127 [sec. 128] as to the representation of States." Accordingly at the Premiers' Conference, 1899, it was agreed to amend the clause by inserting "and the approval of the majority of the electors of the State voting upon the question."

§ 474. "Increase, Diminish, or otherwise Alter."

The Federal Parliament is empowered to alter the limits of a State, subject to two conditions :—(1) The consent of the Parliament of the State, and (2) the approval of the majority of the electors of the State voting upon the question. The second condition was not in the section as framed by the Convention. It was inserted on the recommendation of the Conference of Premiers pursuant to one of the joint resolutions passed by both Houses of the Parliament of New South Wales ; and it is not quite clear whether it in any way affects other sections by which the limits of States may be altered. For instance, sec. 111 empowers the Parliament of a State to surrender any part of the State to the Commonwealth ; secs. 121 and 124 empower the Federal Parliament to form a new State by the separation of territory from a State, or by the union of States or parts of States, with the consent of the States affected. Is the consent of the electors required in any of these cases ?

It is to be noticed that the section is worded, not as a limitation of powers elsewhere conferred, but as an additional and substantive power. "The Parliament of the Commonwealth may," subject to certain consent and approval, alter the limits of a State. It seems, therefore, to refer to a class of cases not included in any other powers of altering limits.

A limit is, strictly speaking, a boundary line ; and a line cannot be "increased or diminished" except in length. But the word is also used in a secondary sense, to denote "the space or thing defined by limits." (Webster, Internat. Dictionary.) In this sense, increasing or diminishing the limits of a State means altering the boundaries of a State so as to increase or diminish its territory.

The limits of a State could be increased by the addition of a part of another State or by the annexation of a Federal territory. The limits of a State could be diminished by taking from it country along its border, and giving it to another State or transferring it to the Commonwealth. The limits of a State could be altered without increasing or diminishing them, as for instance by a mutual rectification of boundaries, or by an equal exchange of strips of country by two adjoining States. Sec. 123 could receive a reasonable construction by confining its operation to the modification of boundaries of States by cession and acquisition, giving and taking, which are within the possible mischief intended to be guarded against. What was in the minds of those who advised and framed the amendment was to make more adequate provision to guard against the possible taking of country from one State and transferring it to another ; such as for example the annexation of Riverina to Victoria.

The limits of a State are clearly diminished when its Parliament consents to a new State being formed by a separation of territory from the State (secs. 121 and 124) ; and also when its Parliament surrenders to the Commonwealth a part of the State along its boundary (sec. 111). On the other hand, the surrender of an internal area might be made without diminishing or altering its limits. But it can hardly be contended that section 123 operates as a restriction of, or condition on, the exercise of the independent powers conferred by sec. 111, or by secs. 121 and 124. It contains not the slightest allusion to the surrender of territory to the Commonwealth, or the establishment of new States ; and it purports, not to restrict those powers, but to confer an additional power.

Even as confined to the adjustment of boundaries between States, the section embodies an extraordinary limitation on the power of the State Parliaments. Hitherto, under the Colonial Boundaries Act, 1895, the Queen has had power to alter the boundaries of any of the Australian colonies with the consent of the colony—*i.e.*, with the consent of the Parliament of the colony. Accordingly, adjustments of boundaries between colonies could be arranged between the Parliaments of the colonies, and then effected by Order in Council. Under this section, however, the consent of the Parliaments of the two States concerned must be supported by a Referendum in each of those States. This provision is an invasion of the principle, recognized by the Convention,

that the Constitutions of the States are not interfered with except so far as is absolutely necessary. In the case of an amendment of the Federal Constitution involving an alteration of the limits of a State, the requirement that a majority of the electors of the State should consent is appropriate enough, as the electors are the ratifying body ; but this section deprives the State Parliaments, without apparent justification, of an existing legislative power.

Formation of new States.

124. A new State may be formed[475] by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

UNITED STATES.—But no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.—Const., Art. IV., sec. 3, sub-s. 1.

HISTORICAL NOTE.—Clause 5, Chap. VI., of the Commonwealth Bill of 1891 was as follows :—

"A new State shall not be formed by separation of territory from a State without the consent of the Parliament thereof, nor shall a State be formed by the union of two or more States or parts of States, or the limits of a State be altered, without the consent of the Parliament or Parliaments of the State or States affected."

At the Adelaide session, this clause was adopted verbatim.

At the Melbourne session, Mr. Walker suggested that to meet the case of Northern and Central Queensland, the power which the Queen then had to subdivide that colony should be reserved (see Imperial Acts 5 and 6 Vic. c. 76, sec. 51 ; 13 and 14 Vic c. 59, sec. 32 ; 18 and 19 Vic. c. 54, sec. 7 ; 24 and 25 Vic. c. 44, sec. 2). (Melb. Conv. Deb., pp. 669-70.) At a later stage, Mr. Walker moved the insertion of the following new clause :—

"If the colony of Queensland adopts this Constitution, or is admitted as a State of the Commonwealth, nothing in this Constitution shall be taken to impair any right which the Queen may be graciously pleased to exercise by virtue of Her Majesty's royal Prerogative, or under any statute, in respect of the division of Queensland into two or more colonies ; but so that the Commonwealth shall retain the powers conferred on it by this Constitution to impose terms and conditions in respect of the establishment of any such colony as a State."

It was feared, however, that in the eyes of a large section of the inhabitants of Queensland this clause would be unwelcome, and at Mr. Barton's suggestion Mr. Walker withdrew the clause in order that the Queensland Government might be consulted. This was done, with the result that the Premier of Queensland telegraphed to the effect that the proposed clause would be likely to injure the prospects of Federation in Queensland ; though the Presidents of the Northern and Central Separation Leagues telegraphed their support. The proposed new clause was negatived. (Conv. Deb., Melb., pp. 1690-1702, 2398-2400.) The clause was recast before the first report, and a verbal alteration was made after the fourth report.

§ 475. "A New State May be Formed."

Section 121 empowers the Federal Parliament to establish new States without indicating the country out of which they are to be formed or the people whom they are to include. In the Notes to sec. 122, we have indicated the probable intention of the Constitution to authorize the establishment of new States out of certain classes of Federal territories. We now come to sec. 124, which does not contain a fresh grant of

power, but merely indicates several methods according to which the power granted by sec. 121 may be exercised. The several methods defined comprehend the creation of new States out of pre-existing States, but of course the specification of methods does not exhaust or limit the generality of sec. 121.

The first method defined is by the separation of territory from a State; the second is by the junction of two or more States; the third is by the union of two or more parts of States. The most important question, in connection with the interpretation of this section, is, what are the conditions precedent to the exercise of the power? The section itself says it can be done "only by the consent of the Parliament of the States affected." If sec. 123 is applicable to the creation of new States out of old ones, then an additional condition precedent must be added to sec. 124, which does not appear on its face, making it read thus: "only with the consent of the Parliament of the States affected and of the majority of the electors of the States voting upon the question." The arguments against such a view have been already presented in the Notes to sec. 123.

CHAPTER VII.—MISCELLANEOUS.

Seat of Government.

125. The seat of Government[476] of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth[477], and shall be vested in and belong to the Commonwealth[478], and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

UNITED STATES.—[The Congress shall have power] to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States.—Const. Art. I., sec. 8, sub-s. 17.

CANADA.—Until the Queen otherwise directs, the seat of Government of Canada shall be Ottawa.—B.N.A. Act, 1867, sec. 16.

HISTORICAL NOTE.—Clause 1 Chap. VII. of the Commonwealth Bill of 1891 was as follows:—

"The seat of Government of the Commonwealth shall be determined by the Parliament. Until such determination is made, the Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion amongst the Governors, as the Governor-General shall direct."

In Committee, Mr. G. R. Dibbs moved an amendment to make the clause read:—"The seat of Government of the Commonwealth shall be Sydney, New South Wales." This was negatived by 26 votes to 4—all the New South Wales representatives, except Mr. Dibbs, voting against it. (Conv. Deb., Syd., 1891, pp. 899-900.)

At the Adelaide session, 1897, the same clause was adopted almost verbatim. In Committee, Mr. Walker proposed to insert "and shall be within an area which shall be federal territory." It was thought better however to leave the Parliament unfettered—giving them the power, under section 52, to exercise exclusive jurisdiction over the seat of Government, but not expressly making it federal territory. The amendment was negatived. (Conv. Deb., Adel., pp. 1019-20.) At the Melbourne session, a suggestion by the Legislative Council of New South Wales, that the seat of Government should be "in Sydney in the colony of New South Wales," was submitted. This evoked from Sir Edward Braddon an amendment in favour of "some suitable place in Tasmania;" from Sir George Turner the suggestion of "St. Kilda," and from Mr. Symon the suggestion of "Mount Gambier." The amendments were negatived, and Mr. Lyne then moved

that the seat of Government should be "in the colony of New South Wales," but he was induced by his colleagues to withdraw it. (Conv. Deb , Melb., pp. 700-12.) Later on, Sir George Turner proposed to insert the words "and shall be within federal territory," whereupon Mr. Lyne moved to add to this amendment the words "and within the colony of New South Wales." This time he pressed the matter to a division. but was defeated by 33 votes to 5. Mr. Peacock, to show that this vote was not a claim to the capital by Victoria, moved to insert the words "and within the colony of Victoria," which was negatived by 36 votes to 3. Sir George Turner's proposal, that the capital should be within federal territory, was then carried by 32 votes to 12. (Conv. Deb., Melb., pp. 1802-16.) After the fourth report, the words "territory vested in the Commonwealth" were substituted for "federal territory," and the clause was adopted by the Convention in the following form :—

"The seat of Government of the Commonwealth shall be determined by the Parliament and shall be within territory vested in the Commonwealth. Until such determination the Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion among the Governors, as the Governor-General shall direct."

After the Convention Bill had failed to secure the statutory majority in New South Wales, the Legislative Assembly of that colony recommended that provision should be made for the establishment of the federal capital "at such place within the boundaries of New South Wales as the Federal Parliament should determine." The Legislative Council of New South Wales asked that the capital should be in Sydney. At the Premiers' Conference, 1899, it was agreed to amend the clause to its present form. In the Imperial Parliament, the words "if New South Wales be an Original State," and "if Victoria be an Original State" were omitted as no longer necessary.

§ 476. "Seat of Government."

The phraseology of this section, and its involved grammatical construction, raise several difficult questions of interpretation. How is the seat of Government to be acquired by the Commonwealth? What is the effect of its acquisition? And what is to happen pending the determination of the seat of Government? These and other questions must be answered ; though the obscurity of the section makes it impossible, in the absence of judicial interpretation, to answer them with absolute confidence.

Question as to a Temporary Seat of Government.—The question has been raised as to whether, before the determination of the seat of government by the Federal Parliament, some place may be appointed as a provisional seat of government? Can there be a temporary capital prior to the selection of the permanent capital? Can such temporary capital be situated outside the State of New South Wales? At what place are the bulk of executive acts to be performed prior to the Federal Administration being provided with its statutory domicile? These questions were ably discussed, first in an opinion by Mr. R. E. O'Connor, Q.C., presented to the Legislative Assembly of New South Wales on 20th July, 1900, and in an answering opinion by Mr. Irvine, Attorney-General of Victoria, subsequently read in the Legislative Assembly of that colony.

In considering this section, and its possible meaning, it must be noticed that it is composed of several mandatory provisions succeeding one another, each being introduced by the verb "shall." The problem of interpretation is—are these mandates blended or connected one with the other, and intended to operate as parts of one scheme beginning with and inseparably associated with the determination of the Parliament? Or can any of these mandates, from this collocation, be severed from the others so as to operate independently of and antecedently to the others? On the one hand it may be argued that the parts of the section relating to the grant. or acquisition, of a particular area of territory, and the situation of the territory in New South Wales, not less than 100 miles from Sydney, do not come legally into force until the Federal Parliament proceeds to determine the site ; that prior to such determination the words "shall be in the State

of New South Wales" have no legal operation, or effect, there being no determination upon which they can possibly bear; that, in fact, the Constitution is silent as to any seat of government before the statutory determination; that before such determination there is consequently no fixed seat of government, and the whole question is at large, with the exception of the last paragraph containing the mandate that the Parliament shall sit at Melbourne until it meets at "the Seat of Government." What seat? Obviously the seat fixed by the determination, showing that until such determination there is no seat of government within the meaning of this section.

If this view be correct then the Executive Government of the Commonwealth could, before the determination of the seat by federal law, be conducted in any part of the Commonwealth, whilst considerations of convenience might suggest that it should - at least while the Parliament was sitting—be conducted in that part of the Commonwealth appointed for the temporary meeting of the Parliament, so that the Executive department might be in proximity to and in touch with the Legislative department.

On the other hand the view has been pressed with some force that the mandate "The seat of Government of the Commonwealth . . . . shall be in the State of New South Wales" is one which can be so severed from the other mandates as to Parliamentary determination, vesting, acquisition, &c., that it comes into force and action as a constitutional declaration from the moment that the Commonwealth is established, on the 1st January, 1901; that it operates continuously from that moment; that until the statutory determination of a site, within the qualified territory of New South Wales, the seat of government must be somewhere within that qualified territory and not outside of it, that all the Federal Parliament can do is to select a site within the part of New South Wales so qualified.

If this latter contention be the correct one, the federal capital will, from the establishment of the Commonwealth, and until the statutory determination of the site, be somewhere within the favoured region of New South Wales, 100 miles from Sydney, and the particular spot within the favoured region at which the mass of Executive Acts should be performed could be selected by the Federal Government, save and except the performance of such administrative business as must necessarily be performed in Melbourne in connection with the sittings of the Parliament.

Whichever view may be adopted, no serious constitutional difficulties, or complications, need arise in actual practice. The Constitution does not direct that the Governor-General must reside at the seat of Government, nor does it require Executive acts to be performed there. The implication, or rather the assumption, no doubt is that the Governor-General will reside there, so far as may be necessary to perform the duties of his office, and that all high administrative acts shall, in like manner, be performed there, and recorded there, so far as is practicable. But, whatever the implication or assumption, no penalty of invalidity or nullity could possibly result from non-observance thereof. No legal sanction whatever is annexed to any breach of any understanding connected with the seat of Government. The question involved will, therefore, be decided, not only from the strictly constitutional aspect, but also from the point of view of convenience, mutuality of interest, and good faith.

Representation of Territory.—As to the representation in the Federal Parliament of the seat of Government and the surrounding territory, see Note, § 473, *supra*.

§ 477. "Granted to or Acquired by the Commonwealth."

Acquisition of the Site.—The chief question which has arisen in connection with these words is whether the determination of the seat of Government rests, in the last resort, solely with the Federal Parliament, or whether the Federal Parliament is limited in its choice to sites offered by the Parliament of New South Wales. The opening words of the section strongly favour the former view; but it has been argued that the words "shall be within territory which shall have been granted to or acquired by the

Commonwealth" point to a prior act of cession by the Parliament of New South Wales, and that—no express power to "acquire" being given by this section—the acquisition must be by surrender and acceptance under sec. 111.

The word "granted" does not occur elsewhere in the Constitution, except in the second paragraph of this section, where it is provided that so much of the territory as is Crown lands "shall be granted to the Commonwealth" without payment. What then is the meaning of the alternatives of grant or acquisition? One explanation that has been suggested is that Crown lands are to be "granted" and other lands are to be "acquired;" but this is not satisfactory, because the section deals with territory, not with property; and the distinction between Crown lands and privately owned lands is one of property, not of territory.

It is submitted that the word "granted" contemplates, as one mode of acquisition, the surrender of territory by the Parliament of New South Wales, and its acceptance by the Federal Parliament, under sec. 111. It is undoubtedly to be desired that the site should be mutually agreed upon between the Commonwealth and New South Wales; and we may anticipate that if any such agreement is possible no other mode of acquisition will be resorted to.

But what is the alternative mode of acquisition contemplated by the words "or acquired?" It can hardly refer to acquisition in the exercise of the power of "eminent domain" under sec. 51—xxxi., because that applies to "property," not to territory. Nor can it refer to acquisition by surrender and acceptance under sec. 111, because that is already provided for by the word "granted." The only conclusion is that the words "or acquired" refer to a different mode of acquisition; and the true interpretation seems to be that, failing an agreement between New South Wales and the Commonwealth, this section confers upon the Federal Parliament a reserve power to acquire a site without the concurrence of the Parliament of New South Wales. In other words, the power to determine the seat of Government, coupled with the direction that the seat of Government shall be within territory granted to or acquired by the Commonwealth, implies that the Commonwealth, in the absence of a grant, has power to acquire the necessary territory without grant.

That this was the intention of the framers seems clear from the history of the section. In the Adelaide Bill (see Hist. Note) it was provided simply that the seat of Government "shall be determined by the Parliament." At the Melbourne session, the words "and shall be within federal territory" were added. This was expanded by the Premiers' Conference to read "and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth." The object appears to have been to supplement the power of surrender and acceptance by a special power of federal acquisition, to make it clear that the duty of the Federal Parliament to determine the site could not be blocked by a refusal of New South Wales to surrender the territory needed.

This view seems to be supported by a general perusal of the section. There is a clear declaration that the seat of Government is to be determined by the Parliament, but there is no declaration that the concurrence of New South Wales is essential. Had that been the intention, it would surely have been expressly mentioned, and not left to be gathered by implication—and especially by implication from such wide words as "granted or acquired."

Against this construction, it may be urged that whilst the federal territory is to contain an area of "not less than 100 square miles," no maximum limit is fixed. It can hardly be supposed that the Federal Parliament has power to federalize an unlimited area of New South Wales as a seat of Government. But the answer seems to be that the power only extends to the acquisition of an area reasonably necessary for the purpose; and perhaps in the case of acquisition without surrender, the reasonable maximum would be held not to exceed, or greatly exceed, the minimum of 100 square miles.

Mr. Oliver's Report.—In November, 1899, in view of the fact that the Parliament of New South Wales might be called upon to offer or recommend a site for the seat of Government, the Government of New South Wales appointed Mr. Alexander Oliver, the President of the Land Court of that colony, as a Commissioner to enquire into and report upon the suitability of sites. He inspected a number of sites and took a quantity of evidence; and in his report, which was laid on the table of the Legislative Assembly on 30th October, 1900, he reported favourably upon three sites, in the neighbourhood of Orange, Yass, and Bombala respectively.

Measurement of Distance.—It would seem that the distance of 100 miles from Sydney is to be measured in a straight line, in accordance with the provisions of sec. 34 of the Imperial Interpretation Act, 1889 (p. 793, *supra*). Distances mentioned in Acts of New South Wales are measured by the nearest road (Interpretation Act [N.S.W.], 1897, sec. 35); but that can hardly be relied upon to show a "contrary intention" within the meaning of the Imperial Act.

§ 478. "And shall be Vested in and Belong to the Commonwealth."

The grammar of this section is by no means clear. Is it the "seat of Government" or the "territory" within which the seat of Government is situated that is to be vested in and belong to the Commonwealth? In the clause as framed by the Convention it was clear that the "territory" was to be vested in the Commonwealth, and it is submitted that this is the true reading of the section. That is to say, the words "and shall be vested," &c., are part of the relative sentence "which shall have been granted," &c., referring to the antecedent "territory."

It is clear from this construction that the Commonwealth acquires under this section territorial rights only, and not proprietary rights. What the Commonwealth may acquire under section 51—xxxi. is "property;" what it acquires under this section is "territory." Landowners or Crown Lessees within the territory chosen for the seat of Government will not be dispossessed unless the Federal Parliament chooses to dispossess them. The result of the transfer of territory will be that instead of holding from the Crown, as represented by the Government of New South Wales, they will hold from the Crown as represented by the Government of the Commonwealth; and the Commonwealth, in the exercise of its exclusive jurisdiction over the territory, will be free to resume so much of the privately opened land as it requires, in accordance with laws passed under the power of "eminent domain" (sec. 51—xxxi.), and subject, of course, to the constitutional requirement of just compensation.

Crown Lands.—The meaning of the provision that Crown lands shall be granted without payment therefor is not clear, and seems to involve some confusion between territorial and proprietary rights. It may be construed to apply to lands which are Crown lands within the meaning of the Crown Lands Acts of New South Wales; or it may—as Mr. Oliver suggests in his report—apply only to vacant Crown lands. It does not appear to mean that the occupation of Crown tenants is necessarily to be disturbed by the acquisition of the territory. It is perhaps intended to mean that the rights of the Crown, in any lands whatever, shall not be the subject of compensation, although the proprietary rights of individuals, if their land is resumed, must be dealt with on just terms (sec. 51—xxxi.). Mr. Oliver, however, suggests that in the case of lands which are not "Crown lands" in the ordinary acceptation of the term, the State may be entitled to compensation for the loss of its rights of taxation.

Exclusive Power.—The seat of Government, when determined by the Parliament and duly acquired, becomes subject to the jurisdiction of the Federal Parliament, which has exclusive power to make laws for its peace, order, and good government. (See notes to sec. 52—i.)

Power to Her Majesty to authorise Governor-General to appoint Deputies.

126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies[479] within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

CANADA.—It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from time to time to appoint any person or any persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor-General such of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power, authority, or function.—B.N.A. Act, 1867, sec. 14.

HISTORICAL NOTE.—Clause 2, Chap. VII., of the Commonwealth Bill of 1891, was in almost identical words, and was adopted verbatim at the Adelaide session, 1897. At the Melbourne session, suggestions by the Legislative Assembly of South Australia, to limit the provision to a single deputy for the whole Commonwealth, and to omit the concluding sentence, were negatived. (Conv. Deb., Melb., pp. 712-3.) Verbal amendments were made after the fourth report.

§ 479. "Deputy or Deputies."

The Deputies provided for in this section are quite distinct from the Acting-Governor-General, or Administrator of the Government of the Commonwealth, referred to in sec. 4, *supra*. An Acting-Governor-General is appointed by the Queen, and acts only in the absence or incapacity of the Governor-General, or during a vacancy in the office; and while he so acts, he has all the powers of the Governor-General. (See Notes, sec. 4, *supra*.) A Deputy, on the other hand, is merely a person to whom the Queen may enable the Governor-General himself—subject to the Royal instructions—to delegate particular duties in particular localities. The immense area of the Commonwealth may make it convenient that some of the powers of the Governor-General, in some parts of the Commonwealth, should be thus exercisable by deputy.

This provision has been adopted from a similar section in the Canadian Constitution, respecting which Mr. Wheeler has the following note:

"Does this mean that there may be two persons with power to exercise one function? The clause provides that the Governor-General may appoint a deputy and may at the same time reserve the power of himself exercising the functions. (Att.-Gen. Canada *v.* Att.-Gen. Ontario, 1892, 3 Ont. App. 6; 19 Ont. Rep. 47. See where a Deputy-Governor acted, Reg. *v.* Amer, Feb. 23, 1878, 42 Upp. Can. Q.B. at p. 408)." (Wheeler, C.C., 10.)

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives[480] shall not be counted.

Historical Note.—In the Commonwealth Bill of 1891, Sir Samuel Griffith, in Committee, added a new clause as follows :—"In reckoning the numbers of the people of a State or other part of the Commonwealth, aboriginal natives of Australia shall not be counted." (Conv. Deb., Syd., 1891, pp. 898-9.)

At the Adelaide session, 1897, the same clause was adopted, with the omission of the words "of Australia." In Committee, Dr. Cockburn urged that natives who were on the rolls ought not to be debarred from voting; but it was pointed out that the clause did not affect their rights. (Conv. Deb., Adel., p. 1020.) At the Melbourne session, a suggestion by the Legislative Councils of New South Wales and Tasmania, to insert "and aliens not naturalized," was negatived. (Conv. Deb., Melb., pp. 713-4.) After the fourth report, the words "of the Commonwealth or" were inserted.

§ 480. "Aboriginal Natives."

The following figures show the number of aborigines enumerated or believed to exist in each Australasian Colony in 1891 :—

Colony.	Males.	Females.	Total.
Victoria	325	240	565
New South Wales	4,559	3,721	8,280
Queensland (1881)	10,719	9,866	20,585
South Australia	14,510	9,279	23,789
Western Australia	3,516	2,729	6,245
Tasmania	73	66	139
Commonwealth	33,702	25,901	59,603
New Zealand	22,861	19,132	41,993
Total...	56,563	45,033	101,596

In most, if not in all, of the colonies, this enumeration was incomplete. In Victoria, whilst only 565 (including half-castes) were enumerated, 731 are believed to be in existence. In Queensland no attempt wrs made to enumerate or estimate the number of aborigines, therefore the number returned in 1881—which is believed to understate the truth—has been repeated. In South Australia the aborigines were not regularly enumerated, the figures given being derived from estimates. In Western Australia only civilized aborigines were enumerated. In the numbers given for that colony 575 are half-castes. In Tasmania there are no longer any aborigines of unmixed race, the last male having died in 1869 and the last female in 1876. There are, however, a few half-castes. With the Maoris of New Zealand, 40 Morioris are included. These are the last surviving aboriginal inhabitants of the Chatham Islands, which are a group lying about 360 miles to the east of New Zealand, and form a dependency of that colony. (Mr. J. J. Fenton, Assistant Government Statist of Victoria, 1899.)

CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration[481] thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

United States.—The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by Conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.—Const. Art. V.

Switzerland.—The Federal Constitution may at any time be [*wholly or partially*] amended.—Art. 118.

A [*total*] revision is secured through the forms required for passing federal laws.—Art. 119.

When either House of the Federal Assembly passes a resolution for the [*total*] revision of the Federal Constitution and the other House does not agree; or when 50,000 Swiss voters demand a [*total*] revision, the question whether the Constitution ought to be amended is, in either case, submitted to the Swiss people, who vote yes or no. If in either case a majority of the Swiss citizens who vote pronounce in the affirmative there shall be a new election of both Houses for the purpose of undertaking the revision.—Art. 120.

[*A partial revision may take place by means of the popular initiative, or through the forms prescribed for ordinary federal legislation. The popular initiative consists in a demand by 50,000 Swiss voters for the addition of a new article to the Constitution, or the repeal or modification of certain constitutional articles already in force.*] . . . Art. 121.

The revised Federal Constitution [*or the revised part thereof*] shall take effect when it has been adopted by the majority of Swiss citizens who take part in the vote thereon and by a majority of the States.—Art. 123.

[The words in brackets were introduced by the amendment of 1891. See Deploige, Referendum in Switzerland, p. 125.]

Germany.—Amendments in the Constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Federal Council.—Art. 78, sec. 1.

The provisions of the Constitution of the Empire by which certain rights are secured to particular States of the Union in their relation to the whole, shall only be modified with the consent of the States affected.—Art. 78, sec. 2.

Historical Note.—The clause as first proposed at the Sydney Convention of 1891 was as follows:—

"The provisions of this Constitution shall not be altered except in the following manner:—

Any law for the alteration thereof must be passed by an absolute majority of the Senate and House of Representatives, and shall thereupon be submitted to Conventions to be elected by the electors of the several States qualified to vote for the election of members of the House of Representatives.

The Convention shall be summoned, elected, and held in such manner as the Parliament of the Commonwealth prescribes by law, and shall, when elected, proceed to vote upon the proposed amendment.

And if the proposed amendment is approved by the Conventions of a majority of the States, it shall become law, subject nevertheless to the Queen's power of disallowance.

But an amendment by which the proportionate representation of any State in either House of the Parliament of the Commonwealth is diminished, shall not become law without the consent of the Convention of that State."

In Committee, it was pointed out that the ratifying process by "Conventions of a majority of the States," gave a second appeal to the States, but none to the people. To obviate this, Sir Samuel Griffith suggested to add the words, "and if the people of the States whose Conventions approve of the amendment are also a majority of the people of the Commonwealth." Mr. Playford pointed out that this was a clumsy device, because instead of ascertaining the total vote for and against, it added the minority in each State to the majority. He contended that a better principle would be to take the vote of the electors directly. Dr. Cockburn moved the omission of the words "Conventions to be elected by," in order that the question should be submitted to the electors. Sir Samuel Griffith favoured the Conventions, as being better able to deal with the complicated questions submitted, but Mr. Deakin pointed out that the Conventions could only say yes or no, and that the electors ought to be allowed to say yes or no themselves, instead of electing men pledged to say it for them. However, the amendment was defeated by 19 votes to 9. Sir Samuel Griffith's amendment, requiring that the people of the States whose Conventions approved should be a majority of the people of the Commonwealth, was then carried; and the words declaring that the amendment, when ratified, should "become law, subject, nevertheless, to the Queen's power of disallowance," were replaced by the words "be presented to the Governor-General for the Queen's assent." In the concluding paragraph words were inserted to prevent an amendment diminishing the "minimum number of representatives" of a State without the consent of the Convention of that State. (Conv. Deb., Syd., 1891, pp. 884-98.)

At the Adelaide session, the clause was drafted as follows:—

"The provisions of this Constitution shall not be altered except in the following manner:—

Any proposed law for the alteration thereof must be passed by an absolute majority of the Senate and of the House of Representatives, and shall thereupon be submitted to the electors of the several States qualified to vote for the election of members of the House of Representatives, not less than two nor more than three calendar months after the passage through both Houses of the proposed law. The vote shall be taken in such manner as the Parliament prescribes.

And if the proposed alteration is approved by the electors of a majority of the States, and if the people of the States whose electors approve of the alteration are also a majority of the people of the Commonwealth, the proposed alteration shall be presented to the Governor-General for the Queen's assent.

But an alteration by which the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, is diminished, shall not become law without the consent of the electors of the State."

In Committee, Mr. Deakin moved the omission of the word "absolute," but this was negatived. The time within which the vote might be taken was extended to six months after the passing. Mr. Lewis pointed out that the population of the approving State might be a majority of the Commonwealth, and yet the votes of a large majority of electors might be against the proposal, and he suggested that the test should be, not that the people of the approving States are a majority of the Commonwealth, but that the electors approving are a majority of those voting. The difficulty, however, was that whilst one State had women's suffrage, and the others had not, the electors of that State would count for twice as many as the electors in the other States. No solution being suggested, Mr. Lewis' amendment was negatived. (Conv. Deb., Adel., pp. 1020-30.) At a later stage, the difficulty as to women's suffrage was met by the provision which now forms part of the Constitution. Verbal amendments were also made. (Conv. Deb., Adel., pp. 1204-9.)

At the Melbourne session, a number of amendments suggested by the Legislatures and by members of the Convention were negatived—including a suggestion by the

Legislative Assembly of Victoria that in case of a disagreement between the Houses, the proposed alteration should be referred to the people. (Conv. Deb., Melb., pp. 715-72.) Verbal amendments were made before the first report and after the fourth report.

After the failure of the Convention Bill to receive the statutory majority in New South Wales, the two Houses of Parliament in that colony asked for reconsideration of this clause, among others, and made certain recommendations which have already been set out (page 217, *supra*). At the Premiers' Conference, 1899, it was agreed to amend the clause to the form in which it now stands; the alterations being (1) the insertion of the third paragraph, providing for a reference to the electors notwithstanding the disagreement of one House, and (2) the provision against an amendment altering the limits of a State without its consent.

§ 481. "Alteration."

The British Constitution can be altered by an Act of the British Parliament. In fact it is sometimes hard to distinguish between Acts passed by the British Parliament relating to matters of ordinary legislation, and Acts passed by it relating to the Constitution. The Federal Parliament, however, is not authorized to amend the Constitution of the Commonwealth. That Constitution can only be varied in a special way and after compliance with certain formalities and prerequisites. In like manner the Congress of the United States is deprived of power to amend the American instrument of Government. The disability of a Federal Legislature to alter the Federal Constitution is one of the organic features and a prominent characteristic of every federal system. If the Federal Legislature could change the Constitution it might transform itself from a subordinate law-making body into an organ of sovereignty; it might destroy the federal system altogether, and substitute a consolidated form of government. A Federal Legislature is a mere creature of the Federal Constitution; it is a mere instrument or servant of a federal community; it is an agent, not a master. The Constitution is the master of the legislature, and the community itself is the author of the Constitution. In this respect a federal legislature differs from a supreme legislature like that of Great Britain, which is the embodiment and essence of the sovereignty of the British nation. Sovereignty resides in that person, or body, or class of persons in whom is ultimately vested the power to amend a Constitution of Government.

"The test of the federal system lies in the principle that the central Government cannot destroy nor modify the local, nor the local Government the central. Now, this relation between central and local Government is impossible unless both rest upon a common basis, *i.e.*, the co-ordination of these independent Governments as parts of a harmonious political system requires an organization of the sovereign, the State, distinct from and supreme over both." (Burgess, Political Sc. i. 141.)

In the Constitution of the Commonwealth of course there is no absolute sovereignty, but a *quasi*-sovereignty which resides in the people of the Commonwealth, who may express their will on constitutional questions through a majority of the electors voting and a majority of the States. No amendment of the Constitution can be made without the concurrence of that double majority—a majority within a majority. These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable.

A Constitution is a charter of government; it is a deed of trust, containing covenants between the sovereign community and its individual units. Those covenants should not be lightly or inconsiderately altered. At the same time a Constitution which did not contain provision for its amendment with the development, growth, and expansion of the community which it is intended to govern, would be a most inadequate and imperfect deed of partnership. It would be doomed to collapse ignominiously, and without hope

of reconstruction. It would be bound to break beneath the pressure of national forces which it could not control or resist. A Constitution may be compared to a living organism. It is not in the nature of a living organism to remain monotonously the same from year to year and from age to age. As with individual units, so with nations, change is one of the laws of life. The Constitution of a nation is the outward and visible manifestation of its national life, to the pulsations of which it necessarily responds. The energy within any healthy organic structure must find vent in change. Change assumes various external forms. The power in a progressive community is never quiescent or stationary.

These principles are incontrovertible; but at the same time the tendency to change must be scrutinized to ascertain whether it is proceeding in a safe direction, and if possible to guide the tendency in that direction. Where a community is founded on a political compact it is only fair and reasonable that that compact should be protected, not only against the designs of those who wish to disturb it by introducing revolutionary projects, but also against the risk of thoughtless tinkering and theoretical experiments. The Constitution of the Commonwealth has provided a safety-valve in the shape of a section defining the method by which its amplification and modification may be effected, but its use is shielded with precautions, the wisdom and propriety of which claim favourable consideration from every reflecting mind. The provisions for the amendment of the Constitution may be considered under the following separate headings: (1) alterations which may be made, (2) initiation of alterations, (3) reference of alterations to the electors, (4) presentation of proposed alterations to the Governor-General for the Queen's assent.

Alterations which May be Made.—The Constitution can be altered in a certain manner. What is the Constitution? What is an alteration? The Constitution is that part of the Imperial Act comprehended in Clause 9 and divided into chapters, parts, and sections, the sections being numbered from 1 to 128 inclusive. The Schedule also is a part of the Constitution. Clauses 1 to 8 of the Imperial Act are not parts of the Constitution, and cannot be altered except by the Imperial Parliament. Every chapter, part, section, paragraph, and word in Clause IX., except the marginal notes, is within the definition of "the Constitution," and, subject to certain qualifications, the whole of the Constitution comes within reach of the amending power formulated in the last section of the instrument. Now, an alteration means any change in the shape of amplifications, additions, omissions, or modifications of old matter in the Constitution. Possible alterations may be thus grouped:—

(1.) Elision of old matter:

(2.) Addition to old matter:

(3.) Introduction of new matter:

(4.) Substitution of new matter for old matter.

Hence it may be concluded that there is no limit to the power to amend the Constitution, but that it can only be brought into action according to certain modes prescribed. We will consider the modes and conditions of constitutional reforms further; meanwhile it is essential to grasp the significance and comprehensiveness of the power itself. For example, the Constitution could be amended either in the direction of strengthening or weakening the Federal Government; strengthening it, by conferring on it new and additional powers; weakening it, by taking away powers. The Constitution could be amended by reforming the structure of the Federal Parliament and modifying the relation of the two Houses; by increasing or diminishing the power of the Senate in reference to Money Bills; by making the Senate subject to dissolution at the same time as the House of Representatives. It is even contended by some daring interpreters that the Constitution could be amended by abolishing the Senate. It could certainly be amended by remodelling the Executive Department, abolishing what is known as Responsible Government, and introducing a new system,

such as that which prevails in Switzerland, according to which the administration of the public departments is placed in the hands of officers elected by the Federal Legislature. The Constitution could be amended by altering the tenure of the judges, by removing their appointment from the Executive, and authorizing the election of judges by the Parliament or by the people. The Constitution could be amended in its most vital part, the amending power itself, by providing that alterations may be initiated by the people, according to the plan of the Swiss Popular Initiative; that proposed alterations may be formulated by the Executive and submitted to the people; that proposed alterations may, with certain constitutional exceptions, become law on being approved of by a majority of the electors voting, dispensing with the necessity of a majority of the States.

Amendments of the Constitution would not necessarily be confined to the machinery, organization, and operation of the Federal Government; they might include changes of functions as well as changes of structure. New powers and functions could be added, or existing powers and functions could be withdrawn.

Nor is the scope of the amending power restricted to the structure and functions of the Federal Government; it extends to the structure and functions of the Governments of the States. Indeed, nearly every extension of powers and functions granted to the Federal Government would involve a consequential contraction of powers and functions in the Governments of the States; and if a constitutional amendment could so alter the powers and functions of the Governments of the States, why should it not be capable of dealing, if necessary, with the Constitutions and political organization of the States? We say "if necessary;" for the necessity may never arise; but the dormant power is there, and may be used in an extraordinary emergency, if the States neglect or refuse to adjust their constitutional arrangements to harmonize with Federal developments and requirements.

Amendments of the Constitution need not be limited even to the functions and organization of Federal Government and of State Government. They might go further, and embrace fundamental laws relating to the rights, privileges, immunities, and duties of the people of the Commonwealth, placing them beyond the domain of Federal legislation and equally outside the sphere of State legislation. The American Constitution contains a Bill of Rights. Neither Congress nor the Legislatures of the States could interfere with or alter one jot or tittle of those fundamental rights. A resort to such constitutional settlements is only justifiable when the ordinary organs of legislation cannot be trusted to protect private rights and individual liberty. In America, of late years especially, there has been a strong disposition to load the State Constitutions with laws which belong properly to the field of ordinary legislation. The reason assigned for this procedure is, that private rights and individual liberty cannot always be safely trusted to the legislatures of the States; that some of those legislatures have at times been so influenced by passion, prejudice, and corruption, or so controlled by combinations of vicious men, that they have disregarded truth and justice. (Per Miller, J., in the Savings and Loan Association *v.* Topeka, 20 Wall. 663. See authorities on this subject collected in Lefroy's Leg. Power, p. xlvi.) But under normal conditions of society a charter of government should not be encumbered with matters of ordinary legislation. It should deal only with subjects of vital consequence involving the organization, continuity, and government of the nation. The legislative machine should be left free and unfettered to grapple with problems as they arise in the changing circumstances of the country.

Attention has been drawn to the alterations which may be made in the Constitution. These have been suggested, not as probabilities, but as possibilities, in order to illustrate the potentialities of expansion and modification inherent in the Constitution. Dr. Pomeroy's observations on the amending power in the Constitution of the United States will bear application to the similar power in the Constitution of the Commonwealth.

"The result of this discussion is, that the People of the United States, by virtue of their inherent absolute attributes as a nation, may, by following the order prescribed in the Constitution, adopt any amendments thereto, whether such changes would enlarge or diminish the functions of the general government, whether they would widen or contract the scope of State legislation. Nay, it is possible that the idea of local self-government, which underlies our present civil polity, might be entirely abandoned, and the plan of complete consolidation substituted in its stead; even a monarchy might be reared in the place of the present republic. It is true that the people have placed an almost insurmountable obstacle to such action on their part, for they have required a species of unanimity as a prerequisite to a reconstruction which should destroy the States as distinctive elements in our political organization." (Pomeroy's Constitutional Law, p. 75.)

Restrictions on the Amending Power.—It is now necessary to draw attention to several restrictions on the amending power, a reference to one of which appears in the above quotation from Dr. Pomeroy. They may be summarized thus: No amendment:

(1) Diminishing the proportionate representation of any State in either House of the Parliament (secs. 7, 24);

(2) Diminishing the minimum number of representatives of a State in the House of Representatives (sec. 24);

(3) Increasing, diminishing, or otherwise altering the limits of a State (sec. 123);

(4) Affecting the provisions of the Constitution in relation to the foregoing matters;

may be carried, unless a majority of the electors voting in the State interested approve of the proposed law. Hence an Original State cannot, without its consent, be deprived of equal representation in the Senate, or of the minimum number of five Representatives in the National Chamber. No State, without its consent, can suffer an increase, diminution, or alteration of its limits.

The alteration of the Constitution in these respects is not prohibited altogether, but is made subject to a three-fold assent: not only the assent of (1) the people of the nation, and (2) the peoples of more than half the States, but also the assent of (3) the peoples of States affected. Thus, for instance, an alteration abolishing the principle of equal representation in the Senate, and substituting some other basis of representation, would require the assent of the peoples of all the States whose power in the Senate might be thereby reduced. This is what Dr. Pomeroy refers to when he says that in the United States the people have placed an "almost insurmountable obstacle" to the abolition of equal representation, by requiring "a species of unanimity as a prerequisite to a reconstruction which would destroy the States as distinctive elements in our political organization." (Pomeroy, Const. Law, p. 75.) This prerequisite is an obstacle, but not an insurmountable obstacle, in the way of national consolidation. When the time arrives for constitutional reconstruction, the people of the Commonwealth, the successors of the original creators and authors of the Constitution, may be able to solve the problem of securing acquiescence in any urgently required reform. If unanimity cannot be secured, there yet remains the possibility of resort to the Imperial Parliament for an amendment of the Constitution, dispensing with the necessity for obtaining the consent of all the States. Such a radical and drastic method of settling a deadlock, unsolvable by the Constitution itself, could only be justified by the gravest considerations of a most serious emergency. Dr. Burgess, referring to a similar provision in the American Constitution, which secures the principle of equal representation in the Senate against amendment by "the sovereignty as organized within the Constitution," argues that this restriction is confused and unnatural, and could not possibly stand against a determined effort on the part of the sovereign body to overthrow it. "It is a relic of confederation, and ought to be disregarded." It may be good political science now and in the future that equal representation should prevail, but the amending power—the sovereignty organized in the Constitution—must be the final judge of this. A Constitution which

undertakes to except anything from the sovereign power as organized in the Constitution "invites the reappearance of a sovereignty back of the Constitution; *i.e.*, invites revolution." (Burgess, Pol. Sci. ii. 49.)

It must be remembered that these are but bare possibilities and remote contingencies. At the present time and for an apparently indefinite period to come the people of the Commonwealth, in the majority of States, will not feel inclined to interfere with the principles of local liberty, local self-government, State autonomy, and State individuality, which pervade the Constitution. They will recoil from an Imperial policy of consolidation and centralization, which would swallow up, absorb, and obliterate the States. At the same time many profound political thinkers are of opinion that federalism, in which there is one political State, one central government, and several provincial governments, is but a transitory form of government, midway between the condition of confederacy and that of a single sovereignty over a combined population and territory.

"Its natural place is, in States having great territorial extent, inhabited by a population of tolerably high political development, either in class or in mass, but not of entirely homogeneous nationality in different sections. When these ethnical differences shall have been entirely overcome, something like the federal system may, indeed, conceivably remain, but the local governments will become more and more administrative bodies, and less and less law-making bodies. In fact, it looks now as if the whole political world, that part of it in which the centralized form of government obtains as well as that part still subject to the federal form, were tending towards this system of centralized government in legislation and federal government in administration. I do not feel sure that this is not the form of the future, the ultimate, the ideal form, at least for all great States." (Burgess, Political Sci. ii. p. 6.)

Initiation of Amendments.—The Constitution specifies two methods by which a proposed alteration may be launched. In the first place it may be formulated, and passed on to the electors, by absolute majorities in both Houses of the Federal Parliament. In the second place, if one House twice passes, by an absolute majority, a proposed alteration, to which the other House on each occasion fails to agree, the proposed alteration, with or without any amendments agreed to by both Houses, may be submitted to the electors. This alternative method of originating an amendment was not in the Constitution as drafted by the Federal Convention. It was recommended by the Conference of Premiers, and was afterwards ratified by the people on the occasion of the second referendum. It was designed to facilitate the amending procedure, and to deprive one Federal Chamber of the power to unduly obstruct or delay the submission of a proposed amendment to the people. The various successive stages in the second method are substantially the same as those prescribed by sec. 57 as the earlier stages of a deadlock in ordinary legislation, except that they apply equally to both Houses. They may be outlined, in their order of sequence, thus:—

(i.) Amendment proposed by an absolute majority of one House and not agreed to by the other House:

(ii.) Interval of three months:

(iii.) Amendment again proposed by the first-mentioned House and again not agreed to by the other House:

(iv.) Governor-General may submit proposed amendment to the electors in each State.

Reference to the Electors.—When a proposed amendment has been passed by the two Federal Houses, or when it has been passed twice by one Federal House, with the interval and in the manner prescribed, the procedure then assumes a form unknown in matters of ordinary legislation. It becomes the duty of the Executive Government to submit the proposed amendment to the popular vote throughout the Commonwealth, and it cannot become law unless it is approved by a majority of the electors voting and by a majority of the States. This means a double majority. In the first place more than half the electors voting must vote "yes;" in the second place, separate majorities

in more than half the States must vote "yes." If the proposed law does not secure this double majority it fails.

The preparation of a proposed amendment, and its approval by an absolute majority of members in each of the Houses, or by an absolute majority of members twice in one House, is merely a preliminary act in the amending procedure. The principal element in the process is the submission of the proposal to the electors. This process is a concrete exemplification of the political expedient, formerly known as the Plebiscite, now better known as the Referendum. It is an undoubted recognition of the qualified electors as the custodians of the delegated sovereignty of the Commonwealth. The qualified electors represent the people of the Commonwealth, as a *quasi*-sovereign State, in *quasi*-sovereign organization The requirement of the approval of a majority of the electors and a majority of the States is the method imposed by the Constitution for ascertaining the will of the people of the Federal Commonwealth. If a majority of the States had been ignored, the federal element in the structure of the Commonwealth would have been impaired and whittled away. In a unified community it would be sufficient if a majority of the people sanctioned a revision of the Constitution In a federal community, in which the National and State elements co-exist, a modification of the fundamental law, without the approval of both the people and the States, would be unjust and repugnant to the whole scheme of government. (Deploige, Referendum in Switzerland, 1898, 136.)

"The law of the Constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the Constitution." (Dicey, Law of the Const. p. 134.)

"The principle of that science is that the undoubted majority of the political people of any natural political unity possess the sovereign constituting power, and may as truly act for the whole people in building up as tearing down; more truly, in fact, for in political science the only purpose of tearing down is to secure a better building up of the whole structure." (Burgess, Political Sci. i. 107.)

The time may come when the national element, the people, may become so strong as to disregard and overshadow the federal element, the States. An amendment of the Constitution may then be projected and carried, abolishing the necessity of the second majority. When that is done the Commonwealth will probably cease to be a Federation and will be converted into a State, national in form and structure and national in organization. It is remarkable that whilst the abolition of equal representation of original States in the Senate, without the consent of those States, is prohibited, there is no prohibition of an amendment sweeping away the requirement that the assent of a majority of States is necessary to the adoption of amendments.

Presentation to the Governor-General.—If, in a majority of the States, a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it must be presented to the Governor-General for the Queen's assent. When this section was drawn by the Federal Convention, it was based on the assumption that both Houses would concur in passing the proposed amendment; that if the proposed law were approved by the statutory majority of electors and of States, it would be presented to the Governor-General for the Queen's assent; and that it would then be assented to by the Queen as a branch of the Federal Parliament. The insertion of the provision enabling one House to draft an alteration, and submit it to the people, emphasizes the fact that the Houses of Parliament, in respect of alterations of the Constitution, are originating and drafting bodies merely, and not the principal legislative organ.

An alteration thus launched by one House and then carried through the subsequent stages would assume the special form of a law passed, say, by the House of Representatives, approved by a majority of the people and a majority of the States, and assented to by the Queen. The other branch of the Federal Parliament would be no party to the Legislative Act. No doubt the law would have to be officially authenticated

in a special manner, certifying compliance with the constitutional requisites, similar to that in which amendments of the American Constitution are verified and promulgated. In that country the practice is that whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, the Secretary of State forthwith causes the amendment to be published in the official newspapers, with his certificate that it has become valid, to all intents and purposes, as a part of the Constitution of the United States.

The necessity of the Queen's assent is a sufficient guarantee that amendments will not be made inconsistent with the supremacy of the Imperial Parliament. It is not likely that the Crown would interpose its veto to prevent the adoption of amendments respecting which there was no question of Imperial or international policy involved. Questions of local expediency would no doubt be left to the decision of the people and the States of the Commonwealth; whilst questions of constitutionality could, with equal safety, be allowed to be settled by the Federal courts.

Limits of the Amending Power.—There are no specific limitations upon the scope of the amending power. No part of the Constitution is excluded from the possibility of amendment; though amendments of a certain kind require a "species of unanimity" which makes such amendments very difficult. The power of amendment, therefore, extends to every part of the Constitution—even to sec. 128 itself, which defines the mode of amendment.

If therefore the Commonwealth were a sovereign and independent State, no amendment, duly passed in the prescribed form, would be beyond its powers; the amending power would have no limits. But the Commonwealth is only *quasi*-sovereign, and the amending power, though above the State Governments and above the Federal Government, is below the Imperial Parliament. The Commonwealth is a dependency of the Empire; and the amending power—the highest legislature of the Commonwealth—is a colonial legislature. It can therefore pass no law which is repugnant to any Act of the British Parliament extending to the Commonwealth, or repugnant to any order or regulation founded upon such Act; and on the other hand no law passed by the amending power will be void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act, order, or regulation. (Colonial Laws Validity Act, 1865 [28 and 29 Vic. c. 63, secs. 2-3].)

In particular, no law can be passed by the amending power which is repugnant to the Commonwealth of Australia Constitution Act—consisting of the preamble and the covering clauses to which the Constitution itself is annexed. The amending power can amend the Constitution, but the Constitution Act is above its reach. How far the scope of the amending power may be limited by the scope and intention of the Constitution Act, as gathered from the preamble, it is impossible to say; but it is certain that, if amendments were passed which were inconsistent with such words as "indissoluble," "Federal Commonwealth," or "under the Crown," strong arguments would be available against their constitutionality. (See Notes on "Preamble," *supra*.)

The American Method of Amendment.—It may be useful to compare the amending procedure provided by this Constitution with that of other federal systems. In the Constitution of the United States, two methods of originating amendments are provided, and there are also two methods of enacting amendments, when so originated. In the first place, Congress itself may, by a two-thirds majority in each House, draft and propose amendments; in the second place the legislatures of two-thirds of the several States may apply to Congress to call a convention for the purpose of proposing amendments On all occasions, up to the present, on which the amending power has been brought into action, the first method only has been employed for the purpose of proposing amendments When amendments are proposed by Congress, or by a constitutional convention, they have to be submitted to the States, and ratified in three-fourths of the States, either by the State legislatures or by State conventions specially elected in each

State for the purpose. The first method of ratification is the only one which up to the present has been resorted to. From this summary of the American amending procedure it will be observed that the facilities for altering the Constitution of the Commonwealth are much greater than those for altering the American Constitution. In regard to origination, an amendment may be proposed by an absolute majority of one House of the Federal Parliament, whilst a two-thirds majority in each branch of the American Congress is required. In regard to ratification, whilst in the Commonwealth a majority of the people voting and a majority of States is sufficient to carry an amendment, in America it must be passed by the legislatures or by the conventions in three-fourths of the several States.

The Swiss Method of Amendment.—In the Federal Republic of Switzerland there are several methods by which revisions of the Constitution may be originated and ratified. A total revision of the Constitution may be brought about in three ways: (1) The National Council and the Council of States may agree to an amendment, as in the case of an ordinary federal law. The Constitution, as drawn up by the two Councils, must then be submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons, it becomes law. (2) If one Chamber votes for a total revision and the other refuses its assent, the question is then submitted to the electors in each Canton, "Do you wish the Constitution to be revised—Yes or No?' If the majority of electors vote "Yes" in support of a revision, the two Chambers are then dissolved, and a new Federal Parliament is elected charged with the work of revising and drafting a new Constitution. When this has been prepared, it is submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons it becomes law. (3) If 50,000 citizens sign a petition in favour of a total revision of the Constitution, it is the duty of the Executive to submit the question to the electors, "Do you wish the Constitution to be revised—Yes or No?" If a majority of the electors decide in favour of revision, the Federal legislature has to carry out the popular wish, and revise the Constitution for submission to the people. If on such submission it is approved by the required double majority it becomes law.

There are two methods by which a partial revision or a partial amendment of the Swiss Constitution may be brought about. An amendment may be proposed by the two Federal Chambers, as in the ordinary process of legislation. It must then be submitted to and accepted by a majority of the people and by a majority of the Cantons. A demand for the adoption of a new article, or the alteration of an old one, may be made in writing by 50,000 Swiss citizens in the same way as a demand for a total revision. If the Federal legislature agrees with the demand of the petitioners it proceeds to formulate the required amendment and prepare it for submission to the people. If on the other hand it disagrees with the demand the question is submitted to the people, "Are you in favour of a revision of the Constitution—Yes or No?" If a majority of the people decide in favour of a revision it becomes the duty of the Federal Legislature, acting as a Drafting Committee, to prepare the required amendment for submission to the people. It is then submitted to the popular vote, and if it receives the support of the required statutory majority of people and of Cantons, it becomes law. The final referendum is obligatory in every proposal to amend the Constitution. (Deploige, Ref. Switz. pp. 128-131.)

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